DEFENDER ASSOCIATION OF PHILADELPHIA

Guide to Representing Non-Citizen Criminal Defendants in Pennsylvania

Last Revised September 2023

INTRODUCTION: REPRESENTING NON-CITIZEN DEFENDANTS IN PENNSYLVANIA

Purpose of the Chart: Under the decision of the Supreme Court in *Padilla v. Kentucky*, 599 U.S.356 (2010), the Sixth Amendment requires defense counsel to provide immigration advice to defendants regarding the deportation consequences of pending criminal charges. The purpose of this guide is to provide an introductory tool for criminal defense attorneys to assist in navigating the complex field of immigration law, and to aide attorneys in complying with their constitutional and ethical obligations by offering a starting point for analysis. What this guide does NOT intend to do is to replace the need for individual research in each case that takes into account the particularities of each client's situation. Competent advice about the best criminal disposition in an individual non-citizen defendant's case will depend on that individual's prior criminal record, their immigration status, the status of their immediate relatives, if any, 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 https://www.immigrantdefenseproject.org/defending-immigrants-partnership/.

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 "probably" 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 would like to comment on how the chart works for you or how it could be improved. Send your email to immigration@philadefender.org.

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

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DISPELLING SOME DANGEROUS MYTHS REGARDING THE 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 non-citizen defendant could face immigration consequences even if the defendant has been in this country since an early age, has been or is a lawful permanent resident (i.e. "green card" holder), is married to a United States citizen or has U.S.-citizen children, has assimilated completely into our society, and/or has never had a prior criminal conviction. The defendant's status may impact what kinds of consequences they face, but all non-citizens 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 non-citizen 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 non-citizen 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, many non-citizens being deported because of a criminal conviction will face mandatory detention pending their removal. A majority may also 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, they may face federal criminal charges if they are caught by immigration authorities, and the potential sentences they could receive 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 non-citizen defendant.

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

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

conviction was expunged or sealed. Oftentimes, expungement of a conviction actually poses additional hardships for the non-citizen because they are unable to demonstrate to the immigration officer the nature of the offense. Indeed, it is essential to obtain, at a minimum, certified dispositions for all of a non-citizen's criminal cases *before* their record is expunged.

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

WRONG and WRONG. This area of the law is undoubtedly complex and the lines that are drawn by immigration law do not always make intuitive sense. However, there are very simple things that a defense attorney can do to improve a client's chances in immigration court if they are 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 non-citizens may be operating under the erroneous assumption that a particular conviction will not affect their immigration status: for instance, a defendant may think that because he is a "permanent" resident he cannot be deported. The ultimate decision about how to proceed is of course up to the client, but defense attorneys have a constitutional and professional obligation to ensure that the client is properly informed. Defense attorneys should keep in mind that the decisions made during the criminal proceedings will be crucial in framing any subsequent immigration proceedings. Clients should be made aware that there may be little an immigration attorney can do down the line if immigration consequences are not addressed during the criminal proceeding.

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

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

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

Aggravated Felony (AF): This will be the worst category of criminal offenses for immigration purposes for lawful permanent residents (LPRs) and individuals seeking asylum. Its name is misleading because the offense need be neither "aggravated" (as that term may be commonly understood) nor a "felony" under state law for it to be an "aggravated felony." The list of what this category includes is long,[2] but the most common offenses charged as aggravated felonies are: murder, rape, sexual abuse of a minor, drug-trafficking crimes, and certain

subcategories of crimes which meet a certain threshold: for example "crimes of violence," "burglary" or "theft offenses" for which a sentence of 1 year or more in prison is imposed, or "fraud" offenses in which the loss to the victim exceeds $10,000.[3] When a non-citizen's conviction falls into this category, the consequences are severe: the individual will face mandatory detention and near-certain deportation, will be ineligible for virtually all forms of immigration relief, and will face criminal penalties of up to 20 years in federal prison for illegal reentry after conviction of an aggravated felony.

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

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

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

Other Categories: Other categories of offenses are more specific: crimes of domestic violence (CODV), firearm offenses, etc. Many of these categories of offenses will have their greatest negative impact on non-citizens who have been lawfully admitted to the country, especially lawful permanent residents (LPRs). Unlike aggravated felonies, these categories of offenses will often (but not always) preserve a lawful permanent resident's eligibility for discretionary waivers of deportation.

COMMON GROUNDS OF DEPORTABILITY AND INADMISSIBILITY

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

In sum, a client's entire criminal and immigration history must be assessed in order to determine the immigration consequences of past convictions and current charges.

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

REPRESENTATION DO'S AND DON'TS

What are the things to AVOID when representing a non-citizen 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, their immigration status, and many other factors regarding 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 pre-trial diversion programs *do* require an admission of guilt. These programs, therefore, will NOT prevent immigration consequences (an example is the Section 17 drug treatment program, which is considered a conviction for immigration purposes). For cases involving juveniles, delinquency adjudications in Pennsylvania are not considered convictions; remember, however, that there are certain types of conduct, particularly conduct 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 a huge difference.

- ✓ **Avoid a "Controlled Substance Offense":** Virtually all drug offenses will result in harsh immigration consequences for most non-citizens. 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 their 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 obtaining legal status, unless it is a first conviction for simple possession of 30 grams or less of marijuana.

- ✓ **Avoid "Crimes of Domestic Violence," "Firearm Offenses," and others:** These categories have particularly serious consequences for lawful permanent residents (LPRs). Other kinds of convictions to be avoided in this area are: crimes of stalking, crimes against children, and violations of protective orders.

- ✓ **Avoid a "Crime Involving Moral Turpitude" (CIMT):** Depending on the individual's status and prior criminal history, this category may make the person removable; however, it *may* leave open more avenues for relief than would a conviction for an aggravated felony. If a CIMT cannot be avoided completely, but the defendant does not have any prior convictions for an offense that would be considered a CIMT, a defense attorney should consider the following options:

    - *If the defendant is a lawful permanent resident (LPR), but has been admitted lawfully for less than five years*: Avoid conviction of a CIMT for which a sentence of more than one year may be imposed (i.e. first and second-degree misdemeanors and all felonies).

    - *If the defendant is a lawful permanent resident (LPR) or other non-citizen lawfully admitted*: Avoid a conviction for 2 or more CIMTS not arising out of a single scheme of criminal misconduct to prevent deportability.

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

WHAT ARE THE THINGS TO DO WHEN REPRESENTING A NON-CITIZEN DEFENDANT?

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

- ✓ **Ask detailed questions about your client's current immigration status:** This information is essential to an attorney's ability to provide specific and accurate immigration advice. We have provided a sample intake form in this guide; however, additional information may be needed depending on the details of a particular client's situation.

- ✓ **Conduct independent research into the immigration consequences of pending charges:** This guide offers a starting point for analysis, but updated research into recent case law that takes into account the individual details of a client's situation and defense priorities is *always* necessary.

- ✓ **Communicate your specific, detailed conclusions regarding the immigration consequences of pending charges to your client:** Under *Padilla v. Kentucky*, it is an attorney's constitutional obligation to inquire as to the immigration status of their clients and to advise a non-citizen client of the deportation consequences of their criminal charges. These consequences go beyond whether a client will be deportable. Many convictions can impact the availability of future immigration relief, as well as a client's ability to travel outside of the United States.

- ✓ **Ascertain your client's wishes regarding the disclosure of their immigration status to the DA and the Court:** Clients may have serious and sometimes warranted concerns regarding the disclosure of their status to anyone for fear of being detained by ICE. Be sure to discuss the possible negative and positive effects of disclosing their status, as well as the risks and benefits. Ultimately, it is your client's decision.

- ✓ **Urge your client to consider pre-trial diversion programs, if applicable:** In many situations, if an outright dismissal is not possible, a pre-trial diversion program like ARD that avoids a "conviction" for immigration purposes (because no plea is entered) will be the best possible outcome for a defendant. Although these programs impose significant requirements, a client should be advised of the benefits in the immigration context.

- ✓ **Pay careful attention to crafting a plea agreement:** In many situations, small changes to how the plea agreement is crafted can have a huge impact on the consequences stemming from the conviction. For instance:

    - If the conviction is one which could constitute an aggravated felony if a sentence of 1 year or more is imposed, a plea agreement with a sentence (whether suspended or to be served) of 364 days instead of 1 year may well make the difference between an essentially permanent deportation and possibly no immigration consequences at all.

    - Consider crafting pleas to charges that do not trigger immigration consequences, or that trigger less serious categories (for instance, it is often better to plead to a CIMT than to plead to an aggravated felony).

DEFINITION OF A CONVICTION & "SENTENCE IMPOSED" IN PENNSYLVANIA

Definition of "conviction" for immigration purposes. A conviction occurs where there is a formal judgment of guilt in a proceeding that affords a defendant all of the constitutional rights of criminal procedure that are applicable without limitation and that are incorporated against the states under the Fourteenth Amendment. The necessary rights are: proof beyond a reasonable doubt, the right to confront one's accuser, a speedy and public trial, notice of the accusations, compulsory process for obtaining witnesses in one's favor, and the right to not be put in jeopardy twice for the same offense.[4] A conviction can also exist where the adjudication of guilt is withheld and two conditions are met:

- A judge or jury has found the non-citizen guilty, the non-citizen has entered a plea of guilty or *nolo contendere, or* the non-citizen has admitted sufficient facts to warrant a finding of guilt; AND

- Some form of punishment, penalty, or confinement on the non-citizen's liberty has been ordered.[5]

Note that this applies to cases in which a diversionary program, for example, requires an upfront plea or admission that is later withdrawn. In every instance, the non-citizen defendant will have been "convicted" in an immigration sense upon entry of the plea, *despite the fact* that it is later withdrawn.

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."[6] Thus, a plea plus confinement, regardless of suspension or execution of the sentence, will be a conviction. Under Pennsylvania's minimum/maximum sentencing structure the "sentence imposed" for immigration purposes is the maximum sentenced imposed.[7] Example: 11 ½ to 23 months is a sentence of one year or more. A sentence of 5 ½ to 11 months is not. Importantly:

- This language refers to the sentence actually imposed, not to the potential sentence.

- It does not include the period of probation, although the additional sentence imposed by a court after a probation or parole violation is included within the "sentence imposed."

- A condition of probation that requires a period of incarceration or confinement, such as an in-patient treatment facility, will count towards a sentence of confinement.

- It includes the entire sentence imposed even if the client has been immediately paroled and never actually served any period of incarceration.

- It includes the aggregation of consecutive sentences on a single charge.

- House arrest with electronic monitoring satisfies the definition of imprisonment.[8]

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.[9] Vacating a sentence can be for any reason, including avoiding immigration consequences. This will not eliminate a conviction, but will help avoid certain aggravated felonies. This will only help avoid an aggravated felony that is triggered by a one-year sentence. Remember that many aggravated felony categories do not have any sentencing requirement. Also note that a state's repeal of a criminal statute often does *not* result in the simultaneous vacatur of the immigration consequences of a conviction under that statute.[10]

To ensure that vacatur of a conviction also invalidates the conviction for immigration purposes, base any claim for post-conviction relief on a substantive or procedural defect in the underlying proceeding (such as ineffective assistance of counsel for lack of *Padilla* compliance).[11] Be sure to specify on the record that vacatur occurred for that reason, and not because of any adverse immigration consequences.[12]

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.[13]

IMMIGRATION REFERRAL

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

Client/Family Contact _____ Immigration Attorney _____

Country of Origin _____ **Date of 1st Entry to U.S.** _____

IMMIGRATION STATUS UPON ENTRY TO U.S.

□ Undocumented □ Visa □ Refugee

□ Lawful Permanent Resident / Green Card Holder

□ Other _____

Prior Immigration Court Hearing? Y N

Ordered Deported? Y N

Relief Granted? Y N

Other Outcome?_____

_____

CURRENT IMMIGRATION STATUS

(check all that apply)

□ Undocumented -- Date of last entry
_____

□ LPR/Green Card Holder -- Since when?
_____

□ US Citizen -- Since when?
_____

□ Application Pending – For what?
_____

□ Asylee/Refugee □ Other
_____

FAMILY TIES IN U.S.

Spouse: □ USC □ LPR □ Undocumented

Partner: □ USC □ LPR □ Undocumented

Children: □ USC □ LPR □ Undocumented
Ages _____

Mother: □ USC □ LPR □ Undocumented

Father: □ USC □ LPR □ Undocumented

USC Grandparent? □ YES □ NO

IMMIGRATION DETAINER IN LOCK & TRACK? Y N

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

Comments _____

_____

Referred by _____ Referral Date _____

IMMIGRATION CONSEQUENCES OF SELECTED PENNSYLVANIA OFFENSES: A QUICK REFERENCE CHART

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Inchoate Crimes				
18 Pa. C.S. § 901 (Generally) **Attempt**	Attempt to commit an aggravated felony is an aggravated felony.[14]	Attempt to commit a CIMT is a CIMT, unless the underlying offense has a mental state of recklessness.[15]	Attempt to commit any controlled substance or firearm offense is a controlled substance or firearm offense. Attempt to commit a CODV or crimes against child offense may be a CODV or crimes against child offense.[16]	Tip for criminal defense attorneys: Look to plead to an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability.
18 Pa. C.S. § 902 **Solicitation**	Generally, no. Possible AF if the underlying crime falls within one of the "relating to" aggravated felony grounds.[17]	Solicitation to commit a CIMT is a CIMT.[18]	Solicitation to commit a controlled substance offense where the record reflects a federally controlled substance is a CSO. This could be charged for other types of offenses as well.[19]	Tip for criminal defense attorneys: Look to plead to an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability.
18 Pa. C.S. § 903 **Conspiracy**	Conspiracy to commit an aggravated felony is an aggravated felony.[20]	Conspiracy to commit a CIMT is a CIMT.[21]	Conspiracy to commit any controlled substance, CODV, firearm or other offense is generally a controlled substance, CODV, firearm or other offense.[22]	Tip for criminal defense attorneys: Look to plead to an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability. Tip for immigration attorneys: A 2022 Third Circuit case, United States v. Abreu, found that conspiracy to commit a COV is not a crime of violence for purposes of sentence enhancement under § 2K2.1(a)(4) of the U.S. Sentencing Guidelines. The argument in Abreu—that conspiracy to commit a COV is only an agreement to commit a COV and not an actual attempt to do so—may apply to immigration law as well.[23]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Homicide				
18 Pa. C.S. § 2502 **Murder**	Yes.[24]	Yes.[25]	CODV: Yes, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[26]	
18 Pa. C.S. § 2503 **Voluntary Manslaughter**	Yes, crime of violence AF if term of imprisonment is imposed of one year or more.[27]	Yes.[28]	CODV: Yes, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[29]	
18 Pa. C.S. § 2504 **Involuntary Manslaughter**	No.[30]	Possibly.[31]	Crimes Against Child: Possibly, if graded as a second degree felony for victim under 12 years of age.[32]	Tip for immigration attorneys: To avoid CIMT, argue that *all* negligence, including gross negligence, includes unawareness of the risk, and therefore Matter of Tavdidishvili controls.[33]
Assault				
18 Pa. C.S. § 2701(a)(1) **Simple Assault**	Probably not, but keep a term of imprisonment to less than one year imposed or make it clear that it involves reckless conduct.[34]	Probably not, but plead to the full language of the statute or reckless conduct.[35]	CODV: Probably not.[36] CAC: Definitely not without M1 sentencing enhancement, possibly with sentencing enhancement.[37]	Tip for criminal attorneys: Simple assault under 2701(a)(2) is preferable. Otherwise, attempt to specify reckless mental state on the record or plead generally to the language of the statute with no mention of the level of intent. Avoid M1 to avoid CAC. Tip for immigration attorneys: Argue that the statute is not divisible between the different *mens reas*, and recklessness is insufficient for a COV or CIMT.[38] For M1, argue that both *mens rea* and actus reus are insufficient to constitute CAC.[39]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S.§ 2701 (a)(2) **Simple Assault (negligently)**	No.[40]	No.[41]	CODV: No. Firearm: Probably not, but avoid putting firearm on the record. Crimes Against Child: Definitely not without M1 sentencing enhancement; possibly with sentencing enhancement.[42]	Tip for criminal attorneys: Make sure the record is clear that client is pleading to or convicted of (a)(2). Avoid M1 to avoid CAC.
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.[43]	Yes.[44]	CODV: Probably if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[45] Crimes Against Child: Definitely not without M1 sentencing enhancement, possibly with sentencing enhancement.[46]	Tip for criminal attorneys: Try to plead to a different subsection if possible. If not, keep the maximum sentence under 365 days to avoid an AF. Avoid M1 to avoid CAC. Tip for immigration attorneys: For M1, argue that both *mens rea* and actus reus are insufficient to constitute CAC.[47] To argue that it is not an AF or CODV, emphasize that physical menace does not rise to the level required for "violent force."[48]
18 Pa. C.S. § 2702(a)(1) **Aggravated Assault**	No.[49]	Yes.[50]	CODV: Probably not, but plead to a *mens rea* of recklessness on the record to lower CODV risk.[51]	
18 Pa. C.S. § 2702(a)(2) **Aggravated Assault**	Probably not.[52]	Yes.[53]	CODV: Probably not, but plead to *mens rea* of recklessness on the record to lower CODV risk.[54] CAC: No, because age of victim not an element of the offense.[55]	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 2702(a)(3)-(6) **Aggravated Assault**	Not a crime of violence AF if convicted under (a)(3).[56] Yes, crime of violence AF if term of imprisonment of one year or more is imposed and if convicted under (a)(4).[57] Possibly crime of violence AF if convicted under (a)(5), or (a)(6) and term of imprisonment is one year or more.[58]	Yes.[59]	CODV: Yes, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[60] CAC: No, because age of victim is not an element. Firearms: Probably not, but avoid putting firearm on the record for (a)(4).	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: To avoid AF, plead to subsection (a)(3). For convictions under subsections (a)(5) and (a)(6), could argue these offenses are not COVs regardless of *mens rea* because they have no use of force element and are functionally similar to subsection (a)(3).[61]
18 Pa. C.S. § 2702(a)(7) **Aggravated Assault**	Probably AF as crime of violence if term of imprisonment of one year or more is imposed.[62]	Probably.[63]	CODV: Probably yes if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[64]	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argument against AF could be that crime could be strict liability offense, so would not rise to the level of intent necessary for an AF or a CIMT.
18 Pa. C.S. § 2702(a)(8), (9) **Aggravated Assault**	Probably not.[65]	Probably.[66]	Crimes Against Child: Yes.[67]	
18 Pa. C.S.§ 2705 **Recklessly Endangering Another Person**	No.[68]	No.[69]	CODV: No, because not a crime of violence.	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 2706 (a)(1) **Making Terroristic Threats**	Probable crime of violence AF if term of imprisonment of one year or more is imposed.[70]	Yes.[71]	CODV: Probably not.[72]	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Harassment may be a safer alternative. To preserve argument against CIMT, plead to a *mens rea* of recklessness. Tip for immigration attorneys: To avoid AF, argue that "crime of violence" under PA law is broader than under federal law.[73] Tip for immigration attorneys: To avoid CODV, argue that one can be convicted of this crime for violence against property, whereas a CODV can only be committed against a person.[74]
18 Pa. C.S. § 2706 (a)(2), (a)(3) **Making Terroristic Threats**	No.[75]	Maybe.[76]	CODV: No, because not a COV.	
18 Pa. C.S. § 2707 **Propulsion of Missiles into Occupied vehicle**	For subsection (a), probably yes if maximum sentence of confinement of a year or more is imposed. For subsection (b), possibly yes if maximum sentence of confinement of a year or more is imposed.[77]	For subsection (a), probably yes. For subsection (b), probably not.[78]	CODV: For subsection (a), probably, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual. For subsection (b), probably not.[79]	Tip for criminal attorneys: Better alternatives are REAP or SA at (a)(1) or (a)(2). Keep max sentence of confinement to less than 365 days to provide extra insulation against AF.
18 Pa. C.S.§ 2709(a) **Harassment**	Probably not, even with a sentence of a year or more in jail, but avoid pleading to subsection (a)(1) to be safe.[80]	Probably not.[81]	CODV: Probably not for all subsections, but avoid pleading to (a)(1) to be safe.[82] Not a crime of stalking.[83]	Tip for criminal attorneys: To provide maximum protection against a COV or CODV, plead to subsection (a)(3) instead of (a)(1).

