WHAT ARE THE IMMIGRATION CONSEQUENCES OF DELINQUENCY?

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I. Introduction

Addressing juvenile conduct in applications for immigration relief can raise legal and even ethical issues. Some questions advocates frequently have in the course of filing such immigration relief applications for their youth clients include: "What constitutes an arrest? What is a crime? Are youth treated differently than adults for purposes of criminal activity?" "Does my client have to admit conduct for which they were never arrested? What if the information is confidential under state law?" These and other related questions arise as a result of questions in United States Citizenship and Immigration Services (USCIS) applications and petitions, such as the I-485 (adjustment of status), I-918 (U Visa), I-589 (asylum), I-914 (T Visa), and others. Clients who are adults now, but who had contact with the juvenile justice system when they were minors, also must decide how to respond to these questions. This may come up in the above applications as well as the N-400 (application for naturalization).

> **For example**, the I-485, adjustment of status application, asks in Part 8, Questions 26 and 30:
>
> "*Have you EVER committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?*
>
> *"Have you EVER violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the United States, or a foreign country?"*

In the course of interviewing your clients during the intake process, you may come across scenarios like the following:

> Your client Antonio was trespassing with some friends in a schoolyard after hours. They saw headlights and a person identified himself as a police officer, walked towards the group, and ordered them to stay where they were. Antonio ran and got away. Must he answer "yes" to the question asking about commission of "a crime of any kind"?
>
> Your client Joshua tells you that he was found with marijuana in his backpack at school. The school resource officer wrote him a ticket, he attended traffic court, and paid a fine. All of this occurred in California while he was a minor. Has he "violated a controlled substance law or regulation"?
>
> Your client Sandra informs you that she tried meth once at a party in high school but was never arrested. Has she "violated a controlled substance law or regulation"?

These are questions that advocates must seriously consider before submitting any application or petition. This advisory will assist practitioners to meaningfully weigh the answers to these questions and related scenarios by analyzing the pertinent legal arguments regarding admission of juvenile conduct, especially in situations where it did not result in an arrest. To further understand the legal arguments, however, it is vital that advocates have knowledge of the distinctions between delinquency and crime for purposes of immigration law, and have the ability to assess whether a youth has committed an act of delinquency or a crime.

II. What is Delinquency?

Juvenile delinquency refers to the process involving alleged violations of law by individuals under a certain age, often either eighteen or sixteen (state laws vary). Under federal law, juvenile delinquency is defined as the violation of a law committed by a person prior to their eighteenth birthday which would have been a crime if committed by an adult.[1]

Delinquency cases arising under state law are handled in juvenile courts or family courts. There are fifty-one different juvenile justice systems in the United States, and each system is guided by its own laws, policies, and a different manner of providing services for young people. Advocates seeking an in depth understanding of their state's juvenile justice system should consult the Juvenile Justice: Geography, Policy, Practice & Statistics website and look for their state under the "states" tab at http://www.jjgps.org/.

If a youth is found to have violated a law while under a certain age, a juvenile court will generally make a finding of "delinquency." This also may be referred to as an adjudication of delinquency. A youth who has an offense adjudicated in juvenile court does not have a "criminal conviction" (an outcome arising out of violation of law in the criminal legal system where the person is treated as an adult) on their record. The sentencing portion of the juvenile delinquency process is often called the "disposition."

It is important to note that not every youth who commits an offense while they are under the age of sixteen or eighteen will be tried in juvenile court. Depending upon the offense committed and the state laws, states may treat older minors who commit more serious offenses as adults, and hold their cases in adult court (called "waiver" or transfer), which may then result in a criminal conviction and adult criminal sanctions, instead of a juvenile delinquency adjudication and disposition.

III. What are Youthful Offender Statutes?

Some states have "youthful offender adjudications," which are often a hybrid between the juvenile and criminal legal systems and affect those who commit offenses between ages sixteen through twenty-one. Each youthful offender statute is treated differently by immigration law, with some found to constitute convictions for immigration purposes and others treated as delinquency. Some examples include:

- New York youthful offender statute under Article 720 of New York state law. This statute gives certain youth facing adult criminal charges a chance to not have a criminal conviction on their record. Youth are automatically eligible for youthful offender status if they are under nineteen years of age, have no prior felony or youthful offender adjudications, and are not charged with certain serious crimes. If granted, the youth does not receive a criminal conviction, but rather a youthful adjudication. This is not treated as a conviction for immigration purposes.[2]

- Michigan's Holmes Youthful Trainee Act (HYTA) under Section 762.11 of Michigan's Code of Criminal Procedure applies to youth between the ages of seventeen and twenty-one (and up to age twenty-four with the consent of the prosecuting attorney) and permits the assignment of the status of youthful trainee rather than a criminal conviction for youth facing certain criminal charges. Youth facing certain serious charges, such as felony charges for which the maximum penalty is life imprisonment or major drug trafficking charges are ineligible. This has been treated as a conviction for immigration purposes.[3]

Practice Tip: The biggest question these state schemes raise in the immigration context is whether they are treated as delinquency or crime for purposes of immigration law. Because juvenile delinquency and criminal convictions trigger different consequences under immigration law, how the state scheme is characterized can have a tremendous impact on any immigration case. The immigration consequences of a state youthful offender scheme will depend upon how the state treats the disposition and whether it is similar to juvenile delinquency or a rehabilitative relief procedure. See **Section V.B** for further information.

IV. What are the Immigration Consequences of Delinquency?

It is well established that **a juvenile delinquency adjudication does not constitute a conviction for immigration purposes, regardless of the nature of the offense.** In *Matter of Devison*, the Board of Immigration Appeals (BIA) reaffirmed its longstanding rule "that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[4] It relied on Congress' recognition that adjudications for juvenile delinquency are separate from criminal convictions. The BIA likened delinquency proceedings to removal proceedings and found that delinquency is not criminal, but civil in nature. Delinquency does not result in punishment. The applicable due process standard for delinquency, like removal proceedings, is fundamental fairness.[5] This holding that juvenile adjudications do not constitute convictions for immigration purposes is incredibly important because most – but not all – criminal-related provisions of immigration law are triggered by a conviction.[6]

Importantly, **admitting to juvenile delinquency also does not constitute an "admission" under the Immigration and Nationality Act** (INA) because the person has to admit to a crime in order to trigger certain inadmissibility grounds requiring an admission, and delinquency is not considered a crime under immigration law.

