



THE IMPACT OF CRIMES ON ELIGIBILITY FOR TEMPORARY PROTECTED STATUS

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I. Introduction

Temporary Protected Status (TPS) extends important protections to nationals of certain countries experiencing war, natural disasters, and civil strife.¹ However, the “bars” to TPS eligibility can complicate securing this important form of humanitarian relief. Crime bars are particularly restrictive in the TPS context compared to other immigration programs. This practice advisory will provide an overview of the ways crimes can impact TPS eligibility and a framework for analyzing whether an applicant is subject to these bars and potential options to overcome them.

NOTE: This advisory is intended to be a summary of crime-related barriers to TPS eligibility. Remember that there are many other bars and requirements to obtain TPS. For a full exploration of TPS eligibility, see ILRC’s manual, *Temporary Protected Status: Practice and Strategies (2022)*.

II. TPS and Crimes: Getting Started

Crimes can render a TPS applicant ineligible in three ways. First, a conviction for one felony or two misdemeanors, regardless of the type of offense, is an absolute bar to eligibility for TPS. Next, certain criminal offenses trigger the crimes-related inadmissibility grounds which are bars to TPS, with a waiver available in only a narrow subset of cases. Finally, the crimes-related asylum bars also preclude eligibility for TPS. Each of these three categories will be explored in detail below. Other than a few of the inadmissibility grounds,² no crimes-related bars to TPS can be waived. Most applicants who come within a bar must get post-conviction relief to eliminate the conviction in order to qualify for TPS. Not all criminal offenses are bars, however, so careful analysis is always necessary.

¹ The current information on countries designated for TPS and their dates for filing is found on the USCIS TPS web page, <https://www.uscis.gov/humanitarian/temporary-protected-status>.

² See discussion below of INA § 244A(c)(2)(A). Possession of a small amount of marijuana and the prostitution inadmissibility ground can be waived. Other more serious grounds, including money laundering and human trafficking, also are eligible for waivers although this may be because the grounds were added after the list of unwaivable grounds for TPS was compiled, and so are not included.

Getting the facts. To properly analyze a case, it is critical to review all of the client’s criminal records.³ The three most important records to obtain are:

1. FBI report. The FBI report will show most, if not all, arrests from state, local, and federal agencies nationwide.⁴
2. State criminal record or ‘rap sheet’. State rap sheets are needed because FBI reports are often incomplete or do not contain enough detail. Note that each state has a different procedure to obtain criminal records.
3. Court records. Obtaining a complete copy of the entire record from the court where the client was convicted is important. You cannot rely on just a rap sheet to assess the potential immigration consequences of a particular conviction.

Doing the analysis. Generally, the application for TPS, Form I-821, covers all areas of possible ineligibility in Part 7. As the advocate, you will have to determine whether any answer in this section: 1) triggers a bar to TPS, either criminal or otherwise 2) raises an inadmissibility issue and 3) whether there is an exception to or waiver available for that inadmissibility ground.

To analyze a TPS applicant’s case, consider these guiding questions:

1. Is the person barred from eligibility for TPS due to conviction of one felony or two misdemeanors in the United States?
2. Is the person barred from eligibility for TPS because they come within the bars to asylum, for example due to a conviction of a “particularly serious crime” or having committed a “serious nonpolitical crime” outside the United States?
3. Is the person inadmissible under INA § 212(a)(2) because of a conviction or criminal conduct, regardless of where this occurred?
4. If the person is in removal proceedings, what ground of inadmissibility or deportability is the client charged with? What potential relief besides TPS is available?
5. Can the person eliminate the disqualifying conviction by going back into criminal court to obtain some form of post-conviction relief? If so, will immigration authorities give effect to this post-conviction relief?

Some of the above questions can become complex and caselaw changes frequently. Federal court and BIA decisions can change the immigration consequences of an offense, and some of these changes apply retroactively to past convictions. In addition, each state has its own criminal laws and ways of clearing up criminal records that interact differently with federal immigration law. Unless you are an expert, often the best way to help a client is a) advise the client to avoid contact with immigration officials; b) refer the case to an expert; and c) start the process of locating their criminal court records, which the expert will need to see.⁵

³ See ILRC’s manual, *FOIA Requests and Other Background Checks: A Practical Guide for Filing Records Requests in Immigration Cases* (2020).