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S.§ 2709.1 **Stalking**	No.[84]	Probably.[85]	Crime of Stalking: No as to subsection (a)(1); almost certainly not as to (a)(2).[86]	Tip for criminal attorneys: Plead to the full language of the statute to avoid divisibility argument. Harassment is a safer alternative. Tip for immigration attorneys: Argue that the two types of intent (place in fear of bodily injury and cause emotional distress) are not divisible and therefore this cannot be a crime of stalking.
18 Pa. C.S. § 2718 **Strangulation**	Possible crime of violence AF if sentence of a year or more is imposed.[87]	Yes.[88]	CODV: Probably, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[89]	Tip for immigration attorneys: Note that this offense has been found to constitute a "particularly serious crime" for purposes of asylum and withholding or removal.[90] In fear-based cases, immigration attorneys should argue that the specific circumstances surrounding the respondent's crime render it not particularly serious. Argue that this is not an AF regardless of sentence because the statute explicitly does not require physical injury and thus includes *de minimis* touching, while "physical force" as used in 18 U.S.C. § 16(a) must be force capable of causing pain or injury under Matter of Velasquez and other, similar cases.[91]
18 Pa. C.S. § 2901(a) **Kidnapping**	Probably not, except possibly under 2901(a)(3) when combined with a prison sentence of a year or more.[92]	Yes.[93]	CODV: Probably not, except possibly 2901(a)(3) if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[94] Crimes Against Child: Conviction under (a.1) would qualify.[95]	Tip for criminal attorneys: Avoid conviction under 2901(a)(3) and/or keep sentence to under 365 days to avoid possible crime of violence AF. Tip for immigration attorneys: Could argue that despite the numbered subsections, the statute is not divisible. The intent under 2901(a)(4) is arguably not morally turpitudinous.[96]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S.§ 2902 **Unlawful Restraint**	No.	Yes.[97]	CODV: No. Crimes Against Child: Sections (b) and (c) would probably qualify.	Tip for criminal attorneys: Avoid sections involving minors to avoid crime against child.
18 Pa. C.S.§ 2903 **False Imprisonment**	No.	Possibly.[98]	CODV: No. Crimes Against Child: Sections (b) and (c) might qualify.	Tip for criminal attorneys: Avoid sections involving minors to avoid crime against child.
18 Pa. C.S.§ 2904 **Interference with Custody of Children**	No.	Probably not.[99]	CODV: No. Crimes Against Child: Probably not.[100]	
18 Pa. C.S. § 2910 **Luring Child into Motor Vehicle or Structure**	No.	Probably not.[101]	Crimes Against Child: Probably not.[102]	
Sexual Offenses				
18 Pa. C.S. § 3121(a) **Rape**	Yes, rape AF regardless of sentence imposed.[103]	Yes.[104]	CODV: Yes, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[105]	
18 Pa. C.S. § 3121(c), (d) **Rape of a Child**	Yes, sexual abuse of a minor AF regardless of sentence imposed.[106]	Yes.	Crime Against Child: Yes.	
18 Pa. C.S. § 3122.1 **Statutory Sexual Assault**	Yes, sexual abuse of a minor AF regardless of sentence imposed.[107]	Probably.[108]	CODV: Probably not, because no use of force required. Crime Against Child: Yes.[109]	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 3123(a)(1)-(2) **Involuntary Deviate Sexual Intercourse**	Yes, rape AF regardless of sentence imposed.[110] Probably not a COV AF.[111]	Yes.[112]	CODV: Probably not, because probably not a COV.	Tip for immigration attorneys: Argument against rape AF would be that conduct criminalized is broader than common law definition of rape.[113]
18 Pa. C.S. § 3123(a)(3)-(5) **Involuntary Deviate Sexual Intercourse where victim cannot consent**	Yes, rape AF regardless of sentence imposed.[114] Not COV AF.[115]	Yes.[116]	CODV: Probably not.	Tip for immigration attorneys: Same as above.
18 Pa. C.S. § 3123(a)(7) **Involuntary Deviate Sexual Intercourse where victim is less than 16**	No.[117]	Yes.[118]	Crimes Against Child: Yes.	
18 Pa. C.S. § 3123(b), (c) **Involuntary Deviate Sexual Intercourse with a child less than 13**	No.[119]	Yes.[120]	Crimes Against Child: Yes.	
18 Pa. C.S. § 3124.1 **Sexual Assault**	Probably a rape AF.[121] Probably not a COV AF because no use of force required.	Yes.[122]	CODV: Probably not, because probably not a COV.	
18 Pa. C.S. § 3124.2 **Institutional Sexual Assault**	No, under (a).[123] (a.1) is likely a sexual abuse of a minor AF regardless of the sentence.	Yes.[124]	Crimes Against Child: Yes, under (a.1).	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 3125(a)(1)-(6) **Aggravated Indecent Assault**	Yes. AF as rape regardless of the sentence imposed.[125]	Yes.[126]	CODV: Possibly, especially for subsections (a)(2) and (a)(3), if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[127]	Tip for immigration attorneys: Argument against rape AF would be that conduct criminalized is broader than common law definition of rape.[128] Argument for (a)(1) could be that lack of consent is broader than common law definition.
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**	Probably not.[129]	Yes.[130]	Crimes Against Child: Yes.	
18 Pa. C.S. § 3125(b) **Aggravated Indecent Assault of a Child**	Probably not.[131]	Yes.[132]	Crimes Against Child: Yes.	
18 Pa. C.S. § 3126(a)(1) **Indecent Assault without consent**	No.[133]	Yes.[134]	CODV: No.	
18 Pa. C.S. § 3126(a)(2)-(a)(3) **Indecent Assault** *(a)(2)* **with force** *(a)(3)* **with threat of force**	Probably not.[135]	Yes.[136]	CODV: Probably not.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid potential AF. Alternatively, plead generally to § 3126(a) without specifying the subsection. Tip for immigration attorneys: Argue that the forcible compulsion needed under PA law is broader than the physical force required for a COV AF.[137]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
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**	No.[138]	Yes.[139]	CODV: Probably not.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid potential 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**	Maybe.[140]	Yes.[141]	Crimes Against Child: Yes.	Tip for criminal attorneys: Plead to an alternative offense, such as indecent exposure, to avoid AF given uncertainty in the law post-Cadapan. Tip for immigration attorneys: Argue that this is not a sexual abuse of a minor aggravated felony based on Cabeda v. Att'y Gen.
18 Pa. C.S. § 3127 **Indecent Exposure**	No.	No.[142]	CODV: No, because not a crime of violence. CAC: Possibly under sentence enhancement for victim less than 16 years old.[143]	Note for immigration attorneys: To avoid CAC where sentence is enhanced for minor complainant, argue that enhancement is not an element of the offense under Jean-Louis v. Att'y Gen.[144]
18 Pa. C.S. §§ 4915, 4915.1 **Failure to Comply with Registration Requirements**	No.	No.[145]	Probably not.[146]	
18 Pa. C.S. § 5901 **Open Lewdness**	No.	Probably not.[147]	No.	
Property Destruction				
18 Pa. C.S. §3301(a)(1)(i) **Arson Endangering Persons**	No.[148]	Possibly.[149]	CODV: No, because not a crime of violence.	Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to *attempted* reckless burning or exploding.[150]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. §3301(a)(1)(ii) **Arson Endangering Persons**	Yes, AF under 8 U.S.C. § 1101(a)(43)(E) regardless of sentence imposed.[151]	Yes.[152]	CODV: Yes, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[153]	
18 Pa. C.S. §3301(a)(2) **Arson Endangering Persons**	Yes, murder AF regardless of sentence.[154]	Yes.	CODV: Yes, if murder in the first and victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[155]	
18 Pa. C.S. §3301(a.1)(1)(i) **Aggravated Arson**	Probably not.[156]	Possibly.[157]	CODV: Probably not because not COV.	Tip for criminal attorneys: To avoid AF, specify recklessness, plead to full language of the statute, or avoid a maximum sentence of 365 days or more.
18 Pa. C.S. §3301(a.1)(2) **Aggravated Arson**	Yes, murder AF regardless of sentence.[158]	Yes.	CODV: Probably not, because not necessarily COV; violent force is not necessarily required to violate the statute.	
18 Pa. C.S. §3301(c)(1) **Arson Endangering Property**	Yes, AF under 8 U.S.C. § 1101(a)(43)(E) regardless of sentence imposed.[159]	Yes. [160]	CODV: Yes, if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[161]	
18 Pa. C.S. §3301(c)(2) **Arson Endangering Property**	No.[162]	Possibly.	CODV: No, because not a crime of violence.	Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to *attempted* reckless burning or exploding.[163]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. §3301(c)(3) **Arson Endangering Property**	Yes AF under 8 U.S.C. § 1101(a)(43)(E) regardless of sentence imposed.[164]	Yes.[165]	No.	
18 Pa. C.S. § 3301(d) **Reckless Burning or Exploding**	No.[166]	Possibly.	CODV: No, because not a crime of violence.	Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to *attempted* reckless burning or exploding.[167]
18 Pa. C.S. § 3301(d.1) **Dangerous Burning**	Not a COV AF.[168] Probably not an AF under 8 U.S.C. § 1101(a)(43)(E).[169]	Probably not, though no direct case law on point.[170]	CODV: Not, because not a crime of violence.	Tip for criminal attorneys: To reduce CIMT risk, specify a *mens rea* of recklessness, coupled with no damage or injury (or damage only to property) on the record.
18 Pa. C.S. § 3301(e) **Failure to Control or Report Dangerous Fires**	Not a COV AF.[171] Probably not an AF under 8 U.S.C. § 1101(a)(43)(E).[172]	Possibly.[173]	No.	
18 Pa. C.S. § 3301(f) **Possession of Explosive or Incendiary Materials and Devices**	Not COV AF because no element of use of force. Probably not an AF under 8 U.S.C. § 1101(a)(43)(E).[174]	Probably.[175]	No.	
18 Pa. C.S. § 3302(a) **Causing Catastrophe**	Not an explosive materials AF.[176] F1 is possible COV AF, F2 is not.[177]	Yes.[178]	No.	Tip for criminal attorneys: Plead to F2 (reckless conduct) OR keep the max sentence to under 365 days to avoid AF.
18 Pa. C.S. § 3302(b) **Risking Catastrophe**	No.	Probably.[179]	No.	Tip for immigration attorneys: Argument against CIMT in the Third Circuit would analogize to Mahn v. Att'y Gen., 767 F.3d 170 (3d Cir. 2014).