While most immigration consequences triggered by violations of criminal law require a criminal conviction, under some provisions of the INA, a formal admission to certain conduct alone is sufficient to trigger inadmissibility.[7] INA § 212(a)(2)(A)(i)(I) and (II), specifically, creates grounds of inadmissibility for any person convicted of, or who admits committing, or admits to conduct comprising the essential elements of:

> (I) a crime involving moral turpitude…or
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)….[8]

Under these provisions, in order for either ground of inadmissibility to be triggered, a person must admit to the essential elements of a crime which meets the definition of a crime involving moral turpitude or a controlled substance offense. Because a person who has only committed an act of delinquency has not committed a crime, these provisions would not apply to them.

In *Matter of M-U-*, the BIA held that an adult cannot admit the essential elements of a moral turpitude offense if the conduct required mandatory delinquency treatment.[9] In that case, an admission by an adult of theft while a minor that resulted in a delinquency adjudication was held not to be an admission of commission of a crime involving moral turpitude.[10] The same reasoning should apply to the issue of inadmissibility for a youth's admission of a controlled substance offense.[11] Further, a person who has committed conduct which

did not result in arrest or charges, may also not make an admission if it would have been mandatorily treated as delinquency.[12] In *Matter of F-*, 4 I& N Dec. 726 (BIA 1952), the BIA held that an adult was not inadmissible for admitting a crime involving moral turpitude, in this case perjury, where the admission would have been treated as juvenile delinquency conduct, not criminal conduct. The governing standard for determining whether conduct would have been treated as delinquency or a crime is the subject of discussion at **Section V**. It is critical for advocates to discern whether the conduct was or would have been treated in juvenile or adult proceedings to determine the implications of any admission.

> **Example:** In reviewing the question, "Have you EVER violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the United States, or a foreign country?" on the I-485 Application for Adjustment of Status, your minor client Roberto informs you he has not, because even though he smokes weed on a regular basis, it is not a violation of the law because it is legal in California. You reiterate what you had already shared with Roberto – that marijuana is still unlawful under federal law. Once Roberto has made this disclosure though, must he answer "yes" to this question?
>
> It is the ILRC's position that there are legal arguments that would support marking "no" to the controlled substance question in this instance. First, "use" of marijuana is not a violation of California or federal law. Marijuana has been decriminalized in California.[13] Further, using a drug or being under the influence does not contain the essential elements of the federal offense of possession; therefore, admission of such use is not admission of a federal offense. [14] Neither should admission of use shift the burden to the person to prove that they did not possess the marijuana.[15] Second, disclosing use does not amount to an admission to all of the essential elements of a controlled substance violation, which should be the standard in order to be required to answer "yes" to this question. This is because of the law governing what constitutes a formal admission, as discussed in **Section V.F(2)** below. Moreover, even if a youth did admit to all of the essential elements of possession of marijuana, if the offense would be required to be handled in delinquency proceedings under state and federal law, at most they would be admitting to an act of delinquency rather than a crime, and thus you could argue that they are not inadmissible under the controlled substance ground.

Even though juvenile delinquency dispositions are not criminal convictions, they can still have consequences for youth.

1. **Certain grounds of inadmissibility and deportability do not depend upon a conviction; mere "bad acts" or status can trigger the penalty.** There are several conduct-based grounds where juvenile court dispositions might provide the government with evidence that the person comes within the ground.[16] They include:

   - **Inadmissible if immigration authorities have "reason to believe" that the person has ever assisted or participated in trafficking a controlled substance.** INA § 212(a)(2)(C). This is by far the most common and serious conduct-based ground of inadmissibility for youth. No conviction is required; immigration authorities only need to acquire reasonable, substantial, and probative evidence. The government may argue that an arrest, admission, adjudication in delinquency proceedings, or criminal conviction for sale, possession for sale, possession with intent to deliver, or similar offenses will trigger this ground. If a youth is undocumented, becoming inadmissible for "reason to believe" can be a permanent bar to

obtaining lawful status despite significant equities, since this conduct-based ground of inadmissibility is only waivable for U and T visa applicants.[17] There are arguments that this ground of inadmissibility should not be applicable to juvenile conduct, or that a legal excuse such as duress should be a defense to triggering the ground, but these arguments should only be raised in defensive cases as there is no precedent on these issues. For further information, see Angie Junck, *The Impact of Drug Trafficking on Unaccompanied Minor Immigration Cases* (May 2015), https://www.ilrc.org/impact-drug-trafficking-unaccompanied-minor-immigration-cases.

- **Inadmissible or deportable based on drug abuse or addiction.** INA § 212(a)(1)(A)(iv); INA § 237(a)(2)(B)(ii). A noncitizen is inadmissible if the drug addiction or abuse is *current* (within the last year), and deportable if the addiction or abuse occurred at any time after admission into the United States, even if they have overcome the problem.[18] The issue of drug abuse and addiction generally comes up during the medical examination of the youth—a requirement for applications for lawful status—or during the interview with an immigration officer. In practice, advocates have reported that this ground is not being charged as often as people had feared for youth already in the United States. However, the ground has been problematic for youth who are going through consular processing abroad. Regardless, a drug-related delinquency adjudication could cause DHS to look into these grounds of inadmissibility or deportability. Adjudications alone are not sufficient to trigger inadmissibility though; in order for inadmissibility to be triggered, a civil surgeon or panel physician must find that the noncitizen uses a controlled substance AND "[m]eets DSM criteria for a substance use disorder."[19] If counsel is defending a permanent resident against removal under this ground, counsel should challenge the finding in the case and contest removability by submitting evidence from an independent physician on the issue of drug abuse or addiction.[20]

- **Inadmissible based on behavior showing a physical or mental condition that poses a current threat to self or others.** INA § 212(a)(1)(A)(iii). This ground might arise where there are multiple arrests or adjudications for driving under the influence; conduct suggesting sexual predation; or even suicide threats or attempts. Again though, adjudications alone are not sufficient to support a finding of inadmissibility based on this ground. The Centers for Disease Control and Prevention provides guidance for civil surgeons and panel physicians in classifying applicants in the "Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-related Disorders for Panel Physicians."[21] These instructions should be consulted in the event you have a youth client who may potentially be found to have such a condition.