⁴ For more information and instructions about an FBI background check, visit: <https://www.fbi.gov/services/cjis/identity-history-summary-checks>.

⁵ Additionally, the ILRC provides free practice advisories and updates on criminal issues in immigration law. See <http://www.ilrc.org/crimes> and <http://www.ilrc.org/chart>.

PRACTICE NOTE: Criminal Convictions as a Basis for Withdrawal of TPS Status

The focus of this advisory is how crimes can bar someone from being granted TPS. But crimes can also result in the loss of TPS protections. When a TPS holder files for re-registration, they attest that they continue to be eligible for TPS. 8 CFR 244.17(a). USCIS can withdraw a grant of TPS if the person was not in fact eligible at the time their case was approved or if they later become ineligible. 8 CFR 244.14(a)(1). If an applicant believes that their TPS was wrongly withdrawn or they were wrongly denied TPS or re-registration, they can file an appeal and renew the application in removal proceedings.⁶

III. Category I: The “Any Felony or Two Misdemeanors” Bar to TPS

A person is not eligible for TPS if they have been “convicted of any felony or two or more misdemeanors committed in the United States...” INA § 244A(c)(2)(B)(i). Even if a felony or misdemeanor conviction does not trigger a ground of inadmissibility, or does not bar asylum, such a conviction could still disqualify someone from TPS. To come within the felony/misdemeanor bar to TPS, the person must have been (a) convicted, (b) of any felony OR two misdemeanors, committed within the United States.

The term “conviction” has a specific meaning in immigration. Sometimes we might have arguments that the outcome of the criminal court is not a “conviction” as defined in INA § 101(a)(43)(A). In some cases, a criminal court might resolve the case without a finding of guilt, which can mean there is no conviction for immigration purposes. Importantly, a juvenile court delinquency disposition is not a conviction for immigration purposes. The BIA has also held that a conviction that is on direct appeal of right on the merits is not yet a conviction.

The TPS regulation provides a specific definition of felony and misdemeanor, based on the potential sentence of the offense. All such offenses must have been *committed in the United States* in order to be a bar. See 8 CFR 244.1. Note that these definitions are similar to those used for DACA and other federal programs.

Felony. A felony is a crime committed in the United States, punishable by imprisonment for more than one year, regardless of time served.

This definition provides a beneficial exception for people who were convicted of a misdemeanor that has a potential sentence of more than one year, and thus could be classed as a TPS felony. Such an offense remains a misdemeanor for TPS as long as the offense is classified as a misdemeanor and the sentence *actually imposed* is one year or less regardless of time served.

Misdemeanor. A misdemeanor is “a crime committed in the United States, either: (1) Punishable by imprisonment for a term of one year or less, regardless of the term ... actually served, if any, or (2) A crime treated as a misdemeanor under the term “felony” of this section.” (The second category refers to the felony exception described above.)

⁶ For additional guidance in these situations, see ILRC, *Temporary Protected Status: Practice and Strategies* (January, 2022)

Neither felony nor misdemeanor. The regulation states “any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.” This would include “infractions” or “offenses” (or even some misdemeanors) that have no possible jail time or five days or less of possible jail time.

The TPS one felony/two misdemeanor bar has no time limit. If a person was convicted of a felony or two or more misdemeanors in the United States at any time, they are barred from TPS.

Example: Mirlande entered the United States in 1995 and was convicted of two misdemeanors in 2000. She is not eligible for TPS even though the convictions occurred more than twenty years ago.

The conviction will cease to be a bar if it is eliminated by a form of post-conviction relief that has effect in immigration proceedings.

Example: In Mirlande’s case, a judge vacated one of her misdemeanors after finding that her guilty plea was legally invalid because she was not adequately advised of the immigration consequences of the conviction. This form of post-conviction relief—a court vacatur based on legal error in the original proceeding—*does* eliminate a conviction for immigration purposes. Now Mirlande has only one misdemeanor conviction and she is eligible for TPS.

IV. Category II: Crimes-Based Grounds of Inadmissibility Bar

The crimes-based grounds of inadmissibility can pose a major obstacle to obtaining TPS. If the person has a criminal conviction that triggers a TPS bar based on inadmissibility grounds, look to see if an exception to inadmissibility applies, and if not, whether a TPS waiver is available. Finally, consider whether it is possible to eliminate the conviction by returning to criminal court to get post-conviction relief.