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 3304(a) (1) **Criminal Mischief**	No, not COV or explosive device AF.[180]	No.[181]	Probably not a "destructive device offense," but keep evidence of the explosive/fire/etc. used off the record.	Tip for criminal attorneys: Plead specifically to negligent or reckless conduct or to the full language of the statute without any facts to avoid AF and CIMT. Tip for immigration attorneys: Argue that the statute is not divisible with regard to the *mens rea* or the dangerous means employed.
18 Pa. C.S. § 3304(a)(2) **Criminal Mischief**	No.[182]	Probably not.[183]	No.	Tip for criminal attorneys: For safest outcome, plead specifically to reckless conduct or to the full language of the statute without any facts to avoid AF and CIMT.
18 Pa. C.S. § 3304(a)(3) **Criminal Mischief**	Probably not, but to be safe, avoid loss of more than $10,000 on the record or a sentence of a year or more.[184]	Possibly.[185]	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, plead specifically to reckless conduct. Plea should specifically be to amount less than $10,000 to avoid AF.[186] Tip for immigration attorneys: Argue that statute is not divisible as to the *mens rea* and reckless conduct is not sufficient for a fraud/CIMT.
18 Pa. C.S. § 3304 (4)(5)(6) **Criminal Mischief**	Probably not, but avoid sentence of a year or more to be safe.[187]	Probably not.[188]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argue that least culpable conduct is not violent force for purposes of COV.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Burglary and Criminal Intrusion				
18 Pa. C.S. § 3502(a)(1)(i)) **Burglary adapted for overnight accommodations and person present and commits, attempts to commit or threatens to commit a bodily injury crime**	Possible burglary AF if a sentence of confinement of a year or more is imposed.[189] Possible crime of violence AF if sentence of confinement of a year or more imposed.[190]	Very probably.[191]	CODV: Possibly. If it's a crime of violence, would be CODV offense if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual.[192]	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF Tip for immigration attorneys: Possible argument against CIMT is that conviction under this statute is distinguishable from Louissant and JGDF because adapted for overnight accommodation under PA statute is broader than dwelling, and could include intent to commit/commission of non-CIMT. Argument against burglary AF is that unlawful entry is not an element; see notes above.
18 Pa. C.S. § 3502(a)(1)(ii) **Burglary adapted for overnight accommodations and person present**	Possible burglary AF if a sentence of confinement of a year or more is imposed.[193] Not a crime of violence AF.[194]	Very probably.[195]	CODV: No, because not COV.	Tip for immigration attorneys: Same as above, argument for not CIMT would focus on distinction between adaption for overnight accommodation and dwelling. Argument against burglary AF is no unlawful entry element.
18 Pa. C.S. § 3502 (a)(2) **Burglary adapted for overnight accommodations and no person present**	Possible burglary AF if a sentence of confinement of a year or more is imposed.[196] Not a crime of violence AF.[197]	Probably.[198]	CODV: No, because not COV.	Tip for immigration attorneys: Same as above; argument for not CIMT would focus on distinction between adaption for overnight accommodation and dwelling. Argument against burglary AF is no unlawful entry element.
18 Pa. C.S. § 3502(a)(3) **Burglary not adapted for overnight accommodations and person present**	Not a Burglary AF.[199] Not a crime of violence AF.[200]	Probably not. [201]	CODV: No, because not a COV.	Tip for immigration attorneys: Argue not CIMT under Matter of M because no intent to commit CIMT and not a dwelling.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 3502(a)(4) **Burglary not adapted for overnight accommodations and no person present**	Not a Burglary AF.[202] Not a crime of violence AF.[203]	No.[204]	CODV: No, because not a COV.	Tip for immigration attorneys: Argue not CIMT under Matter of M because no intent to commit CIMT and not a dwelling.
18 Pa. C.S. § 3503(a) **Criminal Trespass buildings and occupied structures** **(1)(i) F3 (unprivileged entry)**	No.[205]	No.[206]	No.	
18 Pa. C.S. § 3503(a) **Criminal Trespass buildings and occupied structures** **(1)(ii) F2 (breaking and entering)**	No.[207]	Probably not.[208]	No.	Tip for immigration attorneys: even though it requires breaking, least culpable conduct does not require actual use of force or even property damage.
18 Pa. C.S. § 3503(b) **Defiant Trespass**	No.[209]	No.[210]	No.	Tip for immigration attorneys: Statute punishes mere presence, which should not qualify as an AF or CIMT.
18 Pa. C.S. § 3503(b.1) **Simple Trespass**	No.[211]	Probably, at least for subsections (i) and (ii).[212]	CODV: No.	Tip for criminal attorneys: Section (b.1)(1)(iii) (purpose of defacing property) is the safest option. Tip for immigration attorneys: For (iii), argument against CIMT is similar to criminal mischief analysis under § 3304. For (ii), argument against CIMT is that starting a fire is, in and of itself, not a crime or a CIMT.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Robbery				
18 Pa. C.S. § 3701 **Robbery**	Possible theft or attempted theft AF if term of imprisonment of one year or more is imposed, though arguments exist against this categorization.[213] Subsection (ii) is a crime of violence AF if a term of imprisonment of one year or more is imposed.[214] Subsections (i) and (iv) are also possibly crime of violence AFs if a term of imprisonment of one year or more is imposed, but arguments exist against this categorization, especially for subsection (iv).[215]	Yes.[216]	CODV: Yes for subsection (ii) if victim is a current or former spouse, co-parent, intimate partner, co-habitating partner, parent, child, or other "similarly-situated" individual. Possibly for subsections (i) and (iv) if the victim falls into a protected class, though arguments exist against this categorization, particularly for subsection (iv).[217] Firearms: No.	Tip for criminal attorneys: Keep maximum term of imprisonment to 364 days or fewer to avoid AF. Plead to subsection (iv) (F2) for best chance of avoiding COV AF and CODV. Tip for immigration attorneys: Argument against theft AF is that robbery can be committed in the course of any kind of theft under PA law, not all of which constitute generic theft under the federal definition.[218] Argument against crime of violence AF is to argue, where intent is not already specified, that the minimum *mens rea* under the statute is recklessness, which is insufficient for a COV.[219]
18 Pa. C.S. § 3702 **Robbery of a Motor Vehicle**	Possibly if a prison sentence of one year or longer is imposed.[220]	Maybe.[221]	Firearms: Probably not because crime by statute does not require firearm.	Tip for criminal attorneys: UUA is a safer alternative to avoid CIMT. Tip for immigration attorneys: Possible argument against CIMT is that statute requires neither intent to permanently deprive nor intent to harm.[222] Argue that not theft AF because minimum conduct required is "taking" a motor vehicle in the presence of someone in its lawful possession, there is no requirement that the owner did not consent, and no intent to permanently deprive or substantially erode the owner's property rights is required.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
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.[223]	Yes.[224]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. If case involves an auto, unauthorized use of an automobile is a safer option to avoid AF and CIMT. Tip for immigration attorneys: Argue that pre-2016 convictions are not CIMTs because the BIA's change in the definition of a CIMT does not apply retroactively.[225]
18 Pa. C.S. § 3921(b) **Theft by Unlawful Taking** ***Immovable Property***	Possibly a theft AF if a prison sentence of one year or longer is imposed.[226]	Probably not.[227]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argument against theft AF is that one may exercise unlawful control over property—the minimum conduct under 3921(b)—without depriving the true owner of anything; for this reason, 3921(b) may not meet the elements of a theft AF under K.A. v. Att'y Gen.[228]
18 Pa. C.S. § 3922(a) **Theft by Deception**	AF as fraud offense if the loss to the victim reflected in the record is more than $10,000.[229] Very likely a theft AF if a prison sentence of one year or longer is imposed.[230]	Yes.[231]	No.	Tip for criminal attorneys: Plea should specifically be to amount less than $10,000 to avoid AF.[232] Bad checks is a safer alternative. Tip for immigration attorneys: Because K.A. v. Att'y Gen. is in conflict with Matter of Garcia-Madruga, could argue, at a minimum, that pre-May 2021 offenses cannot constitute thefts under K.A.'s expanded definition.[233]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 3924 **Theft of Lost Property**	Yes, probable theft AF if maximum term imprisonment is a year or more.[234]	Maybe.[235]	No.	Tip for criminal attorneys: Keep term of imprisonment to less than 364 days to avoid potential theft AF. Tip for immigration attorneys: To argue that this is not CIMT, argue that, even if mental state is sufficiently culpable, the conduct includes omissions and therefore is not necessarily reprehensible. Pre-2016 convictions should not be CIMTs because statute does not require permanent intent to deprive.[236]
18 Pa. C.S. § 3925 **Receiving Stolen Property**	Yes, theft AF if a term of imprisonment of one year or more is imposed.[237]	Yes.[238]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF.
18 Pa. C.S. § 3926 **Theft of Services**	Probably theft AF if term of imprisonment of one year or more is imposed.[239] Not a fraud AF.[240]	Maybe.[241]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argument against theft AF could be that offense includes fraudulent takings as well as takings without consent.[242] Argument against CIMT is that it doesn't require intent to permanently deprive or to substantially erode the owner's property rights.[243]
18 Pa. C.S. § 3927 **Theft by Failure to Make Proper Disposition of Funds Received**	Likely theft AF if a term of imprisonment of a year or more is imposed.[244] Probably not fraud AF.[245]	Maybe.[246]	No.	Tip for criminal attorneys: Keep maximum term of imprisonment to 364 days or fewer to avoid AF.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 3928 **Unauthorized Use of an Automobile**	Possibly a theft AF if a prison sentence of one year or longer is imposed.[247]	No.[248]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. To avoid AF, develop record to show that taking of vehicle did not deprive the owner of the rights and benefits of ownership.
18 Pa. C. S. § 3929 **Retail Theft**	Yes, theft AF if a term of imprisonment of one year or more is imposed.[249]	Yes (*but see* endnote as to ongoing litigation regarding retail theft as a CIMT).[250]	No.	Tip for criminal attorneys: Keep maximum term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argue that under clarifications to the categorical approach set out in Mathis v. United States (and per the Third Circuit's analysis in Thakker v. Att'y Gen.), the minimum conduct necessary to violate this statute does not involve moral turpitude.[251] For sections (4) and (5), possible argument that these are not theft offenses because there is no requirement of exercising control over property.[252]
18 Pa. C.S. § 3934 **Theft from a Motor Vehicle**	Yes, theft AF if a term of imprisonment of one year or more is imposed.[253]	Yes.[254]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argue that pre-2016 convictions are not CIMTs because the BIA's change in the definition of a CIMT does not apply retroactively.[255]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Forgery and Fraudulent Practices				
18 Pa. C.S. § 4101 **Forgery**	Yes, forgery AF if a term of imprisonment of one year or more is imposed. Probably fraud AF if convicted of intent to defraud and documents related to conviction show loss is greater than $10,000.[256]	Yes.[257]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid forgery AF. Plea specifically to amount less than $10,000 to avoid fraud AF.[258]
18 Pa. C.S. § 4104 **Tampering with Records or Identification**	Probably forgery AF if sentence of a year or more is imposed.[259]	Yes.[260]	No.	Tip for criminal attorneys: Keep the maximum sentence to 364 days or fewer to avoid AF. Tip for immigration attorneys: Possible argument against AF is that document doesn't have to have legal efficacy as required for forgery AF under Williams.
18 Pa. C.S. § 4105 **Bad Checks**	No.[261]	No.[262]	No.	Tip for criminal attorneys: This is a good statute to use when negotiating a plea.
18 Pa. C.S. § 4106(a) **Access Device Fraud**	Probable fraud AF if loss is greater than $10,000. Could be a theft AF if a sentence of a year or longer is imposed.[263]	Yes.[264]	No.	Tip for criminal attorneys: Plead to (c)(1)(ii) or (iii) or specifically to an amount less than $10,000 to avoid AF.[265] In general, (a)(3) is the safest subsection. Tip for immigration attorneys: Argument against AF (or CIMT) could be that no specific intent is required.[266]
18 Pa. C.S. § 4106.1 **Unlawful Device-Making Equipment**	Probably not.[267]	Yes.[268]	No.	Tip for criminal attorneys: To be safe, try to plead specifically to an amount less than $10,000 to avoid AF.[269]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. 4107 **Deceptive or Fraudulent Business Practices**	Probable fraud AF if documents related to conviction show loss is greater than $10,000.[270]	Probably.[271]	No.	
18 Pa. C.S. § 4116 **Copying; Recording Devices**	Possible counterfeiting AF if a term of imprisonment of one year or more is imposed.[272]	Maybe.[273]	No.	Tip for criminal attorneys: Keep maximum term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argument against AF is that no deceptive or counterfeit mark or labeling is required.[274]
18 Pa. C.S. § 4119 **Trademark Counterfeiting**	Yes, counterfeiting AF if a term of imprisonment of one year or more is imposed.[275]	Yes.[276]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF.
18 Pa. C.S. § 4120 **Identity Theft**	Possible fraud AF if loss to the victim is more than $10,000.[277]	Probably.[278]	Yes, possible ground of inadmissibility if non-citizen claims to be USC for any purpose or benefit under the INA or federal or state law.	Tip for criminal attorneys: Plead to M1 or specify a loss to the victim that is less than $10,000 to avoid AF. DHS can rely on extra-record evidence to establish loss to the victim.[279] To lessen CIMT risk, plead to the generic language of the statute or avoid specifying the unlawful purpose the defendant's conduct allegedly furthered.[280] Tip for immigration attorneys: Argument against CIMT could be that there is no intent to defraud or injure victim required.[281]
62 P.S. § 481 **Welfare Fraud**	AF as fraud offense if loss to the victim exceeds $10,000. [282]	Yes.[283]	No.	Tip for criminal attorneys: Plead to misdemeanor or specify a loss that is less than $10,000 to avoid AF. DHS can rely on extra-record evidence to establish loss to the victim.[284]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Offenses Against the Family				
18 Pa. C.S. § 4302(a) **Incest**	No.	Probably.[285]	No.	
18 Pa. C.S. § 4302(b) **Incest of a Minor**	Yes, sexual abuse of a minor aggravated felony regardless of the sentence imposed.[286]	Yes.	Crime Against Child: Yes.	Tip for immigration attorneys: Could argue that § 4302(b)(2) is not an aggravated felony because the victim could be over 16.[287]
18 Pa. C.S. § 4304 (a)(1) **Endangering Welfare of Children**	No.	No.[288]	Probably not a crime of child abuse.[289]	Tip for criminal attorneys: Despite clear precedent in the Third Circuit, some immigration judges have found this offense to be a "crime of child abuse," and BIA case law continues to find similar offenses in other states crimes of child abuse.[290] If possible, may be best to avoid this offense to ensure complete protection from deportability.
Falsification				
18 Pa. C.S. § 4902 **Perjury**	Yes, perjury AF if a term of imprisonment of one year or more is imposed.[291]	Yes.[292]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF.
18 Pa. C.S. § 4903 **False Swearing**	Probably not a perjury AF.[293] Could be a fraud AF if there is a loss to the victim of $10,000 or more.[294]	Yes under (a)(2), probably not under (a)(1) or (b).[295]	No.	Tip for criminal attorneys: To be safe from an AF, keep sentence of imprisonment to 364 days or fewer and, in a case that involves loss, plead specifically to less than $10,000. DHS can rely on extra-record evidence to establish loss to the victim.[296] The best option to avoid CIMT is the M3 under subsection (b). Tip for immigration attorneys: See Rivera v. Lynch, 816 F.3d 1064 (9th Cir. 2016) for additional arguments that this is not a CIMT.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 4904 **Unsworn Falsification**	Not a perjury AF. Could be a fraud AF if there is a loss to the victim of $10,000 or more.[297]	Yes.[298]	No.	Tip for criminal attorneys: In a case that involves loss, plead specifically to less than $10,000. DHS can rely on extra-record evidence to establish loss to the victim.[299]
18 Pa. C.S. § 4905 **False Alarms to Agencies of Public Safety**	Could be fraud AF if there is a loss to law enforcement of $10,000 or more.[300]	Probably.[301]	No.	Tip for criminal attorneys: In a case that involves loss, plead specifically to less than $10,000. DHS can rely on extra-record evidence to establish loss to the victim.[302] Tip for immigration attorneys: Argument against CIMT could be that offense does not require intent to deceive/mislead.[303]
18 Pa. C.S. § 4906 **False Reports to Law Enforcement Authorities**	Could be fraud AF if there is a loss to law enforcement of $10,000 or more.[304]	Yes.[305]	No.	Tip for criminal attorneys: In a case that involves loss, plead specifically to less than $10,000. DHS can rely on extra-record evidence to establish loss to the victim.[306]
18 Pa. C.S. § 4914 **False ID to Law Enforcement Officer**	No.	Probably not.[307]	No.	Tip for immigration attorneys: To argue against CIMT, note that least culpable conduct is giving a name the defendant should have known was wrong and then correcting himself.[308]
Obstruction				
18 Pa. C.S. § 4910 **Tampering with or Fabricating Physical Evidence**	Probable obstruction of justice AF if a term of imprisonment of a year or more is imposed.[309]	Yes.[310]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: To argue against AF, could try to distinguish Denis on the basis that the PA law covers evidence relevant to an investigation.[311]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 4952 **Intimidation of Witnesses or Victims**	Yes, obstruction of justice AF if a term of imprisonment of a year or more is imposed.[312]	Probably.[313]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF.
18 Pa. C.S. § 4953 **Retaliation Against Witness, Victim or Party**	Yes, obstruction of justice AF if a term of imprisonment of a year or more is imposed.[314]	Yes.[315]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF.
18 Pa. C.S. § 5101 **Obstructing Administration of Law or Other Governmental Function**	Possible obstruction of justice AF if a term of imprisonment of one year or more is imposed.[316]	No.[317]	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argument against AF is that the statute covers conduct not related to any judicial proceeding.[318]
18 Pa. C.S. § 5104 **Resisting Arrest**	No.[319]	Probably not.[320]	No.	
18 Pa. C.S. § 5104.1 **Disarming a Law Enforcement Officer**	No.[321]	Probably not.[322]	Firearms: Probably not, but avoid putting firearm on the record.[323]	
18 Pa. C.S. § 5105 **Hindering Apprehension or Prosecution**	Subsection (a)(3) is probably an obstruction of justice AF if a sentence of a year or more is imposed; the other subsections are possibly AFs.[324]	Probably, if the underlying offense the person is wanted for is a CIMT.[325]	Firearms: No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or fewer to avoid AF. Tip for immigration attorneys: Argument against CIMT could be that intent does not necessarily require fraud or deceit, and conduct is not necessarily vile or depraved regardless of the underlying crime.[326]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 5124 **Default in Required Appearance (failure to appear)**	Possible AF under § 1101(a)(43)(T) if the underlying charge is a felony.[327] Possible AF under § 1101 (a)(43)(Q) if related to failure to appear for service of sentence where underlying offense is punishable by 5 years or more.[328] Probably not an obstruction of justice AF.[329]	Probably not.[330]	No.	Tip for criminal attorneys: Criminal contempt for failure to appear in court is a safer alternative. Tip for immigration attorneys: Argument against AF is that the offense includes both failure to appear in court and failure to serve a sentence and therefore does not categorically involve either.[331]
18 Pa. C.S. § 5126 **Flight to Avoid Apprehension, Trial, or Punishment**	Possibly obstruction of justice AF; avoid a sentence of a year or more to be safe.[332]	Possibly.[333]	No.	
42 Pa. C.S. § 4132 **Contempt (failure to appear)**	No.[334]	Possibly, at least under (2) and (3).[335]	No.	
Disorderly Conduct				
18 Pa. C.S. § 5503 **Disorderly Conduct**	No.	No.[336]	No.	
18 Pa. C.S. § 5506 **Loitering and Prowling at Night Time**	No.	Probably not.[337]	Stalking: No.[338]	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Prostitution				
18 Pa. C.S. § 5902(a) **Prostitution**	No.[339]	Yes.[340]	Prostitution: Maybe.[341]	Tip for criminal attorneys: Alternate safe havens: -Obstruction of Highway -Disorderly Conduct -Loitering -Defiant Trespass Tip for immigration attorneys: To avoid prostitution ground of inadmissibility, argue that PA definition of prostitution is broader than the BIA's definition.[342]
18 Pa. C.S. § 5902(b)(1) **Promoting Prostitution**	Yes, regardless of sentence imposed.[343]	Yes.[344]	Prostitution: Possibly.[345]	Tip for criminal attorneys: While not safe, subsections (2)-(5) have stronger arguments against AF. Tip for immigration attorneys: The BIA recently foreclosed the argument that the state definition of prostitution is overbroad for purposes of this AF ground, but it is worth preserving the argument for federal court review.[346]
18 Pa. C.S. § 5902(b)(2)-(5) **Promoting Prostitution**	Maybe.[347]	Yes.[348]	Prostitution: Possibly.[349]	Tip for criminal attorneys: Subsections (3)-(5) are least likely to be AFs. Tip for immigration attorneys: To avoid AF, argue that both the activities criminalized are broader than 8 U.S.C. § 1101(a)(43)(K)(i).[350]
18 Pa. C.S. § 5902(b)(6) **Promoting Prostitution**	Probably, if record shows the offense was committed for commercial advantage.[351]	Probably.[352]	Prostitution: Possibly.[353]	Tip for immigration attorneys: To avoid AF, argue that the categorical approach applies to the commercial advantage requirement, and the PA statute does not require that the act be done for commercial advantage.[354]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 5902(b)(7) **Promoting Prostitution**	Probably not.[355]	Probably.[356]	Prostitution: Probably not.[357]	Tip for immigration attorneys: Argument against CIMT could be that the statute includes omissions which are insufficiently culpable.[358]
18 Pa. C.S. § 5902(b)(8) **Promoting Prostitution**	Probably not.[359]	Probably.[360]	Prostitution: Possibly.[361]	
18 Pa. C.S. § 5902(e) **Patronizing Prostitutes**	No.	Probably.[362]	Prostitution: Not for a single act of soliciting on one's own behalf.[363]	
Firearms Offenses				
18 Pa. C.S. § 6105 **Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms**	Likely to be charged in the circumstances outlined below, but strong argument against.[364] Maybe, where person has been convicted of an enumerated offense in (b).[365] Maybe, where the person is defined under (c)(1)-(5), (9). No, where the person is defined under (6)-(8).[366]	No.[367]	Firearms: Likely to be charged, but strong argument against.[368]	Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns (PIC or POW). If conviction is unavoidable, try to plead specifically to being a person defined under subsection (c), without specifying which particular definition. Tip for immigration attorneys: Could argue that the subsections of (c) are means rather than elements, so a conviction under (c) would not be a categorical aggravated felony.[369] Additionally, can argue that antique firearms are included under this statute in PA, but excluded from the federal definition.[370]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 6106 **Firearms Not to Be Carried Without a License**	No.	No.[371]	Firearms: Likely to be charged, but strong argument against.[372]	Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns (PIC or POW). Tip for immigration attorneys: Argue that this is not a firearms offense because antique firearms are included under this statute in PA but excluded from the federal definition.[373]
18 Pa. C.S. § 6108 **Firearms Not to Be Carried on Public Streets in Philadelphia**	No.	No.[374]	Firearms: Yes, unless also convicted of § 6106, then maybe.[375]	Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns (PIC or POW).
Minors				
18 Pa. C.S. § 6301 **Corruption of Minors (a)(1)(i)**	No.[376]	Probably not.[377]	Crimes Against Child: Probably.[378]	Tip for criminal attorneys: Plead generally to the statute and keep facts off the record. Tip for immigration attorneys: To avoid CAC, argue that level of harm required is not sufficient.[379]
18 Pa. C.S. § 6301 **Corruption of Minors (a)(1)(ii)**	Possible AF as sexual abuse of a minor regardless of sentence imposed.[380]	Probably.	Crimes Against Child: Yes. CODV: No.[381]	Tip for immigration attorneys: See Cabeda v. Att'y Gen., 971 F.3d 165, 2020 WL 4778223 (3d Cir. 2020) for additional arguments that this is not an aggravated felony.[382]
18 Pa. C.S. § 6301 **Corruption of Minors (2) assisting minor in truancy**	No.	No.[383]	Probably not, but possible CAC.	
18 Pa. C.S. § 6310.1 **Sale or Furnishing of Alcohol to Minors**	No.	No.[384]	Crimes Against Child: No.[385]	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 6310.2 **Manufacture or Sale of False Identification Card**	No.[386]	Possibly.[387]	No.	Tip for criminal attorneys: To lessen risk of CIMT, plead specifically to reckless violation of statute or to the full statutory language. Tip for immigration attorneys: Argue that reckless conduct is not sufficient to constitute a CIMT, absent an aggravating factor not present here.
18 Pa. C.S. § 6310.3 **Carrying a False Identification Card**	No.	Probably not.[388]	No.	Tip for criminal attorneys: To lessen risk of CIMT, plead to mere possession or to the full language of the statute. Tip for immigration attorneys: Regardless of the contents of the record, argue that the statute is not divisible and mere possession is the least culpable conduct.[389]
18 Pa. C.S. § 6312(b) **Sexual Abuse of Children: Photographing, Videotaping, Depicting on Computer or Filming Sex Acts**	Probable AF as sexual abuse of a minor regardless of sentence imposed.[390] Not a child pornography AF.[391]	Yes.[392]	Crimes Against Child: Yes.[393]	Tip for criminal attorneys: Try to plead to (c) or (d) to avoid AF. Tip for immigration attorneys: Argument against sexual abuse of a minor AF is that the PA statute includes "knowingly permits" without actually taking any action.[394]
18 Pa. C.S. § 6312(c) **Dissemination of Photographs, Videotapes, Computer Depictions and Films**	No.[395]	Yes.[396]	Crimes Against Child: Yes.[397]	
18 Pa. C.S. § 6312(d) **Child Pornography**	No.[398]	Yes.[399]	Crimes Against Child: Yes.[400]	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. § 6318 **Unlawful Contact with Minor**	Possible sexual abuse of a minor AF.[401]	Probably.[402]	Crimes against Child: Yes as to (a)(5). Probably as to all other subsections (but see case law, cited in footnote, on the divisibility of subsection (a)(1), at a minimum).[403]	Tip for criminal attorneys: Plead generally to (a) or (a)(1) and attempt to clear the record of information identifying the age of the victim. Tip for immigration attorneys: Emphasize least culpable offenses under Chapter 31, like indecent exposure. See Cabeda v. Att'y Gen., 971 F.3d 165, 2020 WL 4778223 (3d Cir. 2020) for additional arguments that this is not an aggravated felony.[404]
Domestic Violence, Protection Orders and Child Support				
23 Pa. C.S. § 6114 **Contempt for Violation of Protection Order**	No.	Yes.[405]	Violation of Protective Order: Yes.[406]	Tip for criminal attorneys: Safer alternative pleas include harassment, simple assault (a)(1) or (2). 18 Pa. C.S. § 4955 could be a safer alternative because no showing of abuse required for order to issue, but since categorical approach does not apply, police reports etc. could still be problematic. Tip for immigration attorneys: If facts are good, use factual approach to show that the court did not determine that the defendant violated a portion of the order involving threats, harassment, or bodily injury.[407]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
Controlled Substances				
35 P.S. § 780-113(16) **Knowing or intentional possession of a controlled or counterfeit substance** *35 P.S. § 780-113(19)* **Purchase or receipt of a controlled substance**	No (see exception below). However, yes if substance is any amount of flunitrazepam.[408]	No.[409]	Controlled substance: Yes, if substance specified is included on list of federal schedule of controlled substances.[410] Exception: For deportability ground only, a first offense for possession of 30 grams or less of marijuana for personal use; second and subsequent offenses would be CSOs.[411]	Tip for criminal attorneys: Best language to use is "substance under PA Law but not under Federal Law" or avoid specifying the substance involved in the record of conviction where client is a lawful permanent resident. In plea colloquy, state guilty of drug or C/S as specified in PA. Do not reference affidavit of probable cause in plea. If client is undocumented you may want to specify a C/S found in the PA statute but not on list of federally controlled substances such as: dextrorphan and salvia dinorum. [412] Tip for immigration attorneys: If the record of conviction is unclear, argue that this is not a CSO regardless of whether your client is applying for relief, because under Mellouli this is a categorical inquiry which is a pure question of law.[413]
35 P.S. § 780-113(30) **Manufacture, delivery, or possession with intent to deliver a controlled substance ALL DRUGS EXCEPT MARIJUANA (SEE BELOW FOR MARIJUANA)**	Yes, as drug trafficking AF if substance specified is included on list of federal schedule of controlled substances.[414]	Yes.[415]	Controlled substance: Yes, if substance specified is included on list of federal schedule of controlled substances.[416]	Tip for criminal and immigration attorneys: Same as above. Tip for immigration attorneys: Though the Third Circuit recently ruled that this statute is divisible as to the identity of the controlled substance at issue, there may be an argument that PA law criminalizes types of *specific* controlled substances that are broader than those criminalized under federal law.[417]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
35 Pa. C.S. § 780-113(30) **Manufacture, delivery, or possession with intent to deliver a controlled substance MARIJUANA**	Probably not if record of conviction 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; in those cases, then this may not be an AF. Very complicated area! See advice![418]	Possibly.[419]	Controlled substance: Yes.[420]	Tip for criminal attorneys: Keep record clear of amount of marijuana other than a small amount; any remuneration involved; and manufacturing for other than self, i.e. have the complaint amended to take out these facts, and do not mention in the colloquy. If client transferred drugs without remuneration, make sure the record indicates so. Sample vague language for amended complaint: "Client did manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, to wit: marijuana with no remuneration." Tip for immigration attorneys: Argue that amount of marijuana and remuneration are not elements of the offense, so any PWID marijuana conviction is categorically not an aggravated felony.[421] Utilize the Third Circuit's recent decision in Singh to argue that distribution of marijuana offenses do not involve moral turpitude.[422] For convictions after December 20, 2018, could argue that PA's marijuana definition is broader than the federal schedule, and therefore this is neither an AF nor CSO.[423]
35 P.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).**	No.[424]	Simple possession: No. Delivery but not for sale: Probably.[425]	Controlled substance: Yes. Exception: A first offense for possession of 30 grams or less of marijuana would not qualify under the deportability grounds, but the second and subsequent offense would.[426]	Tip for criminal attorneys: Note that while a first offense will be "safe" for permanent residents, this offense is not safe for undocumented people, and a second offense can make a permanent resident deportable. Tip for immigration attorneys: For convictions after December 20, 2018, could argue that PA's marijuana definition is broader than the federal schedule, and therefore this is not a CSO.[427]

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
35 P.S. § 780-113(32) **The use of, or possession with intent to use drug paraphernalia for purposes relating to controlled substance**	No.[428]	Simple possession: No.	Controlled substance: Maybe, if the record of conviction reflects that it relates to a substance listed in the federal schedule.[429]	Tip for criminal attorneys: Avoid specifying the substance involved in the record of conviction where client is a lawful permanent resident; just plead to the objects without referencing a particular drug. Do not reference affidavit of probable cause in plea. Tip for immigration attorneys: Argue that the identity of the controlled substance is not an element, and therefore this offense is never a CSO under Meloulli.[430]
35 P.S. § 780-113 (33) **Delivery of, or possession with intent to deliver, drug paraphernalia for purpose of use with a controlled substance**	Probably, if the record establishes that the offense relates to a federally-controlled substance.[431]	Delivery but not for sale: Probably.[432]	Controlled substance: Maybe, if the record of conviction reflects that it relates to a substance listed in the federal schedule.[433]	Same tips as above.
35 P.S. § 780-113(35) **Possession with intent to distribute a noncontrolled substance**	No.[434]	Probably.[435]	Controlled substance: No.[436]	Tip for immigration attorneys: It is clear from the language of the statute that this is not "relating to" a controlled substance because *all* convictions under this statute do not, by definition, involve controlled substances.
Traffic Offenses				
75 Pa. C.S. § 1543 **Driving While Suspended**	No.	No.[437]	No.	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
75 Pa. C.S. § 3732 **Homicide by Vehicle**	No.[438]	Possibly.[439]	No.	Tip for criminal attorneys: Section 3742 is a better alternative to avoid a CIMT. Tip for immigration attorneys: To avoid CIMT, argue that *all* negligence, including gross negligence, includes unawareness of the risk, and therefore Matter of Tavdidishvili controls.[440]
75 Pa. C.S.§ 3732.1 **Aggravated Assault by Vehicle**	No.[441]	Possibly.[442]	No.	Tip: Same as above.
75 Pa. C.S. § 3733 **Fleeing and Eluding Police**	No.	Maybe.[443]	No.	Tip for criminal attorneys: If pleading to felony fleeing and eluding, avoid specifying which of the three aggravating factors at subsection (a.2.)(2) apply to client's conviction, as the Third Circuit has held that the felony version of 3733 is *not* categorically a CIMT.[444]
75 Pa. C.S.§ 3735 **Homicide While DUI**	No.[445]	No.[446]	Controlled substance: No, but the required DUI violation that comes with this offense could be if the record specifies a federally- controlled substance.	
75 Pa. C.S.§ 3735.1 **Aggravated Assault While DUI**	No.[447]	No.[448]	Controlled substance: No, but the required DUI violation that comes with this offense could be if the record specifies a federally- controlled substance.	Tip for immigration attorneys: Note that the BIA has found a conviction under this statute to constitute a particularly serious crime barring asylum and withholding of removal.[449]
75 Pa. C.S. § 3742 **Accidents Involving Death or Personal Injury**	No.	No.[450]	No.	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
75 Pa. C.S. § 3743 **Accidents in Attended Vehicle**	No.	No.[451]	No.	
75 Pa. C.S. § 3802 **Driving While Under the Influence of Alcohol or Controlled Substance**	No.	No.[452]	Controlled substance: No under subsection (d)(1)(i); almost certainly not under subsections (d)(1)(ii), (d)(1)(iii), (d)(2), and (d)(3).[453]	Tip for criminal attorneys: As Pesikan is very new law, it may be best to avoid convictions under § 3802(d), or plead to (d)(2) or (d)(3) and keep mention of the specific drug off the record, for the near future; DHS may continue to charge such convictions as deportable and/or inadmissible offenses. May be best to avoid this offense if defendant is simultaneously charged with (or convicted of) driving on a suspended license or another "aggravating factor" in addition to the DUI; DHS may attempt to argue in such a case that the DUI is a CIMT.[454] If so, argue that a factfinder may not "combine" a DUI with other offenses committed simultaneously, each of which is not a CIMT, to create turpitudinous conduct.[455]
Misc.				
18 Pa. C.S. § 907 (a) **Possession of an Instrument of Crime**	No.	No.[456]	No.	
18 Pa. C.S. § 907(b) **Possession of an Instrument of Crime**	No. [457]	No. [458]	Firearms Offense: Maybe, if the record indicates that the weapon possessed was a firearm.[459]	Tip for criminal attorneys: Plead non-citizen clients to § 907(a), which is the same grade and can encompass the same conduct, instead.[460]
18 Pa. C.S. 908 **Possession of Offensive Weapon**	No.	No.[461]	Firearms Offense: Probably not.[462]	Tip for criminal attorneys: For a safer plea, plead non-citizen clients to § 907(a), which is broader and less likely to be a firearms offense.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance Offense, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
18 Pa. C.S. 912 **Possession of Weapon on School Property**	No.	Probably not.[463]	Firearms Offense: Probably not.[464]	Tip for criminal attorneys: For a safer plea, plead non-citizen clients to § 907(a), which is broader and less likely to be a firearms offense.
18 Pa. C.S. § 5513 **Gambling Devices; Gambling**	No.[465]	No.[466]	Commercialized Vice (Inadmissibility Ground): Possibly.[467] Gambling Offense (GMC bar): Yes.[468]	Tip for Criminal Attorneys: While this offense will likely not make an LPR deportable, it will jeopardize an undocumented person's eligibility for most relief, so avoid it for those clients.
18 Pa. C.S. § 7512 **Communication Facility**	No.[469]	No.[470]	No.[471]	
47 P.S. § 4-491, § 4-492 **Unlawful Sale or Manufacture of Liquor**	No.	No.[472]	No.	

[1] See 8 § U.S.C. § 1226(c); see also 8 U.S.C. § 1231(a)(2) for a complete list of grounds resulting in mandatory detention. Some examples of convictions that would result in mandatory detention: aggravated felonies; inadmissible + CIMT conviction; deportable + CIMT + 1-year sentence; deportable + 2 CIMTS; controlled substance violation; firearms offense; money laundering, etc.
[2] See 8 U.S.C. § 1101(a)(43) for list of aggravated felonies.
[3] Committing an offense involving fraud or deceit with intended losses of over $10,000 (or conspiracy or attempt to commit such an offense) qualifies as an aggravated felony even where the crime's victims are not specifically identified. See Rad v. Att'y Gen., 983 F.3d 651, 669, (3d Cir. 2020).
[4] Matter of S. Wong, 28 I&N Dec. 518 (BIA 2022).
[5] 8 U.S.C. § 1101(a)(48)(A).
[6] 8 U.S.C. § 1101(a)(48)(B).
[7] Bovkun v. Att'y Gen., 283 F.3d 166, 171 (3d Cir. 2002).
[8] Ilchuk v. Att'y Gen., 434 F.3d 618 (3d Cir. 2006) (non-citizen's conviction under Pennsylvania theft of services statute constituted an aggravated felony because a sentence of six to twenty-three months of house arrest with electronic monitoring was a term of imprisonment).
[9] Matter of Cota, 23 I&N Dec. 849 (BIA 2005) (holding that a trial court's decision to modify or reduce a non-citizen's criminal sentence *nunc pro tunc* is entitled to full faith and credit by immigration judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of immigration law without regard to the trial court's reasons for effecting the modification or reduction).
[10] See Khan v. Att'y Gen., 979 F.3d 193 (3d Cir. 2020) (2011 state repeal of marijuana possession statute (Conn. Gen. Stat. § 21a-279(c)) did not prevent respondent's conviction from triggering stop-time rule for cancellation of removal, as "vacatur has no effect on when an offense was committed" or "on whether a non-citizen is rendered inadmissible").
[11] Matter of Pickering, 23 I&N Dec. 621 (BIA 2003) (holding that if a court vacates a non-citizen's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes); Matter of Dingus, 28 I&N Dec. 529 (BIA 2022) (finding that

Matter of Pickering's test regarding the validity of vacated convictions applies to determine if a subject matter modification is based on a procedural or substantive defect in the underlying proceeding).