- **Deportable based on a judicial finding of any violation of a domestic violence protective or "no-contact" order**. INA § 237(a)(2)(E)(ii). Any noncitizen who violates the portion of a domestic violence protection order that "involves protection against credible threats of violence, repeated harassment, or bodily injury" if the order was "issued for the purpose of preventing violent or threatening acts of domestic violence" is deportable, but not inadmissible.[22] This could be a violation of a temporary restraining order, probation condition (e.g., "stay away" order), or other civil or criminal court order. Note that this ground *does not require a conviction*, though a state court (including a delinquency court) would have to make a finding that the protective order in question had in fact been violated.

- **Inadmissible for engaging in prostitution.** INA § 212(a)(2)(D)(iii). A noncitizen is inadmissible, but not deportable, if they come to the United States to engage in prostitution or have "engaged in prostitution" within the last ten years.[23] One or more delinquency adjudications for prostitution can serve as evidence that this ground is triggered. This includes prostitutes and people who work with them in the business and benefit from the proceeds of prostitution, but not customers.[24] A single act of prostitution does not amount to engaging in prostitution under this provision.[25] Rather, "prostitution" is defined as engaging in a pattern or practice of sexual intercourse for financial or other material gain.[26] It is important to note that engaging in prostitution does not encompass sexual conduct that falls short of intercourse.[27]

- **Inadmissible and deportable for making a false claim to U.S. citizenship.** INA § 212(a)(6)(C)(ii); INA § 237(a)(3)(D). A person who falsely represents or has falsely represented themselves to be a U.S. citizen for any purpose or benefit under the INA or any other federal or state law is inadmissible and deportable.[28] Therefore, as written, DHS could apply these provisions to a broad range of scenarios, including someone who is underage and uses the U.S. passport of an older friend to get into a bar and have a drink, someone who votes in an election not realizing that they are not permitted to vote, or someone who falsely claims to be a citizen in filling out an I-9 to get employment. There is a limited and narrow statutory exception for certain children of U.S. citizens.[29]

An in-depth discussion of the conduct-based grounds of inadmissibility and deportability, as well as the waivers that may be available for these grounds, is beyond the scope of this advisory. For further information, please see Chapter 17 in *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth* (ILRC 2018), https://www.ilrc.org/special-immigrant-juvenile-status.

2. In addition, most forms of relief from removal are **discretionary**. This means that in most cases, including those involving adjustment of status, immigration judges or USCIS officers have the discretion to grant or deny the application.[30] Immigration authorities will consider all adverse factors in the case. The applicant must establish they merit a favorable exercise of discretion and therefore, show that they possess positive equities that outweigh any adverse factors. As such, even though a delinquency record may not trigger a statutory ground of inadmissibility or deportability, it will be considered by immigration judges or officials as a significant negative discretionary factor in any discretionary application for lawful status and may be difficult to overcome.

3. **Other Potential Consequences of Juvenile Dispositions.** Certain juvenile offenses involving violence or risk of force – even when handled in juvenile delinquency and only resulting in juvenile adjudications – may cause a person to **lose eligibility for Family Unity benefits**.[31] Family Unity was created by the Immigration Act of 1990, granting a stay of removal and employment authorization for spouses and unmarried children of persons who obtained temporary or permanent resident status through legalization.[32]

   Additionally, **certain juvenile dispositions can bar a U.S. citizen or LPR from petitioning a family member**. Under the Adam Walsh Child Protection and Safety Act of 2006, effective July 26, 2006, both U.S. citizens and lawful permanent residents convicted of certain crimes against minors cannot file family-based petitions, unless they qualify for a narrow exception.[33] These offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct. Certain more serious juvenile delinquency dispositions will be considered "convictions" for this purpose. Whereas under the Immigration and

Nationality Act, juvenile adjudications do not count as convictions for immigration purposes, § 111(a) of Adam Walsh includes juvenile delinquency adjudications as convictions if two criteria are met: (1) the offender is 14 years or older at the time of the offense; and (2) the offense was the same as or more severe than aggravated sexual abuse described in 18 U.S.C. § 2241 or was an attempt or conspiracy to commit such an offense. 18 U.S.C. § 2241 criminalizes someone who crosses a state border to engage in a sexual act with someone under the age of twelve or someone who knowingly engages in sexual conduct with someone who is between the ages of twelve and fifteen by using force or threatening the person with serious bodily harm.

Finally, delinquent conduct will be considered in decisions regarding **whether and where to detain a youth**, including decisions to detain a child in a secure immigration detention facility.

TRAVEL WARNING FOR LAWFUL PERMANENT RESIDENT (LPR) YOUTH WHO HAVE HAD CONTACT WITH THE YOUTH JUSTICE SYSTEM. In general, LPRs who travel can re-enter the United States after a trip abroad even if they are inadmissible, under INA § 101(a)(13). The exception, however, is if they trigger one of the exemptions listed in INA § 101(a)(13)(C). When an LPR youth has had contact with the youth justice system, it is possible that a Customs & Border Protection official will become aware of this when the youth is re-entering the country, and allege that they come within the exemption in INA § 101(a)(13)(C)(v) for committing an offense identified in INA § 212(a)(2), thus making them subject to the grounds of inadmissibility. Therefore, if there is any concern that your LPR youth client may be inadmissible (for example, under the conduct-based ground for being a drug trafficker), they should not travel abroad until they naturalize. If your LPR client does decide to travel despite the risks, they must be prepared to remain silent about juvenile conduct, arrests, and adjudications at the border (most importantly, they should not admit to having committed any drug-related offenses), and be encouraged to call their attorney if any issues arise at the border.[34]