Many of the most common crimes-based grounds of inadmissibility *cannot* be waived for purposes of TPS, although some grounds are in fact waivable, as set out below.⁷

No waiver available for TPS for these offenses:

- Conviction or “admission” of a crime involving moral turpitude. INA § 212(a)(2)(A)(i)(I). Note, there are two key exceptions to this ground, which are discussed below. INA § 212(a)(2)(A)(ii).
- Conviction or “admission” of a controlled substance (drug) offense (except a waiver is available for a single offense involving simple possession of 30 grams or less of marijuana). INA § 212(a)(2)(A)(i)(II).
- A DHS or consular official knows or has reason to believe the person aided or engaged in controlled substance trafficking; which is also applicable to certain family members who benefitted from their family member’s trafficking. INA § 212(a)(2)(C).
- Conviction for multiple criminal convictions where the total aggregate sentence is five years or more. INA § 212(a)(2)(B).

⁷ INA § 244(c)(2)(A)(ii), (iii).

A discretionary waiver is available for TPS for the following offenses:

- Conviction or “admission” of one or more offenses arising from a single incident involving simple possession for personal use of 30 grams or less of marijuana. INA § 212(a)(2)(A)(i)(II).
- Prostitution and commercialized vice. INA § 212(a)(2)(D).
- Serious criminal activity where the person has asserted immunity from prosecution. INA § 212(a)(2)(E).
- Foreign government officials who have committed particularly severe violations of religious freedom. INA § 212(a)(2)(G).
- A DHS or consular official knows or has reason to believe the person aided or engaged in human trafficking, which is also applicable to certain family members who benefitted from the family member’s trafficking. INA § 212(a)(2)(H).
- A DHS or consular official knows or has reason to believe the person engaged in or is entering the United States to engage in money laundering. INA § 212(a)(2)(I).

In these situations, USCIS may grant a discretionary waiver for humanitarian purposes, to assure family unity, or because it is otherwise in the public interest. INA § 244(c)(2)(A)(ii).

Note that some offenses that can be waived as a ground of inadmissibility might *also* trigger a bar to TPS that *cannot* be waived. For example, if the offense is a felony or a “particularly serious crime” (see asylum bars section below). If your client presents a problematic conviction or fact situation, it is important to consider all potential bars.

PRACTICE TIP: A waiver granted for TPS is valid only for purposes of your application for TPS. If a TPS holder later seeks an immigrant visa or adjustment of status, they will need to apply for a new waiver at that time. Some inadmissibility grounds will be waivable at time of adjustment, but under a different standard. Some might not be waivable at all. And other grounds might benefit from a waiver that does not exist for TPS.

Example: John was convicted of a fraud offense, which is a crime involving moral turpitude, and received an 8-month sentence from the criminal court judge. He is barred from TPS eligibility, because there is no waiver for crimes involving moral turpitude in the TPS process. If John can immigrate through a visa petition filed by a relative or employer, he could apply for the traditional crimes waiver under INA § 212(h). (Note that John’s conviction does not qualify for the petty offense exception, which would exempt him from the CIMT ground of inadmissibility. See INA § 212(a)(2)(A)(ii).)

A. Crimes Involving Moral Turpitude

Crimes involving moral turpitude (CIMT) can trigger a ground of inadmissibility that is not waivable in the TPS context. A person can be inadmissible for committing a CIMT if they have been convicted, or if they have made a “qualifying admission” that they committed the crime.⁸

There is no set definition of a CIMT, but the courts have held that moral turpitude “refers generally to conduct that shocks the public conscience as being inherently base, vile, or

⁸ See INA §§ 212(a)(2)(A)(i), 237(a)(2)(A)(i), (ii).

depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."⁹ More recently it has been described as a "reprehensible act" with some form of scienter (intent), "whether specific intent, willfulness, or recklessness."¹⁰ The categorical approach applies to the moral turpitude analysis.¹¹

Do not rely on the labels of the offense to guess whether it involves moral turpitude or not. Instead, look to case law interpreting the statute to determine what is a CIMT in your jurisdiction.

1. The moral turpitude inadmissibility ground and exceptions

A person who has admitted to or been convicted of just one crime involving moral turpitude (CIMT) is inadmissible, *unless* the offense falls within one of the exceptions discussed below. INA § 212(a)(2)(A)(i)(I).