[12] See, e.g., Pilataxi v. Att'y Gen., 2022 WL 1115428 (3d Cir. May 3, 2022) (where state court record reflects that only claim in petition for vacatur of criminal conviction forming basis of removal was ineffective assistance of counsel, vacatur was for a defect in underlying criminal proceeding; immigration court may not speculate about other reasons for vacatur not stated in state record).

[13] See 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (i.e. petty offense exception that enables a single conviction to not be considered for immigration purposes. A subsequent CIMT will void the petty offense exception and the client will have two CIMTs).

[14] 8 U.S.C. § 1101(a)(43)(U); see also United States v. Walker, 990 F.3d 316 (3d Cir. 2021) (an attempt to commit a crime of violence (COV) categorically qualifies as a COV itself).

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

[16] 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance inadmissibility ground); 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance deportability ground); 21 U.S.C. § 846, 8 U.S.C. § 1227(a)(2)(C) (firearms ground of deportability); see also Matter of Bronsztejn, 15 I&N Dec. 281 (BIA 1974) (where a person would be found deportable if convicted of a substantive offense, he would also be deportable if convicted of an attempt to commit that offense).

[17] Matter of Luis Manuel Guerrero, 25 I&N Dec. 631 (BIA 2011) (holding that solicitation is distinct from attempt and conspiracy and therefore not covered under 8 U.S.C. § 1101(a)(43)(U)); see also Ng v. Att'y Gen., 436 F.3d 392, 396 (3d Cir. 2006) (considering whether solicitation of murder was a crime of violence as defined in 18 U.S.C. § 16(b), now unconstitutional, rather than analyzing as equivalent to murder). However, the "relating to" aggravated felony grounds, like 8 U.S.C. § 1101(a)(43)(R)-(T), can embrace offenses with a logical or causal relation to the type of crime in question. Williams v. Att'y Gen., 880 F.3d 100 (3d Cir. 2018); Flores v. Att'y Gen., 856 F.3d 280 (3d Cir. 2017).

[18] Matter of Gonzalez Romo, 26 I&N Dec. 743 (BIA 2016).

[19] Matter of Beltran, 20 I&N Dec. 521, 526–27 (BIA 1992) (defining solicitation as an inchoate crime that presupposes a purpose to commit another crime); see also Mizrahi v. Gonzales, 492 F.3d 156 (2d Cir. 2007).

[20] 8 U.S.C. § 1101(a)(43)(U); see also, e.g., Bent v. Att'y Gen., 852 Fed. App'x 55 (3d Cir. 2021) (conspiracy to commit federal racketeering facially qualifies as an aggravated felony). Like § 1101(a)(43)(U), Pennsylvania conspiracy requires an overt act. Quinteros v. Att'y Gen., 945 F.3d 772, 784-85 (3d Cir. 2019).

[21] 8 U.S.C. § 1182(a)(2)(A)(i)(I); Matter of Al Sabsabi, 28 I&N Dec. 269 (BIA 2021) (finding that the underlying criminal offense is an element, not a means, of committing a conspiracy; if the underlying object of the conspiracy is a CIMT, the conspiracy is a CIMT); Matter of Gonzalez Romo, 26 I&N Dec. 743 (BIA 2016).

[22] 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance inadmissibility ground); 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance deportability ground); 21 U.S.C. § 846, 8 U.S.C. § 1227(a)(2)(C) (firearms ground of deportability); see also Matter of Bronsztejn, 15 I&N Dec. 281 (BIA 1974) (where a person would be found deportable if convicted of a substantive offense, he would also be deportable if convicted of an attempt to commit that offense).

[23] Specifically, one could argue that the definition of COV under 18 U.S.C. § 16(a) (§ 16(b) has been deemed void for vagueness) specifically includes attempts but fails to mention conspiracies. United States v. Abreu, 32 F.4th 271 (3d Cir. 2022); see also United States v. Henderson, No. 18-1894 (3d Cir. Mar. 29, 2023) (conspiracy to commit robbery under Pennsylvania law does not qualify as a "crime of violence" for purposes of sentencing enhancement under the Armed Criminal Career Act (ACCA), as the "overt act" required for a conspiracy under Pennsylvania law "need not be forceful or criminal").

[24] 8 U.S.C. § 1101(a)(43)(A); Matter of M-W-, 25 I&N Dec. 748 (BIA 2012) (holding that murder with malice aforethought, regardless of intent to kill, is an aggravated felony); Commonwealth v. Tolbert, 670 A.2d 1172, 1179 (Pa. Super. Ct. 1995) (noting that all three types of murder require malice).

[25] Matter of Lopez-Amaro, 20 I&N Dec. 668 (BIA 1993); Matter of Sanchez-Linn, 20 I&N Dec. 362 (BIA 1991).

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

[27] Voluntary manslaughter is a COV because it requires intent to kill. Commonwealth v. Mason, 378 A.2d 807 (Pa. 1977); see Stokeling v. United States, 139 S. Ct. 544 (2019) (holding that physical force is capable of causing physical pain or injury); Matter of Luis Manuel Cervantes Nunez, 27 I&N Dec. 238, 241 (BIA 2018) (holding that a voluntary manslaughter statute requiring intent to kill is a COV).

[28] Matter of Rosario, 15 I&N Dec. 416 (BIA 1975).

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

[30] Reckless or negligent conduct is insufficient for a COV under 18 U.S.C. § 16(a). Borden v. United States, 141 S. Ct. 1817 (2021) (a criminal offense that requires only a *mens rea* of recklessness cannot count as a "violent felony" under the elements clause of the Armed Criminal Career Act (ACCA); "use of physical force" under the ACCA's violent felony definition means the volitional or active

employment of force); United States v. Shaw, 858 Fed. App'x 531 (Mem), 2021 WL 4193228 (3d Cir. 2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005).

[31] Reckless manslaughter is a CIMT, while negligent manslaughter is not. Matter of Tavdidishvili, 27 I&N Dec. 142 (BIA 2017); Matter of Wojtkow,18 I&N Dec. 111 (BIA 1981). PA courts interpret "gross negligence" for purposes of this statute to be more culpable than ordinary criminal negligence, but are not entirely clear about what it requires. Commonwealth v. Huggins, 836 A.2d 862, 405 (Pa. 2003).

[32] Child abuse encompasses criminally negligent acts that impair physical well-being. This includes infliction of even slight physical harm. Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008). However, see note below for argument that age of complainant is not an element of the offense.

[33] If "gross negligence" were exactly the same as recklessness, it would be superfluous in this statute.

[34] COV cannot be committed recklessly. Borden v. United States, 141 S. Ct. 1817 (2021) (a criminal offense that requires only a *mens rea* of recklessness cannot count as a "violent felony" under the elements clause of the Armed Criminal Career Act (ACCA); "use of physical force" under the ACCA's violent felony definition means the volitional or active employment of force). See also Popal v. Gonzales, 416 F.3d 249, 254 (3d Cir. 2005). Under Mathis v. U.S., 136 S. Ct. 2243 (2016), the statute should not be divisible. However, DHS may still argue otherwise, so safest to plead to the full language of the statute or recklessness.

[35] Reckless simple assault is not a CIMT. Jean-Louis v. Att'y Gen., 582 F.3d 462 (3d Cir. 2009). Under Mathis v. U.S., 579 U.S. 500 (2016), the statute should not be divisible. However, DHS may still argue otherwise, so safest to plead to the full language of the statute or recklessness.

[36] COV cannot be committed recklessly. Borden v. United States, 141 S. Ct. 1817 (2021) (a criminal offense that requires only a *mens rea* of recklessness cannot count as a "violent felony" under the elements clause of the Armed Criminal Career Act (ACCA); "use of physical force" under the ACCA's violent felony definition means the volitional or active employment of force). Popal v. Gonzales, 416 F.3d 249, 254 (3d Cir. 2005). Under Mathis v. U.S., 579 U.S. 500 (2016), the statute should not be divisible. However, DHS may still argue otherwise, so safest to plead to the full language of the statute or recklessness.

[37] Jean-Louis v. Att'y Gen., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense. Child victim must be an element to be a CAC. Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008). However, under Apprendi v. New Jersey, 530 U.S. 466 (2000), this likely is an element.

[38] Re: recklessness as insufficient *mens rea* for COV, see Borden v. United States, 141 S. Ct. 1817 (2021). Re: divisibility, see, e.g., Matter of Chairez-Castrejon, 27 I&N Dec. 21 (BIA 2017) (finding that a statute with a similar *mens rea* element is not divisible).

[39] Even if the age of the victim is an element of this offense for purposes of the categorical approach, one could argue that it is a strict liability element and therefore does not meet the definition of a crime of child abuse, which requires intentional, knowing, reckless, or criminally negligent maltreatment of a child. Jean-Louis v. Att'y Gen., 582 F.3d 462, 468 (3d Cir. 2009); Matter of Velazquez-Herrera, 24 I&N Dec. 503, 512 (BIA 2008). Also, since the statute includes attempts, it does not necessarily require creation of the necessary "particular likelihood of harm." Zhi Fei Liao v. Att'y Gen., 910 F.3d 719, 721 (3d Cir. 2018).

[40] Leocal v. Ashcroft, 543 U.S. 1 (2004); Popal v. Gonzales, 416 F.3d 249 (3d Cir. 2005).

[41] Partyka v. Att'y Gen., 417 F.3d 408 (3d Cir. 2005) (NJ simple assault is not a CIMT where subsection is not specified and statute includes negligent conduct).

[42] Jean-Louis v. Att'y Gen., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense. Child victim must be an element to be a CAC. Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008). However, under Apprendi v. New Jersey, 530 U.S. 466 (2000), this likely is an element.

[43] Patino Madge v. Att'y Gen., 2021 WL 4438747 (3d Cir. 2021) (holding that simple assault under 18 Pa. Cons. Stat. § 2701(a)(3) is categorically a crime of violence aggravated felony because it requires a threat of violent force); Tomlinson v. Att'y Gen., 2021 WL 5632081 (3d Cir. 2021) (same); Singh v. Gonzales, 432 F.3d 533, 540 (3d Cir. 2006) (finding that simple assault as defined by 18 Pa. C.S. § 2701(a)(3) requires specific intent to use, threaten to use, or attempt to use force against an individual, and is therefore a crime of violence within 18 U.S.C. § 16(a)).

[44] See Javier v. Att'y Gen., 826 F.3d 127 (3d Cir. 2016) (holding terroristic threats with intent to terrorize is a CIMT); Singh v. Gonzales, 432 F.3d 533, 540 (3d Cir. 2006) (noting that the least culpable conduct under 2701(a)(3) requires specific intent); Matter of J-P-G-, 27 I&N Dec. 642 (BIA 2019) (holding that a similar Oregon statute is a CIMT).

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

[46] Jean-Louis v. Att'y Gen., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense. Child victim must be an element to be a CAC. Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008). However, under Apprendi v. New Jersey, 530 U.S. 466 (2000), this likely is an element.

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[48] See Borden v. United States, 141 S. Ct. 1817 (2021) ("use of physical force" under the ACCA's violent felony definition means the volitional or active employment of force). Examples of least culpable conduct that might not be violent force include Commonwealth v. Diamond, 408 A.2d 488, 489 (Pa. Super. 1979) and Commonwealth v. Helman, No. 3254 EDA 2015, 2016 WL 5691718 (Pa. Super. Ct. 2016). Note that any argument will have to distinguish Tomlinson and Patino Madge, however.

[49] The crime of violence aggravated felony definition in 18 U.S.C. § 16(b) is unconstitutional, Sessions v. Dimaya, 138 S. Ct. 1204 (2018), so statute must have element of use of force to be a COV. This subsection does not. Commonwealth v. Thomas, 867 A.2d 594, 597 (Pa. Super. Ct. 2005); United States v. Mayo, 901 F.3d 218, 224 (3d Cir. 2018). Additionally, reckless conduct is insufficient for a § 16(a) COV. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005); United States v. Haines, 296 F. Supp. 3d 726, 736 (E.D. Pa. 2017). U.S. v. Harris, 68 F.4th 140 (3d Cir. 2023) held that § 2702(a)(1) was not a COV AF. See also United States v. Olinsky, No. 21-1659 (3d. Cir. Apr. 14, 2023) (unpublished) (aggravated assault under 18 Pa. C.S. §2702(a)(1) does not qualify as a "crime of violence" under the elements clause of Section 4B1.2 of the U.S. Sentencing Guidelines (U.S.S.G.), as it can be committed with a *mens rea* of recklessness).

[50] Mental state of at least recklessness with element of serious bodily injury/extreme indifference is a CIMT. Baptiste v. Att'y Gen., 841 F.3d 601, 623 (3d Cir. 2016).

[51] Matter of Dang, 28 I&N Dec. 541 (BIA 2022) held that the Supreme Court's construction of "physical force" in Johnson v. United States, 559 U.S. 133 (2010), controls the definition of "violent force" for purposes of the CODV deportability ground. Moreover, reckless conduct is insufficient for a § 16(a) COV. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005). As such, this should not be a CODV. Still, because DHS may argue otherwise, it is best to specify a *mens rea* of recklessness on the record.

[52] The crime of violence aggravated felony definition in 18 U.S.C. § 16(b) is unconstitutional, Sessions v. Dimaya, 138 S. Ct. 1204 (2018), so statute must have element of use of force to be a COV. This subsection does not. Commonwealth v. Thomas, 867 A.2d 594, 597 (Pa. Super. 2005); United States v. Mayo, 901 F.3d 218, 224 (3d Cir. 2018). Additionally, reckless conduct is insufficient for a § 16(a) COV. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005); United States v. Haines, 296 F. Supp. 3d 726, 736 (E.D. Pa. 2017).

[53] Mental state of at least recklessness with element of serious bodily injury is a CIMT. Matter of Danesh, 19 I&N Dec. 669 (BIA 1988); Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996); Baptiste v. Att'y Gen., 841 F.3d 601, 623 (3d Cir. 2016).

[54] Matter of Dang, 28 I&N Dec. 541 (BIA 2022) held that the Supreme Court's construction of "physical force" in Johnson v. United States, 559 U.S. 133 (2010), controls the definition of "violent force" for purposes of the CODV deportability ground. Moreover, reckless conduct is insufficient for a § 16(a) COV. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005). As such, this should not be a CODV. Still, because DHS may argue otherwise, it is best to specify a *mens rea* of recklessness on the record.

[55] The categorical approach applies, so the victim being under 18 years old needs to be an element of the offense. Matter of Velazquez-Herrera, 24 I&N Dec. 503, 515 (BIA 2008).

[56] U.S. v. Jenkins, No. 68 F.4th 148, 2023 WL 3516086 (3d Cir. 2023) (finding that aggravated assault under 18 Pa. Cons. Stat. § 2702(a)(3) is not a crime of violence aggravated felony since (like subsection (a)(1)) it can be violated by omission; moreover, a defendant need not satisfy the realistic probability test because the elements of the offense facially fail to match the federal generic crime).

[57] United States v. Ramos, 892 F.3d 599, 610 (3d Cir. 2018) (subsection (a)(4) is COV); Singh v. Gonzales, 432 F.3d 533 (2006) (attempt by physical menace is COV).

[58] U.S. v. Jenkins, No. 68 F.4th 148, 2023 WL 3516086 (3d Cir. 2023) held that a conviction under (a)(3) is not a COV AF because it does not require violent force. These subsections are functionally similar to (a)(3), so arguments exist that these are also not COV AFs. United States v. Pitts, 655 F. App'x 78, 81 (3d Cir. 2016) and Wilks v. Att'y Gen., 273 F. App'x 196 (3d Cir. 2008) imply otherwise, however, so best to avoid these subsections or a sentence of a year or more in jail to be safe.

[59] Intentional assault on a peace officer is CIMT. Matter of Danesh, 19 I&N Dec. 669 (BIA 1988). Assault with a deadly weapon, even if reckless, is a CIMT. Matter of Medina, 15 I&N Dec. 611 (BIA 1976). Offenses requiring knowing or intentional assault/threats are CIMTs. Jean-Louis v. Att'y Gen., 582 F.3d 462, 468-69 (3d Cir. 2008).

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

[61] See U.S. v. Jenkins, No. 68 F.4th 148, 2023 WL 3516086 (3d Cir. 2023), described supra, for further arguments.

[62] No case law on point, but probably a COV under § 16(a). Use of noxious gas or device would likely be found to require use of force.

[63] No case law on point, but probably a CIMT based on cases equating "use" with intentionality. See Leocal v. Ashcroft, 543 U.S. 1 (2004).

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

[65] The crime of violence aggravated felony definition in 18 U.S.C. § 16(b) is unconstitutional, Sessions v. Dimaya, 138 S. Ct. 1204 (2018), so statute must have element of use of force to be a COV. This subsection does not. Commonwealth v. Thomas, 867 A.2d 594,

597 (Pa. Super. 2005); United States v. Mayo, 901 F.3d 218, 224 (3d Cir. 2018). Additionally, reckless conduct is insufficient for a § 16(a) COV. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005); United States v. Haines, 296 F. Supp. 3d 726, 736 (E.D. Pa. 2017); U.S. v. Jenkins, No. 68 F.4th 148, 2023 WL 3516086 (3d Cir. 2023) (holding that subsection (a)(3) is not a COV because it can be violated by omission).

[66] While Jean-Louis v. Att'y Gen., 582 F.3d 462 (3d Cir. 2009) held that the similar SA statute, 2701(b)(2), is not a CIMT, it focused on the fact that the PA gap-filling statute for *mens rea* would not apply to the age of the child. Here, since the age of the child is an element, they probably would apply and Jean-Louis could be distinguishable.

[67] Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008).

[68] Not a crime of violence under Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2006). See also Borden v. United States, 141 S. Ct. 1817 (2021) and Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005), both of which hold that a *mens rea* of recklessness is insufficient for a COV.

[69] Mahn v. Att'y Gen., 767 F.3d 170, 174 (3d Cir. 2014).

[70] Bovkun v. Ashcroft, 283 F.3d 166 (3d Cir. 2002) held that this is a crime of violence. However, there have been significant developments in the law since that time. Courts have held that Pennsylvania aggravated assault is a qualifying "crime of violence" for purposes of terroristic threats, and yet aggravated assault is not always a COV for immigration purposes. Commonwealth v. Bullock, 170 A.3d 1109, 1121 (Pa. Super. 2017); United States v. Mayo, 901 F.3d 218 (3d Cir. 2018); U.S. v. Jenkins, No. 68 F.4th 148, 2023 WL 3516086 (3d Cir. 2023). Therefore, terroristic threats should not be a categorical crime of violence, but there is no on point case law yet.

[71] Javier v. Att'y Gen., 826 F.3d 127, 131 (3d Cir. 2016); Pena Charles v. Att'y Gen., 2022 WL 337000 (3d Cir. Feb. 4, 2022) (reaffirming Javier because "a threat communicated with a specific intent to terrorize is an act 'accompanied by a vicious motive or a corrupt mind'"). But see Larios v. Att'y Gen., 978 F.3d 62 (3d Cir. 2020) (finding that NJ's terroristic threats statute, which is substantially similar to Pennsylvania's, is not a CIMT when it involves a *mens rea* of mere recklessness and lacks any statutory aggravating factors).

[72] See Liao v. Att'y Gen., 846 Fed. App'x 122 (Mem) (3d Cir. 2021) (terminating case where petitioner successfully argued that § 2706(a)(1) is not a deportable CODV, as one can be convicted under the statute for violence against property; a CODV can only be committed against a person). See also United States v. Brown, 765 F.3d 185, 193 (3d Cir. 2014). The petitioner in Liao also argued that § 2706(a)(1) is not a COV because it does not always require proof of force. For a definition of those individuals who are protected under Pennsylvania family violence law, see 23 Pa. C.S. § 6102. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

[73] See United States v. Brown, 765 F.3d 185, 193 (3d Cir. 2014), but note that unlike the sentencing guidelines, § 16(a) includes force against property. Under Brown, the definition of "crime of violence" is not divisible. 765 F.3d at 193. Commonwealth v. Bullock is an example of a case where the defendant was convicted for terroristic threats without using the type of "violent, physical force" required for a crime of violence. See Matter of Guzman-Polanco, 26 I&N Dec. 806, 807 (BIA 2016); see also Liao v. Att'y Gen., 846 Fed. App'x 122 (Mem) (3d Cir. 2021), supra.

[74] Liao v. Att'y Gen., 846 Fed. App'x 122 (Mem.) (3d. Cir 2021).

[75] United States v. Martinez-Paramo, 380 F.3d 799, 802 (5th Cir. 2004); United States v. Brown, 765 F.3d 185, 192 (3d Cir. 2011). No use of force element.

[76] No case law on point; but in contrast to Javier, above, no requirement of specific intent to terrorize for this subsection.

[77] Subsection (a) is likely a crime of violence pursuant to 18 U.S.C. § 16(a), because the court considers the manner of use and force of the object to determine whether it is a dangerous or deadly weapon capable of serious harm against a person or property. Commonwealth v. Roman, 714 A.2d 440, 443 (Pa. Super. 1998), citing Commonwealth v. McCullum, 602 A.2d 313 (Pa. 1992) (where the inquiry is not in the nature of object but instead on the manner of use of the object and its capacity to "endanger life or inflict great bodily harm"). Subsection (b) could be a COV, but there are likely strong arguments against: the minimum conduct under the statute is merely propelling an object "onto or toward" a roadway, whether or not it is occupied. As such, it is not clear that this offense necessarily involves the use, attempted use, or threatened use of physical force toward the person or property of another.

[78] A conviction under subsection (a) requires specific intent as well as a use of force that would turn the object into a deadly or dangerous weapon. Commonwealth v. McCullum, 602 A.2d 313 (Pa. 1992). Additionally, a deadly or dangerous weapon is defined as any firearm, weapon, device, or instrumentality that, based on how it is used, is "calculated or likely to produce death or serious bodily injury." 18 Pa. C.S. § 2301. Subsection (b), on the other hand, appears to encompass any crime where a "solid object" is propelled toward a roadway. Given that the object in question could be non-dangerous and the roadway unoccupied, there should be strong arguments that this crime is not a CIMT.