PRACTICE TIP: The problem of "legalized" marijuana: State by state, the U.S. is starting to legalize marijuana.[35] It would be reasonable for noncitizens living in these states to think that using marijuana, or working legally in the legitimate marijuana industry, poses no immigration problem as long as they obey state law. Unfortunately, that is not true. Immigration is governed by federal law, and according to federal law, marijuana still is a dangerous "controlled substance." In April 2019, USCIS amended its *Policy Manual* to emphasize that conduct relating to marijuana still triggers very severe immigration penalties—even if it is legal under state law.[36]

The bottom line is that immigrants and their advocates must treat marijuana exactly like any other federally defined controlled substance (other than certain provisions that apply to a single incident involving 30 grams or less).[37] That can be confusing when one is surrounded by billboards advertising cannabis for sale. In that way, legalized marijuana presents a kind of trap for unwary immigrants, because they may think it is safe to admit conduct that is permitted under their state's law. But the risk is that:

- If a noncitizen admits to DHS for example, that, as *an adult*, they used marijuana at home as permitted by state law, they can and likely will be found inadmissible, because they admitted that they committed a federal drug offense (if DHS elicits a formal admission, as discussed in **Section V.F(2)**). This is true for recreational and medical marijuana. If they admit using marijuana more than once, they can be found ineligible for a waiver of inadmissibility under INA § 212(h).

- A noncitizen who has worked legally in the legitimate marijuana industry—as a field worker, delivery person, office staff, or other job—can be found inadmissible because DHS has reason to believe they are a drug trafficker. It is possible that this would be applied to workers under age eighteen.

- Along with being inadmissible, these people are barred from establishing good moral character. For example, they will not qualify for naturalization if the conduct took place during the period for which good moral character must be shown.

We hope that someday, Congress will take marijuana off the federal drug schedules. But until that time, noncitizens must be extremely careful. Tell your clients and your community that the best practice for noncitizens, whether youth or adults, is:

- Don't use marijuana until you're a U.S. citizen.

- Don't work in the marijuana industry.

- If you truly need medical marijuana, get a medical and a legal consult. You may be able to find a way.

- Don't carry marijuana, a medical marijuana card, a pipe, or wear items like marijuana t-shirts. Don't post about marijuana on social media. Don't have photos on your phone about marijuana. This is true anywhere, but especially if you are near or crossing a United States border or going to an immigration interview. The risk is that it could prompt aggressive questioning about marijuana.

- Never discuss marijuana with an immigration officer, or with a doctor at an immigration appointment, without first getting expert legal advice.

- If you have a potential issue with marijuana, do not travel outside the United States without expert legal advice.

- Some states and cities are trying to help people by doing mass "expungement" of past minor marijuana convictions. While this can help for finding employment, do *not* assume that it removes a conviction for immigration purposes. Get expert advice.

- If any of this is a problem for you, one option is to consider waiting a while before filing an affirmative application or traveling outside the United States. The law on marijuana *might* get better.

As discussed above, simply admitting one possessed, or being found in delinquency to have possessed, marijuana *while under the age of 18* should not make the person inadmissible or deportable for admission or conviction of a drug crime, because this is delinquent conduct, not a "crime." See INA § 212(a)(2)(A). But youth should still avoid contact with marijuana. And remember that admission or evidence that the youth frequently uses marijuana could lead to a charge of being inadmissible or deportable as an addict or abuser (INA § 212(a)(1)(a)(iv)), and admission or evidence of sales (or work in the industry) could lead to a charge of being inadmissible because immigration authorities have "reason to believe" the person trafficked drugs (INA § 212(a)(2)(C)).

For community flyers about marijuana and immigrants in English, Spanish, and Chinese and a Practice Advisory that goes into more detail and discusses legal defenses, visit https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

V. How Can I Determine if my Client has Engaged in Delinquent as Opposed to Criminal Conduct?

A. Framework for Distinguishing Between Delinquent and Criminal Conduct

While the BIA has long held that acts of juvenile delinquency are not crimes,[38] it has never foreclosed the possibility that **youth may commit criminal offenses**. This comports with language in the INA stating that the crime involving moral turpitude ground of inadmissibility shall not apply to a person "who committed only one crime" if "the crime was committed when the alien was under 18 years of age."[39] This provision was created in recognition of the fact that some jurisdictions, including those in some other countries, may not have special youth or delinquency proceedings and may treat youth the same as adults. This provision is also used when a youth charged with a serious offense is transferred from delinquency to adult proceedings. (For more discussion on this provision see **subsection F(1)**, below). Because youth may commit and be convicted of crimes, and the consequences of those acts can carry serious consequences, it is important to determine whether a youth's conduct is properly categorized as delinquency or crime.

Case law comparing acts of delinquency with crimes involves prior adjudications or convictions suffered by minors either in the U.S. or abroad. In such cases, the BIA has looked at whether the outcome was criminal or juvenile in nature, and in the case of foreign conduct/convictions, has considered whether the act would have been mandatorily treated as an adult criminal offense under federal law.[40] These cases suggest that the main way to distinguish an act of juvenile delinquency from a crime is to determine the manner in which it was adjudicated. They do not address, however, how to determine whether *conduct for which the person was never arrested* or even charged is properly considered criminal or juvenile in nature. Very little case law exists on this subject.

Some general guidelines to consider in determining whether conduct is properly considered delinquent or criminal, some of which are discussed in greater detail below, include:

- If the youth has a delinquency or criminal disposition occurring in the U.S., check to see if it was handled in state juvenile court, youthful offender proceedings, or adult criminal proceedings. To make this determination, do <u>not</u> go solely by the age of the youth; instead, check the record of proceedings. If the case was handled in delinquency proceedings, it is not a conviction or admission for immigration purposes. If the case was handled in adult criminal court in the United States, it will most likely be a conviction of a crime for immigration purposes. This will require a different and often complex analysis of the immigration consequences of the conviction (see **subsection F**, below). A youthful offender adjudication, a proceeding that exists in some states for treatment of youth between the ages of sixteen to twenty-one, may or may not be a conviction for immigration purposes (see discussion in **subsection B**, below). In all of these cases, check to see if the underlying conduct might carry conduct-based immigration consequences, regardless of whether there is a conviction.