Petty offense exception to the inadmissibility ground

The "petty offense exception" is found at INA § 212(a)(2)(A)(ii)(II). A person qualifies for this exception, and therefore is *automatically not inadmissible*, if three facts are true:

1. This is the first time the person has *committed* a CIMT;
2. The maximum *possible* sentence for the offense is one year or less; **and**
3. The sentence *imposed* in the person's case was six months or less.

If you are unsure what the sentence imposed was in a person's case, get the records and ask an expert. Immigration law has its own definition of sentence. To determine whether a sentence of at least six months was imposed, you will need to evaluate the records from the criminal court proceedings. For immigration purposes, any time that a judge orders the person to spend time in jail or prison as a result of a conviction, it will count as a "sentence imposed." INA § 101(a)(48)(B). This is true even if the judge technically "suspends imposition of sentence" (does not impose a sentence) and instead just orders the person to go to jail as a condition of probation. If a judge imposes a sentence and "suspends execution" (does not make the person serve some or all of the time), the entire sentence the judge imposed still counts as the "sentence imposed," regardless of the actual number of days the person spends in jail or prison.

This is a very important exception to CIMT inadmissibility, particularly in the TPS context where a CIMT is not waivable. Note, however, that a crime that meets the petty offense exception will still count as one misdemeanor, and coupled with another misdemeanor will bar a person from TPS under the two misdemeanor bar.

Youthful offender exception to the inadmissibility ground

A young person who was convicted as an adult may qualify for the youthful offender exception. The person will not be inadmissible if they committed only one offense involving moral turpitude, while under the age of 18, and the commission and release from any resulting

⁹ *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988).

¹⁰ *Matter of Silva-Trevino*, 26 I&N Dec. 550, 833 (A.G. 2015) ("*Silva-Trevino II*").

¹¹ *Id.*

imprisonment occurred over five years before the current application. INA § 212(a)(2)(A)(ii)(I). (Note that a case handled in juvenile delinquency proceedings does not need this exception, since those proceedings do not result in convictions.)

WARNING: If your client’s conviction of a CIMT does not fit within one of these statutory exceptions, they will be barred from TPS eligibility. There is no waiver for CIMTs in the TPS application process. The only recourse would be to return to criminal court and get qualifying “post-conviction relief” to erase the conviction.

2. Admission to a crime involving moral turpitude

A person who makes a qualifying admission that they committed a crime involving moral turpitude (CIMT) is inadmissible, even if there is no conviction. INA § 212(a)(2)(A)(i). The petty offense exception would still apply.

This must be a formal admission of a crime, made to an immigration officer.¹² Most TPS cases do not get called for an interview, so this is likely only to come up in cases where the person was already questioned about their criminal conduct. Note that if the behavior that was admitted was the subject of a criminal court proceeding that did not result in a conviction, the person should not be found inadmissible based on an admission.¹³

For a summary of the many ways that moral turpitude admissions and convictions are used in immigration law, see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2021).¹⁴

B. Controlled Substance Offenses

Drug convictions and, in many cases, just conduct involving drugs can have dire consequences. A conviction or qualifying admission of an offense “relating to” controlled substances (illegal drugs) as they are defined under federal law is a ground of inadmissibility.¹⁵ This includes a conviction under “any state, federal or foreign law or regulation relating to controlled substances.” Even minor offenses such as being under the influence of drugs or possessing a small amount of drugs can trigger this ground. Generally, a noncitizen who is convicted of, or makes a “qualifying admission” that they committed, a drug offense (with a small exception for marijuana) will not qualify for TPS.

1. Grounds of inadmissibility relating to controlled substances

There are four grounds of inadmissibility relating to drug offenses, all of which are bars to TPS eligibility. Only one of them requires a conviction.

¹² See *Matter of K*, 7 I&N Dec. 594 (BIA 1957).

¹³ See, e.g., *Matter of C.Y.C.*, 3 I&N Dec. 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953) (where expungement eliminates offense for immigration purposes, an independent admission to an immigration judge is not an “admission” sufficient to establish inadmissibility).

¹⁴ Available at <https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude>.