[79] Subsection (a) requires that the vehicle into which the object is propelled is occupied, so it arguably involves force against persons. Subsection (b), however, merely requires that the object be propelled "onto or toward" a roadway, whether or not that roadway is occupied or in use. As such, it is far less likely to be a CODV. See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

[80] Even with sentence of a year or more, this should not be a COV because the level of violent force isn't sufficient to qualify under 18 U.S.C. § 16(a). Matter of Dang, 28 I&N Dec. 541 (BIA 2022) (holding that the Supreme Court's construction of physical force in Johnson and Stokeling, which holds that physical force means "violent force" or the force "necessary to overcome a victim's resistance," controls the BIA's interpretation of § 16(a)). Subjecting one to mere "physical contact" should not meet this definition. Still, plead to a subsection other than (a)(1) (which criminalizes shoving, kicking, and striking) to be safe.

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

[82] This should not be a CODV since the force required under the statute is likely insufficient to constitute the "violent force" required for a COV. Matter of Dang, 28 I&N Dec. 541 (BIA 2022). Still, since the force required for CODVs is an evolving concept at the Supreme Court level, it is best to avoid subsection (a)(1). See United States v. Castleman, 572 U.S. 157 (2014) (holding that even "indirect force," such as poisoning, or minor force, such as "offensive touching," qualifies as physical force sufficient to make an offense a "misdemeanor crime of domestic violence"). Dang held Castleman inapplicable to CODVs, but this issue has not yet been addressed by the Third Circuit or the Supreme Court.

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

[84] This statute does not require force as required for a COV, nor does it fall under any other category of crime that would qualify it as an AF.

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

[86] Vurimindi v. Attorney General, 2022 WL 3642104, No. 19-1848 & 19-2904 (3d Cir. Aug. 24, 2022) (stalking under § 2709.1(a)(1) is not a removable "crime of stalking," as the statute is indivisible and the minimum conduct criminalized involves merely causing "substantial emotional distress" to the victim). Under this logic, subsection (a)(2), which criminalizes (at minimum) the infliction of substantial emotional distress, should also not be a crime of stalking. See also Matter of Sanchez-Lopez, 27 I&N Dec. 256 (BIA 2018).

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

[88] Intentional assault is a CIMT regardless of the level of injury. Matter of Solon, 24 I&N Dec. 239, 246 (BIA 2007).

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

[90] See Sunuwar v. Att'y Gen., 989 F.3d 239 (3d Cir. 2021).

[91] See, e.g., Commonwealth v. Frasier, 2020 WL 1490937, at *4 (Pa. Super. 2020).

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

[93] Matter of Nakoi, 14 I&N Dec. 208 (BIA 1972); Matter of C-M-, 9 I&N Dec. 487 (BIA 1961).

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

[95] See Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008) (defining "child" as under 18).

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

[97] Sharpe v. Riley, 271 F. Supp. 2d 631 (E.D. Pa. 2003); see also In re Mioten, 2003 WL 23269873 (BIA 2003); In re Clinton Valentine Sharp, 2002 WL 32149034 (BIA 2002).

[98] Restraint must be knowing, but no intent to harm is required. See Turijan v. Holder, 744 F.3d 617, 621 (9th Cir. 2014).

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

[100] See Liao v. Att'y Gen., 910 F.3d 714, 722 (3d Cir. 2018) (holding that crimes of child abuse require a likelihood of harm to the child).

[101] The statute does not require an intent to harm, so arguably lacks a culpable *mens rea*. Commonwealth v. Hart, 28 A.3d 898, 911 (Pa. 2011). Also, the statute only requires recklessness with regard to the victim's age. Commonwealth v. Gallagher, 924 A.2d 636, 266 (Pa. 2007).
[102] See Liao v. Att'y Gen., 910 F.3d 714, 722 (3d Cir. 2018) (holding that crimes of child abuse require a likelihood of harm to the child).
[103] See Matter of Keeley, 27 I&N Dec. 146 (BIA 2017).
[104] Matter of H, 2 I&N Dec. 406 (BIA 1945).
[105] See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
[106] Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).
[107] Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) (holding that statutory rape offenses qualify as generic sexual abuse of a minor offenses if they require that the victim be under the age of 16).
[108] Matter of Jimenez-Cedillo, 27 I&N Dec. 1, 6 (BIA 2017); but see Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018) (reversing because the BIA failed to explain why it changed its prior position that knowledge of age was necessary for statutory rape to be a CIMT). Note that neither knowledge of victim's age nor intent is an element of the offense – mistake of age defense shifts burden to the defendant. 18 Pa. C.S. § 3102; Commonwealth v. A.W.C., 951 A.2d 1174, 1177-78 (Pa. Super. 2008).
[109] No direct case law on point, but similar statutes have been held to be crimes of child abuse. See, e.g., Matter of Aguilar-Barajas, 28 I&N Dec. 354 (BIA 2021) (finding that the offense of aggravated statutory rape under section 39-13-506(c) of the Tennessee Code Annotated, which criminalizes "the unlawful sexual penetration of a victim by the defendant, or of the defendant by the victim, when the victim is at least thirteen but less than eighteen years of age and the defendant is at least ten years older than the victim," is categorically a "crime of child abuse" under the INA)
[110] Matter of Keeley, 27 I&N Dec. 146 (BIA 2017).
[111] Forcible compulsion need not be physical force as required by 18 U.S.C. § 16(a). 18 Pa. C.S. § 3101; see United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005) (noting that sexual assault that does not require physical force is not a § 16(a) COV)).
[112] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[113] See Keeley v. Whitaker, 901 F.3d 878 (6th Cir. 2018); Perez-Gonzalez v. Holder, 667 F.3d 622, 626 (5th Cir. 2012). In PA this would probably have to be litigated up to the circuit because the BIA said otherwise in Matter of Keeley.
[114] Matter of Keeley, 27 I&N Dec. 146 (BIA 2017).
[115] United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005).
[116] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[117] Cabeda v. Att'y Gen., 971 F.3d 165 (3d Cir. 2020).
[118] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[119] Cabeda v. Att'y Gen., 971 F.3d 165 (3d Cir. 2020).
[120] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[121] Matter of Keeley, 27 I&N Dec. 146 (BIA 2017) defines rape as intercourse without consent, but discussion of lack of consent primarily covers the types of situations criminalized in PA by rape and IDSI, i.e. force or inability to consent due to impairment or mental defect. As a result, arguments may exist that consent is defined more broadly under PA law than the Ohio statute discussed in Keeley.
[122] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[123] Includes indecent contact so should not be a rape AF; should also not count as a COV AF, as no use of force is required.
[124] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008)
[125] Matter of Keeley, 27 I&N Dec. 146 (BIA 2017).
[126] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008)
[127] Unclear if the penetration here, if done through forcible compulsion or threat of forcible compulsion, would satisfy the "violent" force required for COVs and CODVs under Stokeling, 139 S. Ct. 544 (2019), Johnson, 559 U.S. 133 (2010) and Matter of Dang, 28 I&N Dec. 541 (BIA 2022). Given the plain language of the statute, it seems likely that subsections (a)(2) and (a)(3) would be the most dangerous.
[128] See Keeley v. Whitaker, 901 F.3d 878 (6th Cir. 2018); Perez-Gonzalez v. Holder, 667 F.3d 622, 626 (5th Cir. 2012). In PA this would probably have to be litigated up to the circuit because the BIA said otherwise in Matter of Keeley.
[129] The logic of Cabeda v. Att'y Gen., 971 F.3d 165 (3d Cir. 2020) should apply, because Cabeda states that § 3125, like § 3123, can be committed recklessly.
[130] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[131] The logic of Cabeda v. Att'y Gen., 971 F.3d 165 (3d Cir. 2020) should apply, because Cabeda states that § 3125, like § 3123, can be committed recklessly.
[132] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).

[133] Not a rape AF because no penetration required. Matter of Keeley, 27 I&N Dec. 146 (BIA 2017). Not a crime of violence under § 16(a) because no use of violent force required. See Matter of Guzman-Polanco, 26 I&N Dec. 806 (BIA 2016). Crime of violence aggravated felony as defined in § 16(b) has been ruled unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).
[134] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[135] Probably not crime of violence aggravated felony because "forcible compulsion" can include intellectual, moral, emotional, or psychological force, 18 Pa. C.S. § 3101, while 18 U.S.C. § 16(a) requires physical force.
[136] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008)
[137] See United States v. Davis, 875 F.3d 592 (11th Cir. 2017).
[138] Not a rape AF because no penetration required. Matter of Keeley, 27 I&N Dec. 146 (BIA 2017). Not a crime of violence under § 16(a) because no use of violent force required. See Matter of Guzman-Polanco, 26 I&N Dec. 806 (BIA 2016). Crime of violence aggravated felony as defined in § 16(b) has been ruled unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018); United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005).
[139] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008).
[140] Cadapan v. Att'y Gen., 749 F.3d 157 (3d Cir. 2014) held that this *is* a sexual abuse of a minor AF, but Cabeda v. Att'y Gen., 971 F.3d 165 (3d Cir. 2020) likely abrogates that decision, because it hold that offenses that can be committed recklessly cannot be sexual abuse of a minor AFs and suggests that § 3126 is such an offense. Cabeda at *175, but see Johnson v. Elk Lake School Dist., 283 F.3d 138, 157 n.14 (3d Cir. 2002) (stating that the language "for the purpose of" in § 3126 establishes that conduct must be intentional). Still, no direct case law on point, so avoid this offense if possible.
[141] Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. 2008)
[142] Matter of Cortes Medina, 26 I&N Dec. 79 (BIA 2013) ("We therefore hold that for the offense of indecent exposure to be considered a crime involving moral turpitude under the immigration laws, the statute prohibiting the conduct must require not only the willful exposure of private parts but also a lewd intent.").
[143] Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense. Child victim must be an element to be a CAC. Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008). However, under Apprendi v. New Jersey, 530 U.S. 466 (2000), this likely is an element.
[144] Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense. Child victim must be an element to be a CAC. Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008). However, under Apprendi v. New Jersey, 530 U.S. 466 (2000), this likely is an element.
[145] Totimeh v. Att'y Gen. of the U.S., 666 F.3d 109 (3d Cir. 2012).
[146] Although there is a ground of deportability for failure to register as a sex offender, 8 U.S.C. § 1227(a)(2)(A)(v), this only applies to federal convictions under 18 § U.S.C § 2250.
[147] Matter of Cortes Medina, 26 I&N Dec. 79 (BIA 2013) (indecent exposure is only a CIMT where the statute requires lewd intent); Commonwealth v. Botzum, 302 A.2d 381 (Pa. Super. 1973) (holding, for a prior version of the statute, that deliberate or malicious intent is not an element of the offense).
[148] Not a crime of violence. Tran v. Gonzales., 414 F. 3d 464 (3d Cir. 2005). Also not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), because arson offense at 18 U.S.C. § 844(i) requires malicious, not just reckless, property destruction.
[149] Recklessness with regard to risk of harm should not be a CIMT. See Mahn v. Att'y Gen., 767 F.3d 170 (3d Cir. 2014); but see Pretelt v. Att'y Gen., 370 F. App'x 338 (3d Cir. 2010) (unpublished) (holding that a comparable NJ statute is a CIMT); see also United States v. Mitchell, 218 F. Supp. 3d 360 (M.D. Pa. 2016) (discussing least culpable conduct).
[150] See Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless *mens rea* is not a CIMT).
[151] Luna Torres v. Lynch, 136 S. Ct. 1619 (2016). Probably also a COV AF if a sentence of a year or more is imposed.
[152] Matter of S-, 3 I&N Dec. 617 (BIA 1949).
[153] See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
[154] See Matter M-W-, 25 I&N Dec. 748, 750 n.3 (BIA 2012) (noting that felony murder is uncontroversially part of the common law definition of murder).
[155] See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
[156] Least culpable conduct is recklessness, which is not a COV. See Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F. 3d 464 (3d Cir. 2005). Also not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), because arson offense at 18 U.S.C. § 844(i) requires malicious, not just reckless, property destruction. There is a strong argument that statute is not divisible under Mathis v. United States, 579 U.S. 500 (2016), but plead to full language or recklessness to be safe.
[157] Recklessness with regard to risk of harm should not be a CIMT. See Mahn v. Att'y Gen., 767 F.3d 170 (3d Cir. 2014); but see Pretelt v. Att'y Gen., 370 F. App'x 338 (3d Cir. 2010) (unpublished) (holding that a comparable NJ statute is a CIMT); see also United States v. Mitchell, 218 F. Supp. 3d 360 (M.D. Pa. 2016) (discussing least culpable conduct).

[158] See Matter M-W-, 25 I&N Dec. 748, 750 n.3 (BIA 2012) (noting that felony murder is uncontroversially part of the common law definition of murder).
[159] Luna Torres v. Lynch, 578 U.S. 452 (2016). Probably also a COV AF if a sentence of a year or more is imposed.
[160] Matter of S-, 3 I&N Dec. 617 (BIA 1949).
[161] See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
[162] Not a crime of violence. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F. 3d 464 (3d Cir. 2005). Also not an AF under 8 U.S.C. § 1101(a)(43)(E), because arson offense at 18 U.S.C. § 844(i) requires malicious, not just reckless, property destruction.
[163] See Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless *mens rea* is not a CIMT).
[164] Luna Torres v. Lynch, 136 S. Ct. 1619 (2016).
[165] Matter of S-, 3 I&N Dec. 617 (BIA 1949).
[166] Not a crime of violence. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F. 3d 464 (3d Cir. 2005). Also not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), because arson offense at 18 U.S.C. § 844(i) requires malicious, not just reckless, property destruction.
[167] See Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless *mens rea* is not a CIMT). As mentioned above, Knapik remains good law.
[168] This statute does not require the use of force. Moreover, the minimum *mens rea* that can be utilized here (recklessness) is insufficient for a COV under 18 U.S.C. § 16(a). Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005).
[169] The conduct criminalized here is likely broader than that criminalized under 18 U.S.C. § 844(d) and 844(h).
[170] The minimum *mens rea* here is recklessness, which is insufficient for a CIMT absent statutory aggravating factors. Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004). This offense appears to lack statutory aggravating factors; the minimum conduct necessary to violate it appears to be recklessly starting a fire to endanger property, even if no damage actually results. The statute should not be internally divisible. Because a judge could find otherwise and no case law exists on point, however, it may be best to avoid this offense or specify reckless conduct and damage only to property on the record.
[171] This statute does not require the use of force, but rather criminalizes a failure to respond or report. The minimum *mens rea* should also be recklessness, which is insufficient for a COV under 18 U.S.C. § 16(a). Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005).
[172] This statute is broader than 18 U.S.C. § 844(d) and 844(h).
[173] The minimum conduct necessary to violate this statute is recklessly failing to control a fire on one's own property that endangers another's property, apparently even if the potential property damage is relatively minor. The statute also requires, though, that one *know* the fire is endangering property or persons. The fact that an offender must possess such knowledge and still fail to act could render the offense morally turpitudinous.
[174] This statute is broader than 18 U.S.C. § 844(d).
[175] Includes possession with "intent to use or to provide such device or material to commit any offense described in this chapter;" such intent likely qualifies as morally turpitudinous.
[176] The list of means of causing the catastrophe is not divisible because it is an illustrative, not exhaustive, list. Commonwealth v. Karetny, 880 A.2d 505, 534 (Pa. 2005).
[177] Recklessness cannot meet the definition for use of force under 18 U.S.C. § 16(a). Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005).
[178] F1 (intentional or knowing) would definitely be a CIMT; F2 (reckless) would also likely be a CIMT because the magnitude of harm would be an aggravating factor. See Matter of Hernandez, 26 I&N Dec. 464, 466 (BIA 2015).
[179] Catastrophe means "widespread injury or damage," and "[t]he risk proscribed by this legislation is the use of dangerous means by one who consciously disregards a substantial and unjustifiable risk and thereby unnecessarily exposes society to an extraordinary disaster." Commonwealth v. Hughes, 364 A.2d 306, 311-12 (Pa. 1976). The dangerous means and the degree of harm risked would likely be considered sufficient "aggravating factors" to make this recklessness offense a CIMT. See Knapik v. Ashcroft, 384 F.3d 84, 90 (3d Cir. 2004); Matter of Hernandez, 26 I&N Dec. 464 (BIA 2015).
[180] Recklessness/negligence cannot constitute use of force for purposes of 18 USC § 16(a). Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005). Not a match to the elements of any of the offenses in 8 USC 1101(a)(43)(E).
[181] Negligence is not sufficiently culpable to involve moral turpitude. Matter of Tavdidishvili, 27 I&N Dec. 142 (BIA 2017).
[182] Recklessness is insufficient for COV; even intentional conduct might not involve sufficiently violent physical force. Borden v. United States, 141 S. Ct. 1817 (2021); Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005); see United States v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001)
[183] See Matter of B, 2 I&N Dec. 867 (BIA 1947); Matter of M, 2 I&N Dec. 686 (BIA 1946); see also Commonwealth v. Zambelli, 695 A.2d 848, 850 (Pa. Super. 1997) (holding that criminal mischief does not require lack of consent of the property owner).

[184] This is an odd statute because it's hard to imagine what reckless deception or threat would entail, but avoid loss of $10,000 to avoid fraud AF and sentence of a year or more to avoid COV AF.

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

[186] See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[187] 8 U.S.C. § 16 includes force against property, but these provisions probably don't require the level of "violent force" required for a COV. See Johnson v. U.S., 559 U.S. 133, 140 (2010); U.S. v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001).

[188] In re Majok, A 094-582-812 (BIA Dec. 20, 2016) (unpublished); see also Matter of B, 2 I&N Dec. 867 (BIA 1947); Matter of M, 2 I&N Dec. 686 (BIA 1946); Commonwealth v. Zambelli, 695 A.2d 848, 850 (Pa. Super. 1997) (holding that criminal mischief does not require lack of consent of the property owner). Decisions regarding statutes in other states generally have held that only the *malicious* vandalism of property qualifies as a CIMT. See, e.g., Matter of E.E. Hernandez, 26 I&N Dec. 397 (BIA 2014); In re Alian Patrana, A 025-441-027 (BIA Dec. 22, 2014).

[189] United States v. Stitt, 139 S. Ct. 399 (2018), held that generic burglary includes burglaries of vehicles that are adapted for overnight accommodation. However, generic burglary requires an unlawful/unprivileged entry. Taylor v. United States, 495 U.S. 575, 599 (1990). The statute does not have this as an element; instead, privilege or permission is an affirmative defense. 18 Pa. C.S. § 3502(b); see Descamps v. United States, 570 U.S. 254 (2013) (emphasizing that only elements that must be proven beyond a reasonable doubt are relevant to the categorical approach).

[190] The statute goes beyond intent to commit a felony and instead includes an element requiring commission, intent to commit, or threat to commit a bodily injury crime. The term "bodily injury crime" includes:

(1) An act, attempt or threat to commit an act which would constitute a misdemeanor or felony under the following:
Chapter 25 (relating to criminal homicide).
Chapter 27 (relating to assault).
Chapter 29 (relating to kidnapping).
Chapter 31 (relating to sexual offenses).
Section 3301 (relating to arson and related offenses).
Chapter 37 (relating to robbery).
Chapter 49 Subch. B (relating to victim and witness intimidation).
(2) The term includes violations of any protective order issued as a result of an act related to domestic violence.

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

[191] See Matter of Louissant, 24 I&N Dec. 754 (BIA 2009); Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

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

[193] United States v. Stitt, 139 S. Ct. 399 (2018), held that generic burglary includes burglaries of vehicles that are adapted for overnight accommodation. However, generic burglary requires an unlawful/unprivileged entry. Taylor v. United States, 495 U.S. 575, 599 (1990). The statute does not have this as an element; instead, privilege or permission is an affirmative defense. 18 Pa. C.S. § 3502(b); see Descamps v. United States, 570 U.S. 254 (2013) (emphasizing that only elements that must be proven beyond a reasonable doubt are relevant to the categorical approach).

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

[195] See Matter of Louissant, 24 I&N Dec. 754 (BIA 2009); Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

[196] United States v. Stitt, 139 S. Ct. 399 (2018), held that generic burglary includes burglaries of vehicles that are adapted for overnight accommodation. However, generic burglary requires an unlawful/unprivileged entry. Taylor v. United States, 495 U.S. 575, 599 (1990). The statute does not have this as an element, instead privilege or permission is an affirmative defense. 18 Pa. C.S. § 3502(b); see

Descamps v. United States, 570 U.S. 254 (2013) (emphasizing that only elements that must be proven beyond a reasonable doubt are relevant to the categorical approach).

[197] Definition of COV AF in 18 U.S.C. § 16(b) is unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This statute does not require the use, attempted use, or threatened use of force.

[198] See Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

[199] The statute criminalizes entry into structures that are not adapted for overnight accommodation. This falls outside the generic definition of burglary. United States v. Stitt, 139 S. Ct. 399 (2018).

[200] Definition of COV AF in 18 U.S.C. § 16(b) is unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This statute does not require the use, attempted use, or threatened use of force.

[201] Matter of M-, 2 I&N Dec. 721 (BIA 1946) (holding that the concept that burglary is not a CIMT absent intent to commit a CIMT is still good law for burglaries of non-dwellings). See Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

[202] This statute criminalizes entry into structures that are not adapted for overnight accommodation. This falls outside the generic definition of burglary. United States v. Stitt, 139 S. Ct. 399 (2018).

[203] Definition of COV AF in 18 U.S.C. § 16(b) is unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This statute does not require the use, attempted use, or threatened use of force.

[204] Matter of M-, 2 I&N Dec. 721 (BIA 1946).

[205] Definition of COV AF in 18 U.S.C. § 16(b) is unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This statute does not require the use, attempted use, or threatened use of force.

[206] No, because no intent to commit a CIMT required. Matter of M-, 2 I&N Dec. 721 (BIA 1946); Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979).

[207] "Break into" can involve use of force, but it is not required.

[208] No, because no intent to commit a CIMT required. Matter of M-, 2 I&N Dec. 721 (BIA 1946); Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979).

[209] No use of force required here.

[210] No, because no intent to commit a CIMT required. Matter of M-, 2 I&N Dec. 721 (BIA 1946); Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979).

[211] Sections (i)-(iii) are summary offenses. Section (iv) is an M1. While these subsections may qualify as crimes of violence, they are summary offenses and only punishable by up to 90 days in prison, so they cannot be aggravated felonies.

[212] Subsections (i) and (ii) involve intent to commit a CIMT and therefore are likely CIMTs. Subsection (iii) is possibly a CIMT. Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979); see Javier v. Att'y Gen., 826 F.3d 127 (3d Cir. 2016); Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016).

[213] If a prison sentence of one year or longer is imposed, this could be a theft AF under K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021). K.A. does not address the issue of temporary or permanent deprivation at length (the Court only notes that permanent deprivation is not *necessary* to render a crime a theft AF), but does hold that all of NJ's eight recognized theft offenses qualify as theft offenses under the INA. *Id.* at 112. See, however, the "tips" section for this offense for argument that, unlike NJ's theft offenses, not all PA offenses meet the definition of theft under the INA.

[214] U.S. v. Henderson, --- F.4th --- (3d Cir. 2023); see also U.S. v. Cann, 2023 WL 5275054, No. 22-2525 (3d Cir. Aug. 16, 2023) (unpublished).