- If the juvenile or criminal proceedings occurred in federal court, see if the youth was adjudicated under the Federal Juvenile Delinquency Act (FJDA). Most are. If handled under the FJDA, it is not a conviction or admission for immigration purposes, although it may carry conduct-based immigration consequences.

- If the youth committed conduct abroad that resulted in a criminal conviction, advocates will have to analyze whether it would have been adjudicated as delinquency or a crime under federal legal standards, the FJDA (discussed in **subsections C & D**, below).

- If the youth committed conduct domestically or abroad that never resulted in an arrest or was left uncharged, advocates will have to conduct similar analysis to see if the person may have committed an adult "crime," and therefore if the person could become inadmissible if they formally admit the conduct. It is unclear whether domestic unarrested or uncharged conduct will be considered under federal legal standards or under the state law where it occurred (see **subsection D**, below). Advocates may want to analyze the conduct under both standards.

B. Youthful Offender Schemes

As described in **Section III**, youthful offender schemes are intermediary proceedings between the juvenile and criminal legal systems which affect those who commit offenses somewhere between ages sixteen through twenty-one. The question they raise is whether they are properly considered delinquency or criminal convictions for immigration purposes.

In determining whether such a state juvenile proceeding results in a criminal conviction for immigration purposes, the BIA in *Matter of Devison* determined that it must compare the judgment in question with adjudications under the FJDA.[41] Only if the state proceeding is "sufficiently analogous" to the FJDA will it be considered delinquency for immigration purposes.[42]

In *Matter of Devison*, the BIA examined an adjudication under a New York youthful offender statute providing that in certain cases youth who are prosecuted in adult criminal court and found guilty of committing a crime when under the age of nineteen may be handled in adult court as a "youthful offender." Although New York law requires an eligible youth to first be convicted and only be permitted to have the conviction vacated after the youthful offender status is determined upon sentencing, the BIA held that such a determination was not a conviction for immigration purposes. It found the New York procedures "similar in nature and purpose to the juvenile delinquency provisions contained in the FJDA," and therefore, "sufficiently analogous…to classify that adjudication as a determination of delinquency, rather than as a conviction for a crime."[43] Among other factors, the BIA focused on the immediate vacatur of the conviction entered under New York law once a youthful offender status determination was made, that could not be changed as a consequence of the person's subsequent behavior, and the similar factors to be considered under both statutory scheme in deciding whether to treat a youth as a "youthful offender." The BIA reached this conclusion despite the differences between the FJDA and New York Law.

The Third, Sixth, and Eleventh Circuits came to opposite conclusions as *Devison* in evaluating youthful offender schemes found under Michigan, District of Columbia, and South Carolina law. In *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005), the Sixth Circuit evaluated the consequences of youthful trainee status under Michigan's Youthful Trainee Act (YTA). Under the YTA, a court can assign youthful trainee status to a person who pleads

guilty to a criminal offense without entering a judgment of conviction. Once the youth completes their probation or sentence, the court dismisses the proceedings. While the Court found many similarities with the New York procedure, including the same age parameters, a similar legislative intent, and the desire to promote rehabilitation over punishment, it found one difference critical--that is, the YTA allows a judge to revoke the youthful trainee status at any time before completion of the probation or sentence. This critical factor led the Court to hold that the youthful offender scheme was a conviction for immigration purposes because it was more like an expungement (which still counts as a conviction under immigration law) rather than an adjudication of juvenile delinquency under the FJDA. The Sixth Circuit, relying on *Devison*, noted that: "while deferred adjudications, such as an expungement, remain convictions even though they might apply to youthful offenders, findings of delinquency do not because they assign the offender a particular status that cannot be revoked."[44] In the 2014 case *Hanna v. Holder*, the Sixth Circuit relied on *Uritsky* in affirming its holding that YTA adjudications are convictions under the INA.[45]

Similarly, the Third Circuit in *Badewa v. Attorney General*[46] found that the DC Youth Rehabilitation Act of 1985 (DCYRA) more strongly resembled Michigan's YTA than New York's youthful offender law and therefore, was a conviction for immigration purposes. Analyzing the DCYRA, it found that the law required a guilty plea and allowed for the court to set aside the conviction based on post-offense conduct. The Court characterized this process as a "'set aside,' not even reaching the level of expungement."[47] Importantly, the Court found that, "The DCYRA does not convert a criminal conviction into a legal nullity or result in the adjudication of a non-criminal status."[48]

In evaluating youthful offender schemes in other states to determine whether they may be construed as delinquency or crime, counsel should analyze the applicable state procedures against the FJDA and the New York youthful offender statute in *Matter of Devison* to see if any similarities can be drawn.[49] In particular, courts have focused on whether a youthful offender finding constitutes a status that cannot be changed by the court based on the occurrence or nonoccurrence of subsequent events.[50] If so, it could reasonably be argued that the applicable state procedure does not result in a conviction for immigration purposes.

C. The Federal Juvenile Delinquency Act (FJDA)

The BIA has held "that the standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime."[51] While generally youth offenders who violate federal criminal law come within the jurisdiction of state authorities, the FJDA permits and provides guidelines for federal delinquency proceedings where state courts cannot or will not accept jurisdiction.

It was not until 1930 that the federal government addressed the issue of delinquency. At that time, the federal government decided to return all federal youth defendants to their home state's juvenile system.[52] In 1938, this issue was readdressed because of gaps in state juvenile systems for dealing with youth charged with capital crimes and youth charged with conduct that occurred on federal land such as reservations and military bases.[53] The federal government created the Federal Juvenile Delinquency Act which still prioritized the return of federally charged youth to their home state's juvenile system, but allowed for charging a youth as an adult federally for particularly serious crimes and the creation of federal juvenile proceedings.[54] In 1974, this Act was substantially amended.[55] The changes included the creation of more standardized procedural protections for federal juvenile defendants, instead of leaving it to the Attorney General's discretion to determine in which cases a youth defendant was charged as an adult or not.[56] The Act was again modified in 1984 to amend the list of crimes (it expanded) and age for which federal youth defendants could be tried as adults.[57] Although the

law does allow the transfer of some minors to be tried as adults, this determination is clearly delineated and only permissible for youth of certain ages who have been charged with certain serious crimes.