¹⁵ INA §§ 212(a)(2)(A)(i)(II).

a. Inadmissible for a conviction of an offense relating to a controlled substance

A conviction for any offense relating to a controlled substance (as that is defined under federal law) is a ground of inadmissibility. These inadmissibility grounds apply only to substances that appear on federal drug schedules (lists of drugs).

b. Inadmissible for admitting to an offense relating to a controlled substance

A person can be inadmissible if they make a qualifying *admission* to immigration authorities that they committed a drug offense—even if they were never charged or convicted in criminal court. INA § 212(a)(2)(A)(i)(II). DHS does ask people to admit to drug offenses, so it is important to understand this ground and warn your clients. The same rules apply as for admissions to CIMTs.

Warning about Legalized Marijuana: Medical or recreational marijuana is legal in a majority of states. But even if marijuana is legal under state law, it is still a federally defined controlled substance. Noncitizens who admit that they have possessed or used marijuana, even if they do so legally under state law in their own homes, can be found inadmissible. Community members need to be advised that if they admit having used marijuana, they can be found inadmissible for committing a drug crime. For more information, including a Practice Advisory about drug convictions and admissions and educational flyers for community members, see ILRC information about marijuana.¹⁶

To come within this ground of inadmissibility, the person must make a formal admission to an immigration officer of conduct that is a crime in the jurisdiction where it occurred.¹⁷ Warn clients that any admission of a crime might be used against them.

There is an important exception to this ground. If a charge was brought to criminal court and the final result was something less than a conviction (for example, charges were dropped, or the conviction was vacated, or a disposition that was not equal to a conviction occurred), the person cannot be charged with being inadmissible for “admitting” the offense.¹⁸ Also, admission of conduct that occurred when the person was under 18 is not admission of a “crime.”¹⁹

¹⁶ ILRC community alerts, a practice advisory, and other educational materials may be found at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana> and <https://www.ilrc.org/noncitizens-cannabis-warnings>.

¹⁷ See *Matter of K*, 7 I&N Dec. 594 (BIA 1957).

¹⁸ See, e.g., *Matter of C.Y.C.*, 3 I&N Dec. 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); *Matter of Seda*, 17 I&N Dec. 550, 553 (BIA 1980), overruled in part on other grounds by *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988) (criminal court proceedings that do not amount to a conviction for immigration purposes is not an admission); *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953) (where expungement eliminates offense for immigration purposes (under the laws at the time), then independent admission to immigration judge is not “admission” for inadmissibility).

¹⁹ *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (juvenile admission does not cause inadmissibility as a crime involving moral turpitude).

c. *Inadmissible because immigration authorities have “reason to believe” that the person has been involved in drug trafficking; includes some family members*

A person is inadmissible if immigration authorities have “reason to believe” that the person is, or ever was, involved in drug trafficking. INA § 212(a)(2)(C). DHS does not need a conviction but must demonstrate that it has substantial and probative evidence that the noncitizen was engaged in the business of selling or dealing in controlled substances.²⁰ DHS may use evidence such as police reports, witness statements, or the person’s own statements. Even minors may be charged under this ground and DHS can consider evidence from a juvenile delinquency disposition.²¹

This ground also punishes the family members of the suspected drug trafficker. The spouse, sons, and daughters of a person who is inadmissible for drug trafficking under this ground also are inadmissible, if they benefited financially or in any way from the trafficking within the last five years. In some cases, this ground has been used against people who work legally in the legitimate marijuana industry.

d. *Drug abuse and drug addiction*

A person who is *currently* a drug addict or drug abuser is also inadmissible under the “health” grounds in INA § 212(a)(1)(A)(iii), and does not require a conviction. This ground is waivable however, for TPS applicants, though it is not waivable for family or employment-based applicants for permanent residence.

2. Defenses to controlled substance inadmissibility

In some cases, a court disposition with some relation to drugs will not cause immigration penalties. Here, it is best to consult an expert immigration practitioner.

1. *Accessory after the fact and other offenses that do not inherently “relate to” controlled substances*

Accessory after the fact and misprision of felony are offenses that relate to helping someone who has committed a crime. The BIA has found that these offenses do not cause inadmissibility as controlled substance convictions, even if the crime that the other person had committed related to drugs.²² The same may apply to tampering with evidence.²³

2. *The controlled substance list for the offense includes substances that are not on federal lists*

²⁰ *Matter of Davis*, 20 I&N 536, 541 (BIA 1992), using *Black’s Law Dictionary* definition of “trafficking” meaning “commerce; trade; sale or exchange of merchandise, bills, money and the like.”