[215] Matter of Ibarra, 26 I&N Dec. 809 (BIA 2016); United States v. Heng Khim, 748 F. App'x 440, 444 (3d Cir. 2018) (unpublished), United States v. Harris, 205 F. Supp.3d 651, 673 (M.D. Pa. 2016), Zavala Cerrato, 2009 WL 1488348 (BIA 2009), and Vannara Phou, 2006 WL 901553 (BIA 2006) point toward the conclusion that PA robbery qualifies as a COV AF if accompanied by a prison sentence of a year or more. Recently, however, several decisions have arguably abrogated these holdings on *mens rea* grounds. See Borden v. United States, 141 S. Ct. 1817 (2021), which held that crimes committed with mere recklessness could not qualify as COVs; see also accompanying advice under the "tips" section for this offense. In light of Borden, at least two PA courts have found that robbery is not a COV because it can be committed recklessly. See United States v. Blakney, 2021 WL 3929694 (E.D. Pa. 2021) (finding robbery under subsection (iv) not a crime of violence because it requires a minimum *mens rea* of recklessness). The Third Circuit recently held the same in a non-precedential decision for subsection (iv). See United States v. Washington, No. 21-2740 (3d Cir. Jan. 9, 2023).

[216] Matter of Martin, 18 I&N Dec. 226, 227 (BIA 1982).

[217] See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant. Because subsection (ii) has been held to be a crime of violence AF, it will also be a CODV if the victim falls under a protected classification. See U.S. v. Henderson, --- F.4th --- (3d Cir. 2023). Argument against CODV for subsections (i) and (iv) is that that recklessness is an insufficient *mens rea* for a COV; if this is not a COV, it cannot be a CODV. Borden v. United States, 141 S. Ct. 1817 (2021). Subsections (i) and (iv) should have a minimum *mens rea* of recklessness; see above for cases, including Washington and Blakney, that have already found that subsection (iv) is not a COV AF.

[218] See 18 Pa. C.S. § 3902 (noting that all offenses in Chapter 39 of the PA criminal code are "theft"); Commonwealth v. Weigle, 949 A.2d 899 (Pa. Super. 2008) (stating that "it appears that proof of any theft offense defined in Chapter 39 of the Crimes Code would be sufficient"); Commonwealth v. Stevens, 352 A.2d 509, 513 (Pa. Super. 1975) (applying § 3902 to the definition of robbery). See, e.g., Commonwealth v. Espenlaub, 2016 WL 5870893 (Pa. Super. 2016) (arguably relating to a robbery in the course of theft by deception). As such, predicate theft offenses for robbery include crimes such as theft of leased property (18 Pa. C.S. § 3932(a)), which prohibits dealing in leased property as if it is one's own—regardless of whether the owner consents to such use; unlawful possession of retail or library theft instruments (18 Pa. C.S. § 3929.2), which outlaws mere possession of a theft detection shielding device; and theft of trade secrets (18 Pa. C.S. § 3930), which criminalizes entering a building with the intent to obtain a trade secret (even if such an objective is not accomplished). Because not all of these offenses involve exercising control over property without the owner's consent, robbery as a whole—under any subsection—is arguably not a theft AF. Litigators have reported success utilizing this argument at the immigration court level.

[219] Borden v. United States, 141 S. Ct. 1817 (2021) held that crimes committed with mere recklessness could not qualify as COVs. Subsections (i), (iii) and (iv) of this statute should have a minimum *mens rea* of recklessness only. See United States v. Blakney, 2021 WL 3929694 (E.D. Pa. 2021) (finding robbery under subsection (iv) not a crime of violence because it requires a minimum *mens rea* of recklessness). See also United States v. Washington, No. 21-2740 (3d Cir. Jan. 9, 2023) (finding defendant's second-degree robbery conviction under 18 Pa. Cons. Stat. § 3701(a)(1)(iv) is not a "crime of violence" post-Borden, because it could be committed with a *mens rea* of mere recklessness). Some PA courts have held that subsection (ii) also has a minimum *mens rea* of recklessness (see, e.g., United States v. Ruffin, 2022 WL 1485283 at *12 (W.D. Pa. May 11, 2022)), though any argument to this effect would have to overcome the Third Circuit's decision in Henderson, above.

[220] If a prison sentence of one year or longer is imposed, this could be a theft AF under K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021). K.A. does not address the issue of temporary or permanent deprivation at length (the Court only notes that permanent deprivation is not *necessary* to render a crime a theft AF), but does hold that all of NJ's eight recognized theft offenses qualify as theft offenses under the INA. *Id.* at 112. These include crimes that do not affirmatively require an intent to deprive the owner; by this logic, this statute may fall outside the protections conveyed by Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007) and Commonwealth v. Jones, 771 A.2d 796, 798 (Pa. Super. Ct. 2001). Because the statute involves "taking" (rather than stealing) as its minimum conduct, however, arguments remain that this offense is different, and may not be a "theft offense" under the INA. Should also not be a COV after Borden and Dimaya because use of violent force is not an element. Compare Jones, 771 A.2d at 799 (affirming conviction where defendant got in running car and drove it away with victim in the back) with Matter of Kim, 26 I&N Dec. 912 (BIA 2017) (defining use of force as force capable of causing pain or injury) and Matter of Valenzuela, 28 I&N Dec. 418 (BIA 2021) (carjacking under California law, which is accomplished by means of force of fear, is categorically a COV AF). See also Mateo v. Att'y Gen., 870 F.3d 228 (3d Cir. 2017).

[221] Case law establishes that the defendant must have used force, intimidation, or inducement of fear to accomplish the taking, which could be seen as a sufficiently culpable *mens rea* and actus reus to be a CIMT. Commonwealth V. George, 705 A.2d 916, 920 (Pa. Super. 1998).

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

[223] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007); K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021).

[224] Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016).

[225] In Francisco-Lopez v Att'y Gen., 2020 WL 2505155 (3d Cir. 2020), the Third Circuit held that the BIA's decision in Matter of Diaz-Lizarraga, which removed the requirement that theft offenses involve an "intent to permanently deprive," should not apply retroactively. This holding should apply to Pennsylvania theft by unlawful taking convictions prior to Diaz-Lizarraga because, like New York, Pennsylvania's theft statute does not require intent to permanently deprive. See 18 Pa. C.S. § 3901 (defining "deprive").

[226] K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021) found that theft of immovable property under NJ law (criminalized at § 2C:20-3(b)) met the requirements of a theft AF if a sentence of a year or more in prison was imposed. Theft of immovable property in NJ is similar to theft of immovable property in PA, except that in PA, one may be convicted for merely "excercis[ing] control over" immovable property (without intent to deprive the owner of that property); in NJ, one must unlawfully transfer an interest in that property to be convicted. The K.A. Court also noted that a theft aggravated felony has three parts: (1) the taking of property or an exercise of control over property; (ii) without consent; and (iii) with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. Because § 3921(b) does not always involve the third element, it is arguably not a theft AF.

[227] No case law on point here. However, since this offense lacks the intent to deprive, it should not categorically be a CIMT. See Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016); Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973).

[228] In contrast to unlawfully transferring property—which is the minimum conduct punishable under NJ's theft of immovable property statute—a conviction for theft of immovable property in PA requires only that one unlawfully exercise control over immovable property with intent to benefit oneself or another not entitled thereto, arguably even if one had no intent to deprive the owner of the rights and benefits of ownership. For a potential example of how this might transpire, imagine that it is raining, and a defendant sees that the owner

of a corner bodega left the door open after his store closed. The defendant steps inside the bodega to get out of the rain, and is then spotted by police. He tells the police that he owns the store and is then permitted to leave. Though he has unlawfully exercised control over immovable property, the store owner has arguably been deprived of nothing, nor was it the defendant's intent to so deprive him (even though the defendant received a benefit).

[229] In Al-Sharif v. USCIS, 734 F.3d 207 (3d Cir. 2013), the court overruled Nugent v. Ashcroft and held that an offense involving fraud or deceit is a fraud AF regardless of whether it is also a theft offense. Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; the $10,000 loss must be tied to that conviction specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[230] The Third Circuit redefined consent in K.A. v. Att'y Gen. to mean not simply "assent" but "voluntary and intelligent assent." 997 F.3d 99, 112-13 (3d Cir. 2021). As such, the Court also rejected the argument—made by the petitioner in that case—that thefts of deception can be committed with the property owner's consent. See id. (holding as well that theft by deception under N.J. Stat. Ann. 2C:20-4 qualifies as a theft offense under the INA). As such, this is likely a theft AF if a prison sentence of one year or longer is imposed.

[231] Lopez Rodriguez v. Att'y Gen., No. 20-3309, 2021 WL 3052552 (3d Cir. Jul. 20, 2021) (finding that theft by deception under N.J. Stat. Ann. § 2C:20-4(a), which has nearly exactly the same language as § 3922(a), qualifies as a CIMT); Jordan v. DeGeorge, 341 U.S. 223, 227 (1951) (all offenses involving fraudulent intent are CIMTs); Sheriff v. Att'y Gen., 788 F. App'x 879, 881 (3d Cir. 2019) (unpublished) (holding that § 3922(a) is a CIMT).

[232] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that conviction specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[233] The BIA reaffirmed the holding of Matter of Garcia-Madruga, 24 I&N Dec. 436 (BIA 2008), in 2022. See Matter of C. Morgan, 28 I&N Dec. 508 (BIA 2022) (holding that larceny under the Connecticut General Statutes is not a theft offense AF because larceny can include acts such as "obtaining property by false pretenses," "obtaining property by false promise," "defrauding of public community," and "air bag fraud"—none of which require the non-consensual taking of property). See also Matter of Koat, 28 I&N Dec. 450 (BIA 2022) (theft in the first degree under the Iowa Code is divisible with respect to whether a violation of the statute involved theft by taking without consent or theft by fraud or deceit; as such, adjudicators may employ the modified categorical approach to determine whether the conviction involved aggravated felony theft).

[234] K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021); Matter of Reyes, 28 I&N Dec. 52, 64 (A.G. 2020).

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

[236] See Hernandez-Cruz v. Att'y Gen., 764 F.3d 281, 285 (3d Cir. 2014) (citing a statute's prohibition of omissions as an example of non-turpitudinous conduct); Matter of Diaz-Lizarraga, 26 I&N Dec. 847, 852-53 (basing decision on the fact that taking property without consent is inherently reprehensible). See notes above for argument that pre-2016 convictions are not CIMTs because the statute does not apply retroactively.

[237] Barradas Jacome v. Att'y Gen., 2022 WL 2350276 (3d Cir. June 30, 2022); K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021); see also Lewin v. Att'y Gen., 885 F.3d 165 (3d Cir. 2018).

[238] De Leon-Reynoso v. Ashcroft, 293 F. 3d 633 (3d Cir. 2002); Plasencia v. Att'y Gen., 2023 WL 4837839, No. 20-1242 (3d Cir. July 27, 2023) (unpublished).

[239] Ilchuk v. Att'y Gen., 434 F.3d 618, 623 (3d Cir. 2006) held that this is a theft AF. That finding is reinforced by the Third Circuit's 2021 holding in K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021). The K.A. Court affirmatively rejected the idea that thefts that occur by deception can be committed with the consent of the owner. Id. at 112-13. To outline arguments that challenge this finding, however, see Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014); Matter of Garcia-Madruga, 24 I&N Dec. 436, 440 (BIA 2008); but see De Lima

v. Sessions, 867 F.3d 260, 267 (1st Cir. 2017) (holding that theft of services is generic theft); Matter of Reyes, 28 I&N Dec. 52 (A.G. 2020) (holding that a statute can be an aggravated felony if all conduct is either theft or fraud).

[240] This statute does not necessarily involve fraud or deceit. Valansi v. Ashcroft, 278 F.3d 203, 209-10 (3d Cir. 2002).

[241] This statute requires knowing or intentional *mens rea*, but does not necessarily require intent to permanently deprive or substantially erode the owner's property rights. See Garcia v. Sessions, 721 F. App'x 35, 38 (2d Cir. 2018) (remanding for determination of whether theft of services is a CIMT); Johnson v. Holder, 413 F. App'x 435 (3d Cir. 2010) (same); Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016).

[242] Ilchuk v. Att'y Gen., 434 F.3d 618, 623 (3d Cir. 2006) held that this is a theft AF. That finding is reinforced by the Third Circuit's 2021 holding in K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021). The K.A. Court affirmatively rejected the idea that thefts that occur by deception can be committed with the consent of the owner. *Id.* at 112-13. To outline arguments that challenge this finding, see Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014); Matter of Garcia-Madruga, 24 I&N Dec. 436, 440 (BIA 2008); but see De Lima v. Sessions, 867 F.3d 260, 267 (1st Cir. 2017) (holding theft of services is generic theft); Matter of Reyes, 28 I&N Dec. 52 (A.G. 2020) (holding that a statute can be an aggravated felony if all conduct is either theft or fraud); but see Matter of Reyes, 28 I&N Dec. 52 (A.G. 2020).

[243] For example, a conviction was upheld for a legislator who used staff time for political rather than governmental purposes. Commonwealth v. Stetler, 95 A.3d 864 (Pa. Super. 2014).

[244] Cummings v. Att'y Gen., 265 F. App'x 122 (3d Cir. 2008); see also K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021).

[245] Fraud or deceit is not an element of the offense. Commonwealth v. Austin, 393 A.2d 36, 38 (Pa. Super. 1978). We have had clients charged for failing to pay sales taxes from their store, without lying or filling out fraudulent returns.

[246] While the statute requires the intent to treat someone else's property as your own, it may not require intent to permanently deprive or substantially erode the owner's property rights. Matter of Diaz-Lizarraga, 26 I&N Dec. 847, 851 (BIA 2016). For example, Commonwealth v. Turrell suggests that a lawyer who fails to hold funds in escrow and then does not make a required payment back to client could be convicted even if she later pays the money back. 584 A.2d 882 (Pa. 1990).

[247] In Commonwealth v. Carson, 592 A.2d 1318, 1321 (Pa. Super. 1991), the court held that the elements required for a conviction only require the operation of a vehicle without consent and that the defendant knew or should have known that he lacked consent. Therefore, this offense likely does not require the intent to deprive necessary for a theft offense. See Lewin v. Att'y Gen., 885 F.3d 165 (3d Cir. 2018). But see K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021) (redefining "consent" for theft offenses in the Third Circuit to mean "voluntary and intelligent assent," and insinuating that even minor deprivations of an owner's property interest may satisfy the "intent to deprive" element of a generic theft offense). *Id.* at 112-13. To avoid a theft AF, criminal defendants should not accept a plea to this statute when it is accompanied by a prison sentence of one year or longer. Immigration attorneys should argue that the lack of *any* "intent to deprive" element in this statute places it beyond the bounds of a theft offense under the INA.

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

[249] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007); Dempster v. Att'y Gen., 565 F. App'x 123, 125 (3d Cir. 2014) (unpublished decision acknowledging that the BIA determined that the statute was divisible and that subparts (a)(1) through (a)(3) constituted theft offenses under § 1101(a)(43)(G)); Baghdad v. Attorney General, 50 F.4th 386 (3d Cir. 2022) (finding that conviction for retail theft under 18 Pa. Cons. Stat. § 3929(a)(1) is a theft aggravated felony when a sentence of a year or longer in prison is imposed; the presumptions listed at subsection (c) of the statute are permissive, not mandatory, inferences, and thus do not impermissibly shift the burden of proof to defendants); K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021).

[250] Matter of Jurado-Delgado, 24 I&N Dec. 29, 29 (BIA 2006). See also Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016). The intent required for all subsections of this statute should match the level of intent found to be morally turpitudinous in Diaz-Lizarraga, though Diaz-Lizarraga questioned Jurado's continuing validity in a footnote. In its 2020 decision Thakker v. Att'y Gen., 837 Fed. App'x 75 (3d Cir. 2020), the Third Circuit also implied that retail theft may not categorically qualify as a CIMT in the wake of Mathis v. United States, 579 U.S. 500 (2016). Note that a single summary RT conviction is subject to the petty offense exception for both inadmissibility and deportability grounds.

[251] See Mathis v. United States, 579 U.S. 500 (2016); Thakker v. Att'y Gen., 837 Fed. App'x 75 (3d Cir. 2020) (holding counsel ineffective where they failed to argue, post-Mathis, that the respondent's conviction for retail theft was not a CIMT, as the BIA seriously questioned Matter of Jurado in Matter of Diaz-Lizarraga and Jurado's assumption that retail theft involves an intent to permanently deprive may not survive Mathis). See also Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016).

[252] See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007). Unless the Thakker litigation (see footnote directly above) is successful, the argument that Matter of Diaz-Lizarraga doesn't apply retroactively likely will not work for retail theft because there is a 2006 published BIA decision holding that this statute is a CIMT. Matter of Jurado, 24 I&N Dec. 29 (BIA 2006).

[253] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007); K.A. v. Att'y Gen., 997 F.3d 99 (3d Cir. 2021).

[254] Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016).

[255] In Francisco-Lopez v Att'y Gen., 959 F.3d 108 (3d Cir. 2020), the Third Circuit held that the BIA's decision in Matter of Diaz-Lizarraga, which removed the requirement that theft offenses involve an "intent to permanently deprive," should not apply retroactively. This holding should apply to Pennsylvania theft by unlawful taking convictions prior to Diaz-Lizarraga (2016), because, like New York, Pennsylvania's theft statute does not require intent to permanently deprive. 18 Pa. C.S. § 3901 (defining "deprive").

[256] Onyejiaka v. Att'y Gen., 183 Fed. App'x 193 (3d Cir. 2006); see Williams v. Att'y Gen., 880 F.3d 110 (2018) (discussing forgery AFs). An offense can be a forgery offense and a fraud offense. Bobb v. Att'y Gen., 458 F.3d 213 (3d Cir. 2006). However, in Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002), the Third Circuit found, in the context of a different statute, that intent to defraud is a sufficient *mens rea* for AF purposes, but intent to injure is not. But see Commonwealth v. Leber, 802 A.2d 648 (Pa. Super. Ct. 2002) (holding that fraudulent intent is an essential element of PA forgery).

[257] Jordan v. DeGeorge, 341 U.S. 223, 227 (1951) (all offenses involving fraudulent intent are CIMTs).

[258] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

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

[260] Matter of Flores, 17 I&N Dec. 225 (BIA 1980) (indicating that crimes involving fraud are crimes involving moral turpitude).

[261] Not fraud AF because no intent to defraud. Mirat v. Att'y Gen., 184 F. App'x 153 (3d Cir. 2006) (unpublished decision).

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

[263] See Kawashima v. Holder, 565 U.S. 478 (2012); Mowlana v. Lynch, 803 F.3d 923, 928 (8th Cir. 2015) (holding that unauthorized SNAP use is a fraud AF). This could be a theft AF if a sentence of a year or longer in prison is imposed. See K.A. v. Att'y Gen., 997 F.3d 99, 112-13 (3d Cir. 2021). K.A. redefined consent to mean not simply "assent" but "voluntary and intelligent assent;" the case is vague as to what control over property is sufficient for a theft AF, but the case seems to imply that the taking can be minimal and still qualify. This is arguably at odds with the intent to deprive necessary for a theft AF under Matter of Garcia-Madruga, 24 I&N Dec. 436 (BIA 2008). To be safe, keep any sentence imposed to less than a year in prison.

[264] Matter of Chouinard, 11 I&N Dec. 839 (BIA 1966).

[265] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038, No. 21-2637 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

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

[267] Probably not a fraud AF because it includes intent to defraud *or* injure. Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002). This is not a theft AF because it does not require a taking of property, and thus should not implicate K.A. v. Att'y Gen., 997 F.3d 99, 112-13 (3d Cir. 2021). See also Matter of Garcia-Madruga, 24 I&N Dec. 436 (BIA 2008).

[268] Matter of Flores, 17 I&N Dec. 225 (BIA 1980) (indicating that crimes involving fraud are crimes involving moral turpitude).

[269] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note

that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[270] See Kawashima v. Holder, 565 U.S. 478 (2012). Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[271] Matter of Flores, 17 I&N Dec. 225 (BIA 1980) (indicating that crimes involving fraud are crimes involving moral turpitude).

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

[273] Matter of Zaragoza-Vaquero, 26 I&N Dec. 814 (BIA 2016).

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

[275] Yong Wong Park v. Att'y Gen., 472 F.3d 66 (3d Cir. 2006); Fofana v. Ridge, 114 Fed. App'x 490 (3d Cir. 2004) (unpublished opinion finding PA statute to be counterfeiting AF; rejecting argument that counterfeiting only applied to counterfeit currency).

[276] Matter of Kochlani, 24 I&N Dec. 128 (BIA 2017); see Dolgosheev v. Att'y Gen., 436 F. App'x 91, 2011 WL 2653828 (3d Cir. 2011) (unpublished).

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

[278] Compare Linares-Gonzalez v. Lynch, 823 F.3d 508 (9th Cir. 2016) (holding that a similar CA statute is not a CIMT) with Veloz-Luvevano v. Lynch, 799 F.3d 1308 (10th Cir. 2015) (holding that criminal impersonation is inherently fraudulent and therefore a CIMT). A recent Third Circuit decision, Sasay v. Att'y Gen., 13 F.4th 291 (3d Cir. 2021), held that 18 U.S.C. § 1028A(a)(1), which criminalizes aggravated identity theft, is divisible as to which underlying felony the defendant's conduct facilitated. Though 4120 includes no such list of enumerated felonies, this at least raises the possibility that an adjudicator could find the statute similarly divisible as to the "unlawful purposes" the identity theft advanced.

[279] Nijhawan v. Holder, 557 U.S. 29 (2009). See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[280] See Sasay v. Att'y Gen., 13 F.4th 291, 2021 WL 4127431 (3d Cir. 2021); taking this precaution could protect a non-citizen if DHS argues that the statute is divisible as to the crime(s) the defendant's conduct furthered.

[281] See Linares-Gonzalez v. Lynch, 823 F.3d 508 (9th Cir. 2016).

[282] Welfare fraud is a fraud, not theft, offense. Matter of Garcia-Madruga, 24 I&N Dec. 436 (BIA 2008).

[283] Miller v. U.S. I.N.S., 762 F.2d 21 (3d Cir. 1985); Matter of Cortez Canales, 25 I&N Dec. 301 (BIA 2010).

[284] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe

v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[285] Gonzalez-Alvarado v. INS, 39 F.3d 245, 246 (9th Cir. 1994).

[286] See Restrepo v. Att'y Gen., 617 F.3d 787, 796 (3d Cir. 2010) (adopting a definition of sexual abuse of a minor that includes incest).

[287] See Esquivel-Santana v. Sessions, 137 S. Ct. 1562, 1572 (2017) (holding that statutory rape is not categorical sexual abuse of a minor AF where the age of consent is 18 rather than 16). However, Esquivel-Santana may be distinguishable because it notes that a higher age of consent where there is a special relationship between the offender and the victim could qualify.