The FJDA currently defines "juvenile delinquency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult...."[58] The FJDA applies to those charged before the age of twenty-one with a violation of federal criminal law occurring before they turn eighteen. In more serious cases, the juvenile offender will be mandatorily transferred for trial as an adult in federal court. The FJDA also provides that commission of certain designated felony offenses by a person between the ages of thirteen and eighteen can warrant discretionary transfer to adult prosecution.[59]

Advocates should be aware of the below definitions and limitations in the FJDA, because these can support arguments that particular kinds of juvenile conduct or court dispositions do not constitute an admission or conviction for immigration purposes:

- Because the FJDA requires an offense to be a felony before transfer to adult court is possible, any misdemeanor conviction of a crime of violence or any of the other listed offenses cannot trigger transfer to adult court under the FJDA, and therefore cannot be considered a "conviction" or "admission" for immigration purposes.

- No person under the age of thirteen can be transferred to adult court under the FJDA. Therefore, no matter how serious the conduct is, as long as the person was under this age during commission of the act, it cannot constitute a conviction or admission of a crime.

WARNING! While the BIA has held that the FJDA is the standard for distinguishing between delinquency and crime, this standard is not always applied. Advocates should carefully consider the facts of each case and determine whether there is a strong argument that the FJDA standard would apply.

Under the FJDA, there are two types of transfers: mandatory and discretionary. Unless a foreign or federal offense is subject to **mandatory** transfer to adult court under the FJDA (state offenses may be treated under state laws), juvenile conduct arguably cannot be considered a "conviction" or "admission" for immigration purposes. In other words, if a youth is under the age of 18 and commits an offense that is not listed under the FJDA's mandatory transfer provision, then this is a defense that the youth has only committed an act of delinquency and not a crime. If the conduct could be subject to discretionary transfer to adult court, under BIA case law, this would not suffice to be treated as adult criminal conduct for immigration purposes, but further analysis may be required.

Mandatory transfer under the FJDA for conduct committed by a youth of age sixteen or older. Transfer of a youth to the U.S. District Court for adult criminal proceedings is mandatory if:

- the person is alleged to have committed an act after their sixteenth birthday;

- which if committed by an adult would be a felony offense;

- that has an element the use, attempted use, or threatened use of physical force against the person of another,[60] or would constitute certain enumerated offenses (including drug trafficking, arson or

destruction of some facilities, and some offenses involving explosives[61]); and

- they have previously been found to have committed comparable misconduct.

Discretionary transfer under the FJDA. Transfer is discretionary under the FJDA if:

- **Offenses Committed after 15th Birthday:** Transfer of a youth to U.S. District Court for adult criminal proceedings is discretionary[62] if (1) they are alleged to have committed an act of juvenile delinquency after their fifteenth birthday, (2) the act would be a felony if committed by an adult,[63] and (3) the charge constitutes a "crime of violence," certain enumerated controlled substance offenses,[64] or certain enumerated firearms offenses.[65]

- **Offenses Committed after 13th Birthday:** Transfer of a youth, who committed the act after their thirteenth birthday, to U.S. District Court for adult criminal proceedings is discretionary if they committed an enumerated crime of violence,[66] or if they possessed a firearm during an enumerated offense.[67]

D. Foreign Juvenile Conduct Resulting in Adjudication/Conviction

When a foreign conviction is the basis for a finding of inadmissibility, the conviction must be for conduct deemed criminal by United States standards. In other words, "it is a necessary element that the act underlying the conviction be something forbidden by United States law…".[68] The BIA has further held that the FJDA governs whether a foreign offense is to be considered delinquency or crime by U.S. standards.[69] Importantly, the age when the conduct was committed will not alone determine whether it will be considered an act of delinquency or a crime. In addition to the age when the act was committed, the court will look at the offense and sentence to determine whether the offense would have been treated as delinquency or a crime under U.S. law.