²¹ For more information on juvenile delinquency see ILRC, *What are the Immigration Consequences of Delinquency?* (2020). Available at: <https://www.ilrc.org/what-are-immigration-consequences-delinquency>.

²² See, e.g., *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

²³ Note, however, that outside the Ninth Circuit accessory and tampering offenses might be deemed aggravated felonies as “obstruction of justice” if a year or more is imposed. Compare *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018) (accessory after the fact is an aggravated felony as obstruction of justice) with *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1056-58 (9th Cir. 2020) (petition for rehearing denied) (accessory after the fact is not obstruction of justice).

For immigration purposes, a controlled substance (illegal drug) is defined by federal drug schedules (lists of controlled substances) at 21 USC § 802. Some offenses under state, municipality, or tribal laws prohibit controlled substances that are not on the federal list. Under the categorical approach, these offenses are “overbroad” compared to the federal definition. In some cases, this will mean that a conviction is not an inadmissible or deportable controlled substance offense. This analysis can get quite complicated, and you should get expert assistance if you are not an expert.²⁴

3. *Eliminating (“vacating”) the conviction*

In most jurisdictions, a drug conviction can only be eliminated for immigration purposes if a criminal court judge vacates the conviction *because there was a legal or procedural error in the original proceeding*. A conviction will not be eliminated for immigration purposes by so-called “rehabilitative relief” -such as expungement²⁵- where the criminal court legally erases the conviction because the person completed probation, fulfilled other conditions, or for humanitarian purposes.²⁶

However, for TPS applicants who reside *within the Ninth Circuit*, state rehabilitative relief will eliminate the immigration consequences of a first conviction for simple possession of a controlled substance or certain other minor drug offenses, such as possession of drug paraphernalia, *if and only if the conviction was entered on or before July 14, 2011* and the person meets other requirements.²⁷

4. *Waiver available for single incident involving possession of 30 grams or less of marijuana*

The person may be able to apply for a discretionary waiver of inadmissibility under INA § 244(c)(2)(A)(iii)(II). While controlled substance offenses are generally not waivable for TPS, a waiver is available for one or more convictions or admissions of offenses relating to a single incident involving simple possession for personal use of 30 grams or less of marijuana.²⁸

WARNING: The traditional 212(h) waiver for inadmissibility based on crimes differs from the TPS waiver in important ways. While a 212(h) waiver has the potential to waive crimes involving moral turpitude, the TPS waiver does not. Like the section 212(h) waiver, the TPS waiver cannot waive any drug offense other than one or more convictions relating to a single incident involving simple possession of thirty grams or less marijuana. Those with any other controlled substance offense will likely be barred from TPS as well as eligibility for traditional

²⁴ To learn more about the categorical approach and drug crimes, see ILRC’s *How to Use the Categorical Approach Now*, <https://www.ilrc.org/how-use-categorical-approach-now-2021> and ILRC’s note on controlled substances, <http://www.ilrc.org/chart>.

²⁵ *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

²⁶ See, e.g., *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). For more about effective post-conviction relief see <https://www.ilrc.org/immigrant-post-conviction-relief>.

²⁷ See discussion of *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc) at ILRC, *Lujan and Nunez, July 14, 2011* (2011) at <https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011>.

²⁸ For more information, see ILRC, *Practice Advisory: Immigrants and Marijuana* (May 2021) along with other information about marijuana at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>.

adjustment of status. In addition, because the TPS waiver requirements are broader and do not require a showing of hardship to a “qualifying relative” a TPS applicant may be eligible for a waiver of a simple possession marijuana offense, but not be eligible for the 212(h) waiver needed to adjust status.

Example: Jun has a conviction for simple possession of 20 grams of marijuana, and so qualifies for a TPS waiver. Jun’s sister filed a visa petition for Jun, and the priority date will be current in a couple years. However, to obtain a waiver of the same marijuana conviction in order to be granted permanent residence based on that petition, Jun will need a spouse, parent, or son or daughter who is a U.S. citizen or permanent resident who will suffer extreme hardship if she is not approved for a 212(h) waiver. Conceding inadmissibility for TPS will likely mean Jun will not be eligible to become an LPR in the future if she has none of these “qualifying relatives”.