[288] Hernandez-Cruz v. Att'y Gen., 764 F.3d 281 (3d Cir. 2014).

[289] Zhi Fei Liao v. Att'y Gen., 910 F.3d 714 (3d Cir. 2018).

[290] See, e.g., Nunez v. Attorney General, 35 F.4th 134 (3d Cir. 2022) (stating that N.J. Stat. § 2C:24-4(a)(1), which criminalizes endangering the welfare of a child, requires a particular likelihood of harm to a child and qualifies as a "crime of child abuse" under the INA; this is so even though the statute does not require proof of actual harm to a child); Matter of Rivera-Mendoza, 28 I&N Dec. 184 (BIA 2020) (finding that § 163.545(1) of the Oregon Revised Statutes categorically constitutes a "crime of child abuse," as the statute's phrase "may be likely to endanger the health or welfare of a child" necessitates "more than a mere possibility of, or potential for, harm" to a child).

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

[292] Matter of B-, 5 I&N Dec. 405 (BIA 1953); Matter of H-, 1 I&N Dec. 669 (BIA 1943) (holding that perjury where materiality is required is a CIMT).

[293] Does not fit the BIA's generic definition of perjury because the statement need not be material. See Matter of Alvarado, 26 I&N Dec. 895 (BIA 2016). However, it is possible that it could be deemed to have a "logical or causal connection" to perjury under the Third Circuit's approach. Williams v. Att'y Gen., 880 F.3d 100 (3d Cir. 2018); Flores v. Att'y Gen., 856 F.3d 280 (3d Cir. 2017).

[294] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offendmer's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Could be a fraud offense if there is sufficient loss. Singh v. Att'y Gen., 677 F.3d 503 (3d Cir. 2012).

[295] Offenses involving intent to mislead are CIMTs. Matter of Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006). Subsections (a)(1) and (b) are probably not CIMTs because they do not require materiality. Matter of G-, 8 I&N Dec. 315 (BIA 1959); Matter of L-, 1 I&N Dec. 324 (1942).

[296] See Nijhawan v. Holder, 557 U. S. 29 (2009), and related cases, above. Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

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

[298] Matter of Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006); Cisneros-Mayo v. Att'y Gen., 859 Fed. App'x 640 (3d Cir. 2021) (holding that conviction under 4904(a)(3) constitutes a CIMT).

[299] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.

[300] See Singh v. Att'y Gen., 677 F.3d 503 (3d Cir. 2012); Pilla v. Holder, 668 F.3d 368 (6th Cir. 2012) (holding that false statements to FBI resulting in more than $10,000 in government losses is an aggravated felony).

[301] See Matter of Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006).
[302] See Nijhawan v. Holder, 557 U.S. 29 (2009), and related cases, above. Still, pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.
[303] See Ildefonso-Candelario, 866 F.3d 102 (3d Cir. 2017) (distinguishing Matter of Jurado-Delgado).
[304] See Singh v. Att'y Gen., 677 F.3d 503 (3d Cir. 2012); Pilla v. Holder, 668 F.3d 368 (6th Cir. 2012) (holding that false statements to FBI resulting in more than $10,000 in government losses is an aggravated felony).
[305] The intent required for this statute is analogous to the intent to mislead discussed in Matter of Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006).
[306] Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish loss amount. See also Hafeed v. Att'y Gen., 2022 WL 819515 (3d Cir. Mar. 17, 2022) (stating that courts may identify the loss attributable to the fraud based on the full record, including the indictment, presentence investigation report, and plea colloquy). The BIA has arguably gone even further, holding that courts should look to "the facts and circumstances underlying an offender's conviction," and may consider "any admissible evidence" to determine the loss amount. Matter of F-R-A-, 28 I&N Dec. 460 (BIA 2022). But note that only the offense of conviction can be grounds for finding of fraud AF; $10,000 loss must be tied to that specifically. See, e.g., Joe v. Att'y Gen., 2022 WL 604038 (3d Cir. Mar. 1, 2022) (finding respondent not necessarily convicted of fraud aggravated felony where it was unclear whether the offenses of which he was actually *convicted* produced a loss to his victims of more than $10,000). Pleading to a specific amount under $10,000 in the plea colloquy should provide a certain degree of protection to non-citizen defendants, even under this circumstance-specific approach.
[307] The statute does not require intent to disrupt the performance of official duties. Cf. Matter of Jurado-Delgado, 24 I&N Dec. 29, 35 (BIA 2006); see also Blanco v. Mukasey, 518 F.3d 714, 720 (9th Cir. 2008). An unpublished BIA case held it is not a CIMT. Roosevelt Raphael, A XXX-XX0-497 (BIA Feb. 26, 2010).
[308] Commonwealth v. Flamer, 848 A.2d 951 (Pa. Super. Ct. 2004); see Bobadilla v. Holder, 679 F.3d 1052, 1058 (8th Cir. 2012) (stating that this type of conduct is not morally turpitudinous).
[309] Denis v. Att'y Gen., 633 F.3d 201 (3d Cir. 2011) (holding that a similar New York offense is an aggravated felony).
[310] The statute requires intent to impair evidence or mislead. See Matter of Mendez, 27 I&N Dec. 219 (BIA 2018).
[311] See Flores v. Att'y Gen., 856 F.3d 280, 292-93 (3d Cir. 2017) (making this distinction). Note, however, that Pugin v. Garland, 599 U.S. --- (2023)—which held that an offense may "relat[e] to obstruction of justice" under §1101(a)(43)(S) even if an investigation or proceeding is not pending—could significantly limit or preclude such an argument.
[312] This is sufficiently analogous to 18 U.S.C. § 1512(b). See Flores v. Att'y Gen., 856 F.3d 280, 291 (3d Cir. 2017).
[313] BIA case law says that taking steps to conceal a felony is morally turpitudinous. Matter of Mendez, 27 I&N Dec. 219 (BIA 2018). Also, the statute requires intimidation or actual harm. Commonwealth v. Doughty, 126 A.3d 951, 957 (Pa. 2015); cf. Javier v. Att'y Gen., 826 F.3d 127 (3d Cir. 2016) (holding that terroristic threats is a CIMT); Commonwealth v. Ostrosky, 589 Pa. 437 (Pa. 2006). But see Escobar v. Lynch, 846 F.3d 1019 (9th Cir. 2017).
[314] This is analogous to 18 U.S.C. § 1513. See Flores v. Att'y Gen., 856 F.3d 280, 291 (3d Cir. 2017).
[315] BIA case law says that taking steps to conceal a felony is morally turpitudinous. Matter of Mendez, 27 I&N Dec. 219 (BIA 2018). Also, the statute requires intimidation or actual harm. Commonwealth v. Doughty, 126 A.3d 951, 957 (Pa. 2015); cf. Javier v. Att'y Gen., 826 F.3d 127 (3d Cir. 2016) (holding that terroristic threats is a CIMT); Commonwealth v. Ostrosky, 589 Pa. 437 (Pa. 2006). But see Escobar v. Lynch, 846 F.3d 1019 (9th Cir. 2017).
[316] PA statute could be deemed similar enough to the "catchall" provision of 18 U.S.C. § 1503(a) to have a "logical or causal connection" to that statute. See Flores v. Att'y Gen., 856 F.3d 280 (3d Cir. 2017).
[317] Ildefonso-Candelario v. Att'y Gen., 866 F.3d 102 (3d Cir. 2017) (noting that the statute covers conduct like shouting profanities at a meter maid and blocking a street during a protest).
[318] Ildefonso-Candelario v. Att'y Gen., 866 F.3d 102, 106 (3d Cir. 2017); Flores v. Att'y Gen., 856 F.3d 280, 292 (3d Cir. 2017) (noting that "due administration of justice" in section 1503 means a judicial proceeding).
[319] Not a COV because does not require the use of force. Commonwealth v. Miller, 475 A.2d 145 (Pa. Super. 1984). Not an obstruction of justice AF because not related to any offense in Title 18, Chapter 73. See Flores v. Att'y Gen., 856 F.3d 280 (3d Cir. 2017); see also Matter of Joseph, 22 I&N Dec. 799 (BIA 1999). Also, the BIA has found that this is not a COV or obstruction of justice aggravated felony. Juan Pedro Stoll, AXX-XX3-301, 2007 WL 1168514 (BIA 2007).
[320] Unpublished BIA opinion held that this crime is not a CIMT. Dariusz Garncarz, AXX-XX0-578, 2005 WL 1104185 (BIA 2005). Under Matter of Danesh, 19 I&N Dec. 669 (BIA 1988), statutes like this that punish "passive resistance" are not CIMTs. See Commonwealth v. Thompson, 922 A.2d 926 (Pa. Super. 2007) (holding that passive resistance is sufficient for a conviction under this statute); but see United States v. Stinson, 592 F.3d 469 (3d Cir. 2010) (holding that the statute does not criminalize passive resistance). No *mens rea* for risk of bodily injury so default should be recklessness, which is (absent an aggravating factor) insufficient for CIMT. See Mahn v. Att'y Gen., 767 F.3d 170 (3d Cir. 2014).
[321] This is not a crime of violence, because it does not require the use of force.

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

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

[324] Flores v. Att'y Gen., 856 F.3d 280 (3d Cir. 2017) held that that accessory after the fact is not an aggravated felony; see also Denis v. Att'y Gen., 633 F.3d 201 (3d Cir. 2011). In 2023, however, the Supreme Court decided Pugin v. Garland, 599 U.S. --- (2023)—which held that an offense may "relat[e] to obstruction of justice" under §1101(a)(43)(S) even if an investigation or proceeding is not pending. Arguably, Pugin does not disturb Flores' central holding that "an analysis of specific statutes must be employed to determine whether a 'logical or causal connection' exists between an alien's prior offense and a Chapter 73 offense;" per Flores, accessory after the fact does not have such a connection. Still, Pugin could be read to imply a broader reading of what offenses "relate to" obstruction of justice. Accessory after the fact is also an obstruction of justice aggravated felony under BIA case law when a prison sentence of one year or more is imposed. Matter of Valenzuela Gallardo, 27 I&N Dec. 449 (BIA 2018). Avoid a sentence of a year or more in prison on this offense to be safe.

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

[326] See Ildefonso-Candelario v. Att'y Gen., 866 F.3d 102, 105 (3d Cir. 2017); Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1071 (9th Cir. 2007), rev'd on other grounds by United States v. Aguila-Montes de Oca, 503 F.3d 1063 (9th Cir. 2007).

[327] Matter of Garza-Olivares, 26 I&N Dec. 736 (BIA 2016) (finding that the categorical approach applies to whether the offense relates to failure to appear before a court, but the circumstance-specific approach applies to whether it is pursuant to a court order to answer to a felony punishable by two years or more). This offense does not categorically require failure to appear *before a court*.

[328] See Matter of Adeniye, 26 I&N Dec. 726 (BIA 2016). It is not clear which elements are categorical vs. circumstance-specific, although Matter of Garza-Olivares is likely a good guide.

[329] Failure to appear is not punished within Chapter 73 of Title 18 of the U.S. Code; like the offense at issue in Flores, it is codified elsewhere. See Flores v. Att'y Gen., 856 F.3d 280 (3d Cir. 2017).

[330] The minimum *mens rea* is recklessness. See Commonwealth v. Miller, 560 A.2d 229, 234 (Pa. Super. Ct. 1989). This is arguably a regulatory offense, meaning that it is not a CIMT. See, e.g. Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014).

[331] Under Matter of Garza-Olivares, 26 I&N Dec. 736 (BIA 2016), the categorical approach applies to whether an offense relates to failure to appear in court for purposes of 8 U.S.C. § 1101(a)(43)(T). This statute criminalizes failure to appear at any time and place and is therefore overbroad. See also Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014) (adopting a similar analysis).

[332] Under current Third Circuit case law, for on offense to be an obstruction of justice AF (8 USC 1101(a)(43)(S)), it has to have a logical or causal connection to an offense in Chapter 73 of Title 18 of the U.S.C., which this offense does not. Flores v. Att'y Gen., 856 F.3d 280, 291 (3d Cir. 2017). In 2023, however, the Supreme Court decided Pugin v. Garland, 599 U.S. --- (2023)—which held that an offense may "relat[e] to obstruction of justice" under §1101(a)(43)(S) even if an investigation or proceeding is not pending. Arguably, Pugin does not disturb Flores' central holding regarding a connection to an offense in Chapter 73 of Title 18, but that is not entirely clear; Pugin could be read to imply a broader reading of what offenses "relate to" obstruction of justice. Avoid a sentence of a year or more in prison to be safe.

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

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

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

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

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

[338] This statute does not require repeated conduct directed at a specific individual, as required for a crime of stalking. Matter of Sanchez-Lopez, 27 I&N Dec. 256 (BIA 2018).
[339] This section does not include the business-related activity necessary for an 8 U.S.C. § 1101(a)(43)(K) AF.
[340] Matter of W, 4 I&N Dec. 401 (BIA 1951).
[341] 8 U.S.C. § 1182(a)(2)(D). "Engaging in" prostitution or "procuring" prostitutes within ten years before an application for admission, even absent a conviction, is a separate basis for inadmissibility. However, under Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008), prostitution requires sexual intercourse, while it is defined more broadly under PA law. Commonwealth v. Cohen, 538 A.2d 582, 584 (Pa. Super. Ct. 1988) (holding that "sexual activity" includes masturbation); see Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008)). Matter of Ding did not revisit this inadmissibility ground, but the BIA might do that in the future. 27 I&N Dec. at 299, n.9.
[342] 8 U.S.C. § 1182(a)(2)(D). "Engaging in" prostitution or "procuring" prostitutes within ten years before an application for admission, even absent a conviction, is a separate basis for inadmissibility. However, under Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008), prostitution requires sexual intercourse, while it is defined more broadly under PA law. Commonwealth v. Cohen, 538 A.2d 582, 584 (Pa. Super. 1988) (holding that "sexual activity" includes masturbation); see Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008)). Matter of Ding did not revisit this inadmissibility ground, but the BIA might do that in the future. 27 I&N Dec. at 299, n.9.
[343] Matter of Ding, 27 I&N Dec. 295 (BIA 2018).
[344] Matter of P, 3 I&N Dec. 20 (BIA 1947); Matter of Lambert, 11 I&N Dec. 340 (BIA 1965); Matter of W, 3 I&N Dec. 231 (BIA 1948).
[345] 8 U.S.C. § 1182(a)(2)(D). "Engaging in" prostitution or "procuring" prostitutes within ten years before an application for admission, even absent a conviction, is a separate basis for inadmissibility. However, under Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008), prostitution requires sexual intercourse, while it is defined more broadly under PA law. Commonwealth v. Cohen, 538 A.2d 582, 584 (Pa. Super. Ct.1988) (holding that "sexual activity" includes masturbation); see Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008)). Matter of Ding did not revisit this inadmissibility ground, but the BIA might do that in the future. 27 I&N Dec. at 299, n.9. This inadmissibility ground is likely broad enough in terms of the acts committed to embrace this offense. See Matter of R-M-, 7 I&N Dec. 392, 395 (BIA 1957).
[346] Compare Matter of Ding, 27 I&N Dec. 295 (BIA 2018) with Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008)).
[347] Arguably these sections do not entail the owning, managing, or supervising required by 8 USC § 1101(43)(K)(i); see, e.g., Familia Rosario v. Holder, 655 F.3d 739 (7th Cir. 2011); but see Williams v. Att'y Gen. of the U.S., 880 F.3d 100 (3d Cir. 2018) (discussing the Third Circuit's interpretation of "relating" under the INA).
[348] Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).
[349] 8 U.S.C. § 1182(a)(2)(D). "Engaging in" prostitution or "procuring" prostitutes within ten years before an application for admission, even absent a conviction, is a separate basis for inadmissibility. However, under Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008), prostitution requires sexual intercourse, while it is defined more broadly under PA law. Commonwealth v. Cohen, 538 A.2d 582, 584 (Pa. Super. 1988) (holding that "sexual activity" includes masturbation); see Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008)). Matter of Ding did not revisit this inadmissibility ground, but the BIA might do that in the future. 27 I&N Dec. at 299, n.9. This inadmissibility ground is likely broad enough in terms of the acts committed to embrace these offenses. See Matter of R-M-, 7 I&N Dec. 392, 395 (BIA 1957).
[350] Specifically, these offenses do not necessarily relate to a prostitution business. See Matter of Ding, 27 I. &N. Dec. 295, 300 (BIA 2018).
[351] This is similar to the offenses in 8 USC 1101(43)(K)(ii), other than the jurisdictional element. See Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (holding that a state statute that lacks an interstate commerce element but otherwise matches the generic federal offense is an aggravated felony). The circumstance-specific approach likely applies to whether the offense was committed for commercial advantage. Nijhawan v. Holder, 557 U.S. 29, 38 (2009) (dicta).
[352] See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).
[353] 8 U.S.C. § 1182(a)(2)(D). "Engaging in" prostitution or "procuring" prostitutes within ten years before an application for admission, even absent a conviction, is a separate basis for inadmissibility. However, under Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008), prostitution requires sexual intercourse, while it is defined more broadly under PA law. Commonwealth v. Cohen, 538 A.2d 582, 584 (Pa. Super. Ct. 1988) (holding that "sexual activity" includes masturbation); see Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008)). Matter of Ding did not revisit this inadmissibility ground, but the BIA might do that in the future. 27 I&N Dec. at 299, n.9.
[354] Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 147 (2d Cir. 2008). Could also argue that the PA statute is overbroad because it includes paying for transportation, while the federal statute requires that the defendant actually transport the individuals. See United States v. Holland, 381 F.3d 80, 87 (2d Cir. 2004).
[355] The statute does not require supervision, ownership, etc. of the actual business, as required under 8 U.S.C. § 1101(43)(K)(i). See Matter of Ding, 27 I&N Dec. 295, 300 (BIA 2018).

[356] See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).
[357] This statute includes failure to stop prostitution from occurring, which is neither prostitution nor receiving proceeds from prostitution.
[358] See Hernandez-Cruz v. Att'y Gen., 764 F.3d 281, 285 (3d Cir. 2014).
[359] The statute does not require supervision, ownership, etc. of the actual business, as required under 8 U.S.C. § 1101(43)(K)(i). See Matter of Ding, 27 I&N Dec. 295, 300 (BIA 2018).
[360] See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).
[361] See notes on this inadmissibility ground, above.
[362] Reyes v. Lynch, 835 F.3d 556 (6th Cir. 2016); Rohit v. Holder, 670 F.3d 1085 (3d Cir. 2012); Ranjit Singh Sehmi, A XXX-XXX-847, 2014 WL 4407689 (BIA 2014).
[363] Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008).
[364] Arguably, § 6105 is not an aggravated felony because it can apply to antique firearms, which do not fall within the federal definition of a firearm. Compare 18 U.S.C § 921(a)(3) with 18 Pa. C.S. § 6118. Commonwealth v. Berta, 514 A.2d 921 (Pa. Super. 1986) shows a realistic probability that PA gun laws will be applied to conduct that does not relate to a firearm as defined under federal law.
[365] This is an AF under 8 U.S.C. § 1101(a)(43)(E)(ii), which cross-references 18 U.S.C. § 922(g)(1) (making it unlawful for anyone with a prior conviction in any court punishable by a year or more to "ship or transport in interstate or foreign commerce, or possess in or affecting any commerce, any firearm or ammunition"). This is equivalent to 18 Pa. C.S. 6015(a)(1) because the enumerated offenses listed in subsection (b) are all punishable by a year. See Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (holding that a state statute that lacks an interstate commerce element but otherwise matches the generic federal offense is an aggravated felony); see also Juan Ramon Belliard Tejada, A XXX-XX4-573, 2012 WL 6968960 (BIA 2012) (unpublished decision where 6105(a)(1) was deemed to be an aggravated felony because the underlying offense was punishable by one year). The statute is probably divisible between people defined under (b) and people defined under (c). See Commonwealth v. Jemison, 189 A.3d 1004, 1261 (Pa. 2014) (holding that the specific underlying offense is an element of the crime).
[366] 18 US.C. § 922(g)(1)-(5) match 18 Pa. C.S. 6105(c)(1)-(5); see 18 Pa. C.S. § 3803 (providing that third DUIs are either M1s or M2s, punishable by more than a year imprisonment). However, 18 Pa. C.S. § 6105 (c)(6)-(9) do not match the 922(g) grounds that are listed in 8 U.S.C. § 1101(a)(43)(E).
[367] See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014); Matter of Granados, 16 I&N Dec. 726 (BIA 1979).
[368] Arguably, § 6105 is not a firearms offense because it can apply to antique firearms, which do not fall within the federal definition of a firearm. Compare 18 U.S.C § 921(a)(3) with 18 Pa. C.S. § 6118. Commonwealth v. Berta, 514 A.2d 921 (Pa. Super. 1986) shows a realistic probability that PA gun laws will be applied to conduct that does not relate to a firearm as defined under federal law. At least one unpublished BIA decision holds that 6105(a)(1) is not a firearms offense. See Jens Peter Engelund, A XXX-XXX-767 (BIA Feb. 27, 2020).
[369] Commonwealth v. Keiper, 887 A.2d 317 (2005) (holding that defendant's prior conviction of burglary was not an element of his charge under 6105); but see Commonwealth v. Jemison, 189 A.3d 1004, 1261 (Pa. 2014) (holding that the specific underlying offense is an element of the crime). There is less case law on (c), but also seems to require proof of the specific subsection. See, e.g., Commonwealth v. Smith, No. 1028 EDA 2017, 2018 WL 4089657 (Pa. Super. Aug. 28, 2018).
[370] Compare 18 U.S.C. § 921(a)(3) with 18 Pa. C.S. § 6118. Commonwealth v. Berta, 514 A.2d 921 (Pa. Super. 1986) shows a realistic probability that PA gun laws will be applied to conduct that does not relate to a firearm as defined under federal law. At least one unpublished BIA decision has held that 6105 is not an AF. See Jens Peter Engelund, AXXX-XXX-767 (BIA Feb. 27, 2020) (possession of a firearm under 18 Pa. Const. Stat. 6105(a)(1) not an aggravated felony because state definition encompasses some antique firearms).
[371] See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014); Matter of Granados, 16 I&N Dec. 726 (BIA 1979).
[372] Arguably, § 6106 is not a firearms offense because it can apply to antique firearms, which do not fall within the federal definition of a firearm. Compare 18 U.S.C § 921(a)(3) with 18 Pa. C.S. § 6118. Commonwealth v. Berta, 514 A.2d 921 (Pa. Super. 1986) shows a realistic probability that PA gun laws will be applied to conduct that does not relate to a firearm as defined under federal law. There are at least two unpublished BIA decisions holding that 6106(a)(1) and 6106(a)(2) are not firearms offenses. See Claudio Jose Santana Colon, A XXX-XXX-566 (BIA June 30, 2020) (for subsection (a)(1)); Enmanuel D. Figueroa Ramos, A XXX-XXX-564 (BIA Oct. 19, 2020) (for subsection (a)(2)).
[373] Compare 18 U.S.C § 921(a)(3) with 18 Pa. C.S. § 6118. Commonwealth v. Berta, 514 A.2d 921 (Pa. Super. 1986) shows a realistic probability that PA gun laws will be applied to conduct that does not relate to a firearm as defined under federal law. See also unpublished BIA decisions on this issue, above.
[374] See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014); Matter of Granados, 16 I&N Dec. 726 (BIA 1979).
[375] Pennsylvania law, like federal law, excludes antique firearms from its firearms statutes. 18 Pa. C.S. § 6118; 18 U.S.C. § 921(a)(3). However, this exclusion does not apply to concealed firearms as defined in 18 Pa. C.S. § 6106. If the violation of § 6108 involves a concealed firearm, it is arguably not a firearms offense either.
[376] Even corruption of morals does not have to be sexual, and the statute is not further divisible. See Commonwealth v. Decker, 698 A.2d 99, 101 (Pa. Super. Ct. 1997) (discussing the breadth of the statute).