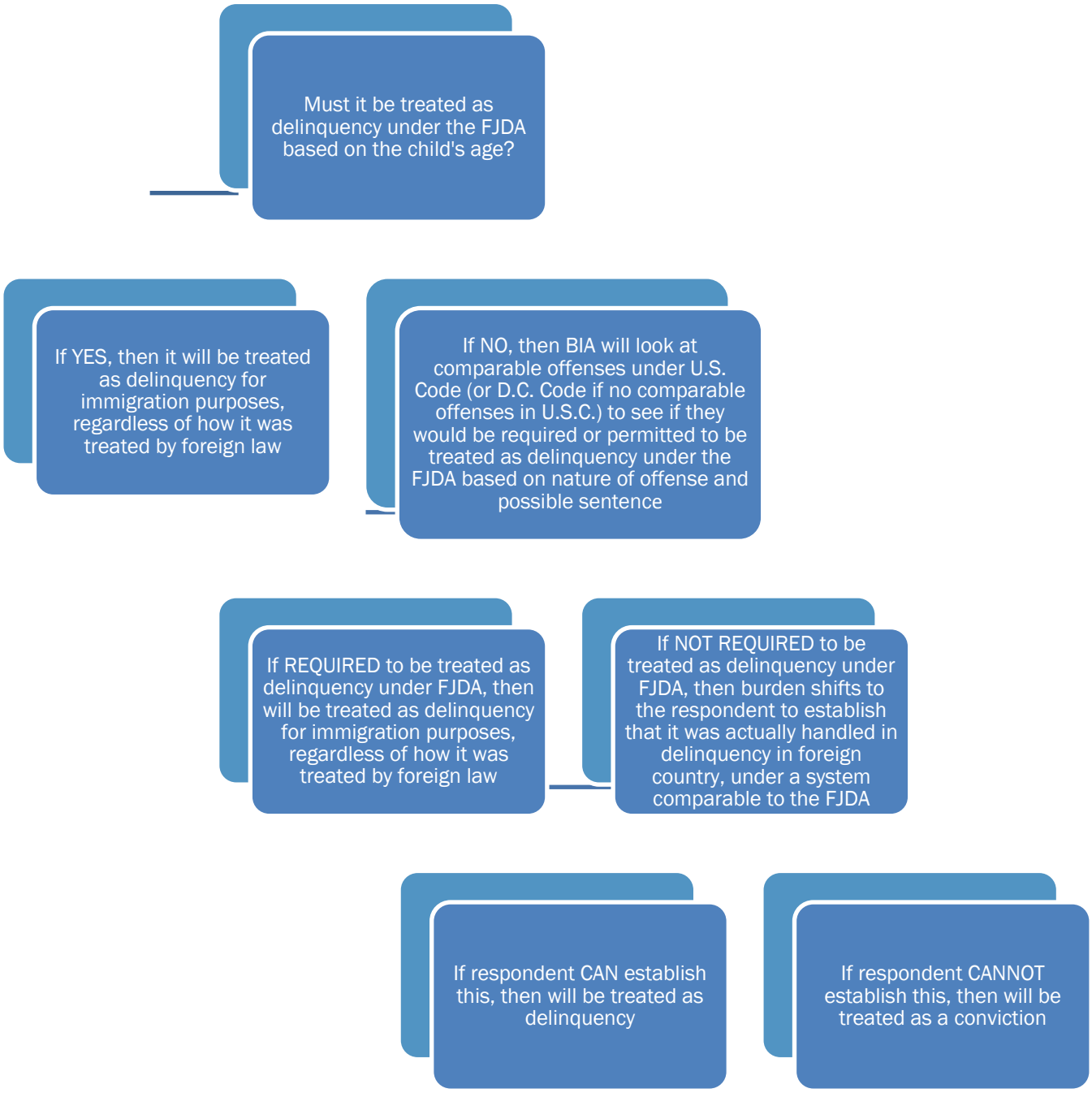
In *Matter of Ramirez-Rivero*, the BIA set forth the FJDA as the governing standard to analyze whether a foreign act is to be considered delinquency or crime by United States standards. In that case, the applicant entered an unoccupied home and stole arms and other goods when he was thirteen-years-old, resulting in a conviction and imposition of a twenty-year prison sentence.[70] Although his acts were treated as criminal under Cuban law, the BIA found that under the version of the FJDA in effect at that time, there was no basis for anyone under the age of sixteen to be subject to federal criminal prosecution, so he could not have been processed in adult criminal proceedings. The BIA held that since he could not have been transferred to adult court under the FJDA, his foreign conviction could not, as a matter of law, be treated as a conviction for immigration purposes regardless of how the foreign country treated it.

In *Matter of De La Nues*, the BIA analyzed two convictions under Cuban law occurring while the person was under the age of eighteen but over the age of sixteen.[71] The applicant, when he was sixteen years of age, was convicted of possession of stolen property and sentenced to one year in prison. At the age of seventeen, he was convicted of breaking and entering theft and sentenced to eight years in prison. Looking at the version of the FJDA in effect at that time, the court found that because neither of the offenses were committed when he was under the age of sixteen, he was not entitled as a matter of law to treatment as a juvenile. Since it was not clear that the acts would be required to be treated as delinquency based on the applicant's age, the BIA went on to examine the nature of the offenses to see how comparable federal offenses in the U.S. Code (or if an equivalent crime is not found there, in the District of Columbia Code) would have been treated under the

FJDA.[72] Finding that respondent's offenses most closely resembled second degree burglary and receiving stolen property in the District of Columbia Code, both of which have a maximum penalty of 10 years of imprisonment or longer, the BIA determined that he would not, as a matter of law, have been entitled to treatment in delinquency under U.S. standards.[73] Because the offenses were analogous to crimes under U.S. law that were not entitled to mandatory treatment as delinquency, the BIA held that it was incumbent upon the applicant to establish that his case was in fact dealt with as delinquency in Cuba under a system of treatment similar to the FJDA. Since he could not establish that he was treated as a juvenile delinquent under a system comparable to the FJDA, his offenses were considered to be criminal convictions.

In an older case, the BIA similarly considered not only whether the person could properly be treated as a juvenile delinquent under U.S. law, but also under the law of the foreign country.[74] While the law of the foreign country is not the governing federal standard, it is an additional factor that the courts and adjudicators may consider when the foreign conduct would not be required to be treated as delinquency under federal law. For that reason, advocates should not only carefully analyze how the conduct at issue would be treated under the FJDA, but also the juvenile/criminal standards of the foreign country and compare it to the FJDA. Keep in mind that the FJDA has been amended since it was considered in *Matter of Ramirez-Rivero* and *Matter of De La Nues* and is no longer as favorable to young offenders.

Summary of Analysis of Foreign Conviction as a Minor Under BIA Case Law



E. Uncharged Juvenile Conduct

For purposes of conduct for which the person was never arrested or even charged, case law does not explicitly address what standard governs as to whether it is properly considered criminal or juvenile in nature. Very little case law exists on this subject. There are some guidelines, however, that can be discerned.

Foreign Uncharged Conduct. As discussed in the previous section, since foreign conduct at issue must be for something that is deemed criminal by U.S. standards and the FJDA is the governing standard for analyzing foreign convictions resulting when the person was a minor, the appropriate standard here should similarly be the FJDA. Advocates should, therefore, analyze whether the person's unarrested or uncharged conduct would be properly treated as delinquency under the FJDA, as described above.

> **Example:** Your client Ronaldo informs you that when he was eleven, he was forced by a drug cartel to carry a backpack containing drugs from one point in the city to another on various occasions. He was never arrested for this conduct. Would this conduct be treated as delinquency or criminal?
>
> Using the FJDA as the governing standard, since Ronaldo was under the age of thirteen at the time of the conduct, he could not have been transferred for adult proceedings, and thus this conduct would be required to be treated as delinquency, so any admission to the conduct would not support a finding of admitting to a controlled substance offense. This conduct could still be problematic under the conduct-based "reason to believe drug trafficker" ground.