V. Category III: Asylum Crime Bars are Also Bars to TPS

The two criminal-related bars to asylum also apply to TPS.²⁹ These two bars are (1) the conviction of a “particularly serious crime” and (2) commission of a serious nonpolitical crime outside the United States. Neither is waivable.

A. Conviction of a Particularly Serious Crime

The first criminal offense related bar to asylum and TPS, is where an applicant, “having been *convicted* of a final judgment of a **particularly serious crime**, constitutes a danger to the community of the United States.”³⁰ Courts have held that any individual convicted of a particularly serious crime automatically constitutes a danger to the community of the United States. In other words, this bar is triggered by a conviction of a particularly serious crime, and the government is not required to separately prove that the individual poses a danger to the community.³¹

If the elements of a crime, by the statutory definition, bring it within the “range” of a particularly serious crime, either party may present evidence regarding the underlying facts to determine whether it should be treated as such.³² “All information may be considered, including the conviction records and sentencing information, as well as other information outside the confines of the record of conviction.”³³ The Attorney General may designate *per se* particularly serious crimes by regulation, but they may also be determined by the courts through caselaw.³⁴

²⁹ INA § 244(c)(2)(B)(ii), INA 208(b)(2)(B)(A)(ii),(iii)

³⁰ INA § 208(b)(2)(A)(ii); 8 CFR § 208.13(c).

³¹ See *Matter of L-S-*, 22 I&N Dec. 645, 650 (BIA 1999), citing *Matter of K-*, 20 I&N Dec. 418 (BIA 1991), *aff’d Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (quoting *Crespo-Gomez v. Richard*, 780 F.2d 932, 934 (11th Cir. 1986)).

³² *Matter of N-A-M-*, 24 I&N Dec. 336, 344 (BIA 2007). See *Anaya-Ortiz v. Mukasey*, 594 F.3d 673, 678 (9th Cir. 2010).

³³ *Matter of N-A-M-*, 24 I&N Dec. at 342.

³⁴ *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011).

What Is a “Particularly Serious Crime”?

1. Factors to consider

In *Frentescu*, the BIA set out criteria to determine whether a crime is particularly serious: (a) nature of the conviction; (b) sentence; (c) whether it was a crime against a person or property; and (d) whether the person is a danger to society.³⁵ In *Matter of N-A-M-*, the BIA noted that it no longer engages in a separate analysis whether a crime is a danger to the community.³⁶ It focuses instead on the nature of the crime. Courts still refer to the *Frentescu* standards, as modified by *Matter of N-A-M-*.³⁷

Matter of N-A-M- clarified that once the elements of an offense are found to potentially bring the offense into the category of a particularly serious crime, the court should consider “all reliable information and [is] not limited to reviewing the record of conviction and sentencing information.”³⁸ Additionally, the Board specifically rejected the notion that a crime must be an aggravated felony to be a particularly serious crime.³⁹

2. Aggravated felonies

For purposes of asylum (and TPS eligibility), *any* aggravated felony is automatically defined as a particularly serious crime.⁴⁰ This could include, therefore, something such as a nonviolent theft offense with a one-year suspended sentence.⁴¹ “Aggravated felony” is a term of art defined in INA § 101(a)(43), which lists dozens of common law terms and references to federal statutes. Federal and state offenses can be aggravated felonies, as can foreign offenses, for which the period of imprisonment ended within the previous 15 years.⁴² Whether or not a conviction is an aggravated felony is a complicated area of the law. Each offense should be closely examined and a TPS application should not be filed until it is determined that it is not an aggravated felony.⁴³

³⁵ *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). See *Martins v. INS*, 972 F.2s 657, 660 (5th Cir. 1992)(trafficking heroin was considered to be a particularly serious crime); *Mahini v. INS*, 779 F.2d 1419 (9th Cir. 1986) (possession and intent to distribute heroin); *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986) (possession of cocaine for sale); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1996) (robbery with firearm, attempted robbery with firearm, grand theft second degree and accessories after the fact); see also, *Matter of Rodriguez-Coto*, 19 I&N Dec. 208 (BIA 1985).