[377] Subah v. Att'y Gen., F. App'x 556 (3d. Cir. 2007) (unpublished decision holding this conviction is not a CIMT because the least culpable conduct does not meet the requirements for a CIMT).
[378] See Matter of Mendoza-Osorio, 26 I&N Dec. 703 (BIA 2016); Matter of Velazquez-Herrera, 24 I&N Dec. 503, 512 (BIA 2008).
[379] See, e.g., Commonwealth v. Penrith, 11 Pa. D. & C. 3d 619, 1979 WL 632 (Pa. Wyo. Cty. Ct. 1979) (holding that buying alcohol for a minor is sufficient to convict for CMOM); Sharon Khakai Luvisia, A 099-785-387 (unpublished) (finding that buying alcohol for a minor does not rise to the level of harm required for a CAC under Velasquez Herrera).
[380] See Blaziu Palfi, A 028-118-725, 2004 WL 1167145 (BIA 2004) (unpublished decision). This portion of the statute deals with sexual offenses.
[381] Chapter 31 includes offenses that do not involve the use of force, such as indecent exposure.
[382] Although Matter of Rodriguez-Rodriguez remains good law after Cabeda, there is a lot of helpful language about the fact that sexual abuse of a minor needs to be serious, and this offense arguably would not rise to that level since it does not require actual sexual conduct.
[383] See Matter of C-, 2 I&N Dec. 220, 222 (BIA 1944) (aiding a student in skipping school is not enough for a CIMT).
[384] Matter of P-, 2 I&N Dec. 117 (BIA 1944).
[385] This does not necessarily involve a likelihood of harm to a child under eighteen years old. See Matter of Velasquez Herrera, 24 I&N Dec. 503 (BIA 2008).
[386] This is overbroad compared to 8 U.S.C. § 1101(a)(43)(P) because it does not necessarily involve immigration documents. See Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (holding that a crime triggers an aggravated felony ground with "described in" language if it is a categorical match to the non-jurisdictional elements of the federal offense).
[387] See Matter of Flores, 17 I&N Dec. 225, 227 (BIA 1980) (holding that conspiracy to utter and sell false immigration registry papers is a CIMT because it is inherently fraudulent). However, this offense can be committed recklessly so arguably does not require intent to defraud.
[388] The least culpable conduct is mere possession of a fake ID. Matter of Serna, 20 I&N Dec. 579 (BIA 1992) (holding that possession of a false document without intent to use it or otherwise defraud is not a CIMT).
[389] See, e.g., Commonwealth v. Yellin, No. 2033 MDA 2013, 2014 WL 10897008, at *2 (Pa. Super. 2014) (noting that the offense "require[s] mere possession").
[390] See Restrepo v. Att'y Gen, 617 F.3d 787 (3d Cir. 2010); Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999).
[391] Although the conduct criminalized is similar to the conduct in 18 U.S.C. § 2251, Pennsylvania describes prohibited sexual acts more broadly than federal law by including all nudity. 18 Pa. C.S. § 6312(g); Commonwealth v. Savich, 716 A.2d 1251, 1257 (Pa. Super. Ct. 1998); see Salmoran v. Att'y Gen., 909 F.3d 73 (3d Cir. 2018).
[392] Moreno v. Att'y Gen., 887 F.3d 160 (3d Cir. 2018).
[393] Salmoran v. Att'y Gen., 909 F.3d 73 (3d Cir. 2018).
[394] See Restrepo v. Att'y Gen, 617 F.3d 787, 796 (3d Cir. 2010) (adopting the BIA's definition that includes "employment, use, persuasion, inducement, enticement, or coercion"). "Knowingly permits" is none of those things.
[395] The definition of a prohibited sexual act is broader than the definition of sexually explicit conduct for the purposes of 18 U.S.C. § 2252. Although the conduct criminalized is similar to the conduct in 18 U.S.C. § 2251, Pennsylvania describes prohibited sexual acts more broadly than federal law by including all nudity. 18 Pa. C.S. § 6312(g); Commonwealth v. Savich, 716 A.2d 1251, 1257 (Pa. Super. Ct. 1998); see Salmoran v. Att'y Gen., 909 F.3d 73 (3d Cir. 2018).
[396] Moreno v. Att'y Gen., 887 F.3d 160 (3d Cir. 2018).
[397] Salmoran v. Att'y Gen., 909 F.3d 73 (3d Cir. 2018).
[398] The definition of a prohibited sexual act is broader than the definition of sexually explicit conduct for the purposes of 18 U.S.C. § 2252. Although the conduct criminalized is similar to the conduct in 18 U.S.C. § 2251, Pennsylvania describes prohibited sexual acts more broadly than federal law by including all nudity. 18 Pa. C.S. § 6312(g); Commonwealth v. Savich, 716 A.2d 1251, 1257 (Pa. Super. Ct. 1998); see Salmoran v. Att'y Gen., 909 F.3d 73 (3d Cir. 2018).
[399] Moreno v. Att'y Gen., 887 F.3d 160 (3d Cir. 2018).
[400] Salmoran v. Att'y Gen., 909 F.3d 73 (3d Cir. 2018).
[401] Under Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (1999) the definition of sexual abuse of a minor is broad, but one could argue that contact for the purpose of a sexual offense does not rise to the level of "employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." 18 U.S.C. § 3509(a)(8); see Commonwealth v. Morgan, 913 A.2d 906 (Pa. Super. Ct. 2006).
[402] See Matter of Jimenez-Cedillo, 27 I&N Dec. 1, 7 (BIA 2017).
[403] In its 2021 non-precedential decision McKoy v. Att'y Gen., No. 20-3626, 2021 WL 4956073 (3d Cir. Oct. 26, 2021), the Third Circuit held that subsection (a)(1) prohibits "conduct involving either a minor or a 'law enforcement officer acting in the performance of his duties who has assumed the identity of a minor.'" As such, the Court found the statute divisible and subject to the modified categorical approach to determine whether the convicted conduct involved a minor; where (as there) it does, the conviction qualifies as

a "crime of child abuse." Mondragon-Gonzalez v. Att'y Gen., 884 F.3d 155 (3d Cir. 2018), however, holds that subsection (a)(5) categorically qualifies as a "crime of child abuse," regardless of the conduct of which the defendant was actually convicted.

[404] Although Matter of Rodriguez-Rodriguez remains good law after Cabeda, there is a lot of helpful language about the fact that sexual abuse of a minor needs to be serious, and this offense arguably would not rise to that level since it does not involve actual sexual conduct.

[405] Clinton Sharp, A 90-677-084, 2002 WL 32149034 (BIA Oct. 7, 2002) is an unpublished decision where the court held that violation of 23 Pa. C.S. 6114 is a CIMT, citing Commonwealth v. Baker, 722 A.2d 718, 721 (Pa. Super. Ct. 1998), aff'd, 564 Pa. 192, 766 A.2d 328 (2001) (wrongful intent is an element of civil contempt). Note that the maximum penalty is six months in prison, so the petty offense exception would apply to a first offense in both the inadmissibility and deportability contexts. 23 Pa. C.S. § 6114(b)(1).

[406] Michel v. Att'y Gen., 2022 WL 1421163 (3d Cir. May 5, 2022) (finding that plea to § 6114(a) constitutes a deportable offense where (1) a valid PFA existed against the non-citizen; (2) at least one portion of the order involved protection against a credible threat of violence, repeated harassment, or bodily injury; and (3) a court determined, using all "probative and reliable evidence" that the non-citizen engaged in conduct that violated that portion); Sunuwar v. Att'y Gen., 989 F.3d 239 (3d Cir. 2021) (finding respondent properly rendered deportable under 8 U.S.C. § 1227(a)(2)(E)(ii) for contempt conviction under this statute, as conduct constituted violation of protective order). See also Matter of Obshatko, 27 I&N Dec. 173 (BIA 2017) (holding that the categorical approach does not apply to the violation of protection order ground of deportability in 8 U.S.C. § 1227(a)(2)(E)(ii)); Matter of Strydom, 25 I&N Dec. 507 (BIA 2011) (holding that "violation of a "no-contact" provision of an injunction designed to protect a person against abuse is sufficient to find deportability without an additional showing that the respondent made credible threats of violence, repeated harassment or bodily injury").

[407] Pennsylvania protection from abuse orders can include conditions that do not involve protection against threats of violence, harassment, or bodily injury—for example, provisions relating to custody and payment of child support. 23 Pa. C.S. § 6108. Defendants can be arrested and convicted for violations of these conditions. See, e.g., Thompson v. Thompson, 223 A.3d 1272 (Pa. 2020); Kauffman v. Kauffman, No. 11-CV-4896, 2014 WL 1281134 (E.D. Pa. Mar. 28, 2014). If this is the case for your client, you could argue that a court did not determine that they violated the portion of the order involving threats of violence, repeated harassment, or bodily injury. See 8 U.S.C. § 1227(a)(2)(E)(ii).

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

[409] Matter of Abreu-Semino, 12 I&N Dec. 775 (BIA 1968).

[410] See Mellouli v. Lynch, 135 S. Ct. 1980 (2015); Rojas v. Att'y Gen., 728 F.3d 203 (3d Cir. 2013); Gonzalez-Espinoza v. Att'y Gen., 742 Fed. App'x 666 (3d Cir. 2018) (unpublished) (holding that the statute is divisible).

[411] This *only* applies to avoiding deportability for LPRs under 8 U.S.C. § 1227(a)(2)(B)(i). A conviction for possession of marijuana will still make an undocumented person inadmissible and ineligible for some relief. See 8 U.S.C. § 1182(a)(2)(A)(i)(II). Singh v. Att'y Gen., 839 F.3d 273 (3d Cir. 2016). Also note that this exception applies to one offense *only*. See Sybbliss v. Att'y Gen., 2021 WL 3415050 (3d Cir. Aug. 5, 2021) (unpublished) (holding that non-citizen's three convictions for possession of 50 grams or less of marijuana, in violation of N.J. Stat. Ann. § 2C:35-10(a)(4), did not fall under the personal use exception to CSO offenses; even though all three offenses collectively involved possession of less than 30 grams of marijuana, the personal use exception excuses only one such conviction).

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

[413] See Sauceda v. Lynch, 819 F.3d 526 (1st Cir. 2016)

[414] Singh v. Att'y Gen., 839 F.3d 273 (3d Cir. 2016); Avila v. Att'y Gen., 826 F.3d 662, 666 (3d Cir. 2016); Matter of German Santos, 28 I&N Dec. 552 (BIA 2022). Note that a court can look to documents of conviction to determine the substance possessed. See, e.g., Harmon v. Att'y Gen., 844 Fed. App'x 557 (3d Cir. 2021).

[415] Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

[416] Matter of German Santos, 28 I&N Dec. 552 (BIA 2022); Mellouli v. Lynch, 135 S. Ct. 1980 (2015); United States v. Dawson, 32 F.4th 254 (3d Cir. 2022).

[417] Matter of German Santos, 28 I&N Dec. 552 (BIA 2022) held that this statute is divisible as to the identity of the controlled substance possessed, as any fact that establishes or increases the permissible range of punishment for a criminal offense is an "element" under the categorical approach. But see Commonwealth v. Beatty, 227 A.3d 1277, 2020 WL 544096, at 1285 ("In other words, the specific identity of the controlled substance is not an element of the offense"); Commonwealth v. Ramsey, 214 A.3d 274, 278-79 (Pa. Super. 2019). Still, for some controlled substances, such as cocaine, PA does criminalize possession and distribution of isomers not criminalized under federal law. As such, where respondents have been convicted of possession or distribution of one of those substances, one could argue that that the statute is overbroad with respect to that crime. In the Third Circuit, the realistic probability doctrine should not be a barrier to this argument. See Singh v. Att'y Gen., 839 F.3d 273, 286, n.10 (3d Cir. 2016).

[418] For argument against AF, see Davis v. Att'y Gen., 2021 WL 4145114 (3d Cir. Sep. 13, 2021) (unpublished) (holding that the modified categorical approach applies to this offense and that a court may examine only "the statutory definition [of the offense], charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented;" because none of those documents contained any information about the amount of marijuana possessed by the defendant, his conviction was analogous only to a federal misdemeanor and not an AF or presumptive particularly serious crime). See also Walker v. Att'y Gen., 625 F. App'x 87 (3d Cir. 2015) (unpublished); Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Evanson v. Att'y Gen., 550 F.3d 284 (3d Cir. 2008); Garcia v. Att'y Gen., 462 F.3d 287 (3d Cir. 2006); Jeune v. Att'y Gen., 476 F.3d 199 (3d Cir. 2007); Matter of Rosa, 27 I&N Dec. 228, 232 n.7 (BIA 2018).

[419] Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997) held that crimes involving the distribution of controlled substances are generally CIMTs. The Third Circuit recently questioned that assumption for distribution of marijuana offenses, however; in Singh v. Att'y Gen., 2023 WL 5291786, No. 22-1045 (3d Cir. Aug. 17, 2023) (unpublished), the Court held that in light of "[t]he shifting moral standards surrounding marijuana—coupled with the legal ambiguity of its synthetic counterparts at the time of Singh's arrest[,]" his conviction for possession with intent to distribute synthetic marijuana was not a CIMT. Because there is no precedential case law on point, however, it is probably best to avoid this offense until binding precedent is issued.

[420] Mellouli v. Lynch, 135 S. Ct. 1980 (2015); United States v. Dawson, 32 F.4th 254 (3d Cir. 2022).

[421] Walker v. Att'y Gen., 625 F. App'x 87 (3d Cir. 2015) (unpublished).

[422] Singh v. Att'y Gen., 2023 WL 5291786, No. 22-1045 (3d Cir. Aug. 17, 2023) (unpublished).

[423] On December 20, 2018, Congress amended the federal definition of marijuana to exclude hemp. 21 U.S.C. § 802(16)(B). The Pennsylvania definition still mirrors the prior definition. 35 P.S. § 780-102(b). Therefore, could argue that the PA conviction is overbroad. In the Third Circuit, the realistic probability doctrine should not be a barrier to this argument. See Singh v. Att'y Gen., 839 F.3d 273, 286, n.10 (3d Cir. 2016). However, note that PA does permit cultivation of industrial hemp.

[424] Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Evanson v. Att'y Gen. of U.S., 550 F.3d 284 (3d Cir. 2008).

[425] Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

[426] 8 U.S.C. § 1227(a)(2)(B)(i). Note that the controlled substance inadmissibility ground does not include this exception.

[427] On December 20, 2018, Congress amended the federal definition of marijuana to exclude hemp. 21 U.S.C. § 802(16)(B). The Pennsylvania definition still mirrors the prior definition. 35 P.S. § 780-102(b). Therefore, could argue that the PA conviction is overbroad. In the Third Circuit, the realistic probability doctrine should not be a barrier to this argument. See Singh v. Att'y Gen., 839 F.3d 273, 286, n.10 (3d Cir. 2016). However, note that PA does permit cultivation of industrial hemp.

[428] Possession of paraphernalia is not a federal felony under 21 U.S.C. § 863.

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

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

[431] This is a federal felony. 21 U.S.C. § 863.

[432] Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

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

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

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

[436] If substance is not on federal schedule, then the conviction does not constitute a controlled substance offense. Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

[437] This is a regulatory offense. See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014).

[438] Francis v. Reno, 269 F.3d 162, 166 (3d Cir. 2001) (holding that homicide by vehicle is not a crime of violence).

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

[440] If "gross negligence" were exactly the same as recklessness, it would be superfluous in this statute.

[441] Francis v. Reno, 269 F.3d 162, 166 (3d Cir. 2001).

[442] Causing death with criminal negligence is not a CIMT, but recklessly causing death can be. Matter of Tavdidishvili, 27 I&N Dec. 142 (BIA 2017); Matter of Hernandez, 26 I&N Dec. 464 (BIA 2015); Matter of Franklin, 20 I&N Dec. 867 (BIA 1994). It's not entirely clear where PA "gross negligence" falls on that spectrum in the context of this provision. Compare Commonwealth v. Huggins, 836 A.2d 862 (Pa. 2003) (holding that gross negligence is similar to recklessness for the purposes of the involuntary manslaughter statute) with Commonwealth v. Heck, 535 A.2d 575, 579-80 (Pa. 1987) (applying the definition of ordinary criminal negligence to the vehicular homicide statute). This applies with equal force to this statute involving causing serious bodily injury rather than death.

[443] Rosario-Ovando v. Att'y Gen., 2022 WL 2205257, No. 21-1810 (3d Cir. June 21, 2022) (unpublished), held that the minimum conduct required for a felony conviction under this statute was not a CIMT. The court left unresolved, however, whether some of the aggravating factors listed in subsection (a.2)(2) might involve turpitude under the modified categorical approach; Rosario-Ovando's conviction did not specify which aggravating factor applied to his case. In addition, Matter of Ruiz-Lopez, 25 I&N Dec. 551 (BIA 2011) held that a somewhat similar statute was a CIMT, but emphasized that that statute required reckless driving. This PA statute does not require flight or a chase. See also Commonwealth v. Wise, 171 A.3d 784 (Pa. Super. 2017). See also Commonwealth v. Scattone, 672 A.2d 345 (Pa. Super. Ct. 1996) (characterizing this offense as a regulatory/malum prohibitum offense).

[444] Rosario-Ovando v. Att'y Gen., No. 21-1810, 2022 WL 2205257 (3d Cir. June 21, 2022) (unpublished).

[445] Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

[446] This does not require any *mens rea* and therefore is not a CIMT. See Matter of Tavdidishvili, 27 I&N Dec. 142 (BIA 2017).

[447] Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

[448] Matter of Tavdidishvili, 27 I&N Dec. 142 (BIA 2017). The negligence required for conviction under this statute is criminal negligence, comparable to the *mens rea* at issue in Tavdidishvili. Commonwealth v. Ketterer, 725 A.2d 801, 806 (Pa. Super. Ct. 1999).

[449] Vashchenka v. Att'y Gen., No. 21-3261, 2022 WL 2315446 (3d Cir. June 28, 2022) (unpublished) (noting the BIA's PSC finding but failing to rule on it).

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

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

[452] Matter of Torres-Varela, 23 I&N Dec. 78 (BIA 2001); Matter of Lopez-Meza, 22 I&N Dec. 1188, 1194 (BIA 1999).

[453] Pesikan v. Att'y Gen., --- F.4th--- (3d Cir. 2023). Pesikan made an explicit finding only as to subsection (d)(1)(i), but also noted that all of a defendant's DUI convictions under (d)(1) should be merged at sentencing, as § 3802(d)(1) proscribes a "single harm to the Commonwealth—DUI-Controlled Substance." This suggests that subsection (d)(1) as a whole is indivisible. Subsections (d)(2) and (d)(3) refer broadly to "drugs"—presumably those outlined the Schedules referenced at (d)(1). If, at a minimum, Schedule 1 is overbroad as compared to the federal drug schedule, and subsections (d)(2) and (d)(3) can involve any drug (including those listed in Schedule 1), then subsections (d)(2) and (d)(3) are overbroad as well.

[454] See Matter of Vucetic, 28 I&N Dec. 276 (BIA 2021) (finding that the offense of aggravated unlicensed operation of a motor vehicle in the first degree in violation of section 511(3)(a)(i) of the New York Vehicle and Traffic Law, which criminalizes driving under the influence of alcohol or drugs while knowing or having reason to know that one's license is suspended, is categorically a CIMT; recklessness is a sufficient culpable mental state for moral turpitude purposes where it entails a conscious disregard of a substantial and unjustifiable risk posed by one's conduct).

[455] See Matter of Torres-Varela, 23 I&N Dec. 78, 91 (BIA 2001).

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

[457] This should not be a crime of violence aggravated felony, as there is no element requiring the use of force: the statute punishes repairs, sales, uses, or possession. There is no requirement to intend to use the offensive weapon. Commonwealth v. Karlson, 674 A.2d 249, 251 (Pa. Super. 1996) (citing Commonwealth v. Gatto, 344 A.2d 566 (Pa. Super. 1975)).

[458] Matter of S-, 6 I&N Dec. 769 (1955) and Matter of Serna, 20 I&N Dec. 579 (BIA 1992) hold that possession of an instrument of a crime is only a CIMT if there is intent to use it for a CIMT. "Intent to use criminally" can include intent to commit any crime, not only CIMTs. See Commonwealth v. Vida, 715 A.2d 1180 (Pa. Super. 1998) (upholding conviction for possession of paint stick used to commit criminal mischief, i.e., create graffiti). Like § 907(a), intent to use criminally is broader than intent to commit a CIMT. However, § 907(a) is better because it more clearly covers non-violent conduct.

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

[460] See Commonwealth v. Smith, 384 A.2d 1343, 1345 (Pa. Super. 1978) (holding that the two provisions are not mutually exclusive). Section 907(a) is less likely to be a CIMT and a firearms offense.

[461] Matter of Serna, 20 I&N Dec. 579 (BIA 1992); see Commonwealth v. Gatto, 344 A.2d 566 (Pa. Super. 1975) (noting that this offense does not require an intent to use the weapon criminally).

[462] The definition of a weapon in the statute includes non-firearms and is a non-exhaustive/illustrative list—therefore, it should not be divisible under Mathis.

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

[464] The definition of a weapon in the statute includes non-firearms and is a non-exhaustive/illustrative list—therefore, it should not be divisible under Mathis.

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

[466] This is a regulatory offense that is not a CIMT. Matter of Gaglioti, 10 I&N Dec. 719 (BIA 1964).

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

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

[469] Hillocks v. Att'y Gen., 934 F.3d 332, 344 (3d Cir. 2019).

[470] Hillocks v. Att'y Gen., 934 F.3d 332 (3d Cir. 2019) holds that the statute is not divisible with regard to the underlying felony. Since there are possible predicate felonies that are not CIMTs, this is not a CIMT.

[471] Hillocks v. Att'y Gen., 934 F.3d 332, 345 (3d Cir. 2019).

[472] Regulatory offenses are not CIMTs. Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014).