³⁶ *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

³⁷ See *Anaya-Ortiz*, 594 F.3d 673, 679 (9th Cir. 2010); *Gao v. Holder*, 595 F.3d 549, 557 (4th Cir. 2010); *Nethagani v. Mukasey*, 532 F.3d 150, 155-56 (2nd Cir. 2008); but see *Alaka v. Att’y Gen. of the U.S.*, 456 F.3d 88, 105 (3rd Cir. 2006).

³⁸ *Matter of N-A-M-*, 24 I&N Dec. 336, 343 (BIA 2007).

³⁹ *Id.*

⁴⁰ See INA § 208(b)(2)(B)(i); 8 CFR § 208.13(c)(2)(D).

⁴¹ See INA § 101 (a)(43)(G) (defining an aggravated felony as a theft offense for which the term of imprisonment is at least one year).

⁴² INA § 101(a)(43).

⁴³ The ILRC’s website contains various resources regarding the immigration consequences of criminal convictions, including an advisory on how to apply the categorical approach when analyzing criminal statutes. See: <https://www.ilrc.org/crimes>.

3. Other offenses

Other than the aggravated felony rule, the determination of whether an offense is a particularly serious crime is made on a case-by-case basis, based on factors such as whether the offense involved violence against people, the extent of injury, the length of sentence, and other factors. The adjudicator may look beyond the record of conviction.⁴⁴

Example: Rogelio wants to apply for TPS but was convicted of a felony theft offense in Arizona, for which was sentenced to two years in prison. This is an aggravated felony under INA 101(a)(43)(G), as a theft offense with at least a one-year sentence. Rogelio's conviction is a particularly serious crime because it is an aggravated felony. He is, therefore, ineligible for TPS due to both the asylum/TPS bar and the one felony/two misdemeanor TPS bar.

B. Serious Nonpolitical Crime Bar

An individual is ineligible for asylum, and also for TPS, if there are “serious reasons” to believe that the individual committed a serious nonpolitical crime before coming to the United States. The category includes crimes that are less serious than particularly serious crimes and applies *even if there is no conviction*. The statute only requires the existence of “serious reasons to believe” that the individual committed such an offense, which courts have interpreted as requiring probable cause.⁴⁵ Thus, the BIA has stated that it need not determine that an individual actually committed the crime, only that this condition is met.⁴⁶ This bar is of particular importance when assisting asylum or TPS applicants with **prior affiliations with gangs**.⁴⁷

The BIA has articulated the following factors as “proper considerations” when determining if an offense is a **serious crime**: (1) the immigrant’s description of the crime; (2) the turpitudinous nature of the crime according to BIA precedents; (3) the value of any property involved; (4) the length of sentence imposed and served; and (5) the usual punishments imposed for comparable offenses in the United States.⁴⁸ For this bar to apply, the offense must not only be serious, but also non-political.

VI. Vacating a Conviction to Become Eligible for TPS

Due to these strict bars, and the many ways a conviction might bar TPS eligibility, advocates should consider whether vacating a prior conviction will help create eligibility for those impacted by the criminal bars. In almost all cases, the criminal court must vacate the conviction based on some legal or procedural error in the original criminal proceedings in order

⁴⁴ *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982).

⁴⁵ INA § 241(b)(3)(B)(iii). See e.g., *Khouzam v. Ashcroft*, 361 F.3d 161, 165-66 (2nd Cir. 2004); *Barahona v. Garland*, 993 F.3d 1024, 1028 (8th Cir. 2021); *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1189-90 (9th Cir. 2016).

⁴⁶ *Matter of Ballester-Garcia*, 17 I&N Dec. 592 (BIA 1980).

⁴⁷ See e.g., *Urbina-Mejia v. Holder*, 597 F.3d 360, 369 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009).

⁴⁸ *Matter of Ballester-Garcia*, 17 I&N Dec. at 595.

to be eliminated for immigration purposes. See, e.g., *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

A qualifying error in the proceedings can include recognized legal errors that have to do with immigration, such as the court's failure to provide a required generic immigration consequences warning, a defender's failure to advise the defendant about the immigration consequences of a proposed plea bargain, or a range of others. It also could include due process or criminal procedure errors not related to immigration status, such as failure to provide a competent translator at the plea hearing, obtaining evidence through police misconduct, or a defender's failure to make a reasonable investigation of defenses. If you are not an expert, try to find post-conviction relief counsel to assist.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.