Domestic Uncharged Conduct. The governing standard for analyzing conduct occurring in the United States for which a person has not been arrested or been adjudicated/convicted is less clear. The author has only been able to locate one case that confronts the issue of uncharged juvenile conduct occurring in the U.S. In *Matter of F-*, the respondent, upon seeking admission at a border crossing, admitted to the customs officer that he had previously entered the country by making a false statement.[75] Although the BIA was unable to find that he had formally admitted the elements of the crime of perjury due to the absence of sufficient evidence in the record, it held that, regardless, since he was a minor at the time and the FJDA defined his conduct as an act of juvenile delinquency, it was not a crime and did not render him inadmissible.[76]

While this case seems to indicate that the FJDA may be the governing standard, advocates should be aware that this case involved an admission of lying under oath to a federal officer and therefore, jurisdiction of this offense may have been with the federal courts. For that reason, the FJDA may have been applied in this context to determine whether the act constituted delinquency or a crime. This case does not address the issue of a crime that may be within the exclusive jurisdiction of a state court.

While not directly addressing this issue, the BIA in *Matter of M-U-*, dealt with an adult admission of a previous offense committed while the person was a minor, and applied the state law where the conduct occurred.[77] In that case, the respondent testified in open court that he committed the crime of theft prior to his entry. He had been arrested, charged, and had his case adjudicated in what he believed to be a reform school for boys under the age of twenty-one. While the BIA merely sought to determine the nature of this adjudication, and did not begin from an analysis of the conduct itself, it did analyze the conduct under the state laws in effect at the time of the offense since the juvenile record could not be obtained. It concluded that, "Since the respondent was only about 15 years of age at the time of the theft, at most, he could only have been found guilty of an act

of juvenile delinquency."[78]

There are also several Circuit Court decisions that have rejected the FJDA as the governing standard when considering whether adult convictions occurring in state courts and resulting from conduct committed while the person was a minor should be properly deemed a conviction for immigration purposes.[79] These cases hold that state treatment of the youth controls. A driving rationale in these cases is that immigration courts do not want to second guess or reevaluate the judgments of the state courts to treat persons as adults as opposed to juveniles. (For a discussion on this theory, see **subsection F(3)** below).

In order to advocate for the FJDA as the standard in domestic conduct, this line of cases could be distinguished on the basis that they deal with state convictions and not mere conduct, and that in analyzing conduct as opposed to convictions, no second guessing of state court judgments is involved. It can also be argued that because there is a need for uniformity in the administration of federal immigration laws, the FJDA should be the governing standard.

Since there is no clear standard in this area, advocates may want to evaluate how the underlying conduct would be treated under the state law where the conduct occurred, as well as under the FJDA. Advocates should be aware that different states have different standards to determine when a youth can be charged as an adult and that state laws can be much less stringent than federal law for when a youth can be tried as an adult.

> **Example**: Your client Antonio was trespassing with some friends in a schoolyard after hours when he was 15. They saw headlights and a person identified himself as a police officer, walked towards the group, and ordered them to stay where they were. Antonio ran and got away. Will this conduct be treated as delinquency or criminal? Must Antonio answer "yes" to the question asking about commission of "a crime of any kind"?
>
> Advocates should look to both the FJDA and the law in the state where this conduct occurred to evaluate whether this would be required to be handled in delinquency. Under the FJDA, and likely under the relevant state law as well, this conduct would be required to be handled in delinquency proceedings. Thus, Antonio has not committed a "crime of any kind," since at most this act would constitute delinquency, and he need not answer "yes" to the question on the I-485.

F. What Defenses Exist for Youth who are Convicted of or Admit to Committing Adult Offenses?

PRACTICE TIP: Always screen for possible citizenship! Some people who believe that they are undocumented in fact may be U.S. citizens. You must screen for this possibility, as citizenship is the best defense against deportation! If your client turns out to be a U.S. citizen, then they cannot be deported despite adult criminal convictions. Further, if your minor client is an LPR and has a parent who is eligible to naturalize, they may be able to automatically derive citizenship when the parent naturalizes. For more information about acquisition and derivation of citizenship, see ILRC, *Acquisition & Derivation Quick Reference Charts* (Feb. 26, 2020), https://www.ilrc.org/acquisition-derivation-quick-reference-charts.

Minors who are tried as adults, those who have committed acts as juveniles which would have faced treatment in adult court, or those who have just become adults and enter the adult criminal legal system may face devastating immigration consequences. Importantly, however, even if a youth is convicted as an adult or admits committing all the elements of an offense that would be chargeable in adult court under federal law, arguments may remain that the offense does not trigger removal, e.g., is not a crime of moral turpitude or controlled substance offense.

While the analysis of the immigration consequences of crimes is beyond the scope of this advisory, practitioners should be aware that there are several defenses that may assist youth clients. This section just summarizes some of those defenses and is not meant to be an exhaustive discussion. Advocates should consult immigration consequences of crimes expert whenever dealing with a criminal conviction or conduct that may be considered adult criminal conduct as the analysis is complicated. Visit www.ilrc.org/crimes for further information.

1. Exceptions for Youth Convicted as Adults of Crimes Involving Moral Turpitude

A noncitizen who has been *convicted* of or admits to commission of a crime involving moral turpitude (CIMT) at any time may be inadmissible. Importantly, advocates should remember that these provisions do not apply to acts of delinquency, but only crimes committed by youth. Crimes involving moral turpitude is a vaguely defined term that is dependent upon the elements of the offense and case law of the Board of Immigration Appeals and the federal court of appeals with jurisdiction. Typically it includes offenses containing an element of: fraud, theft with intent to permanently or substantially deprive, threat or use of force with intent to cause great bodily harm or with a deadly weapon; some offenses with lewd or sexual intent; and some more serious offenses that involve recklessness.[80]

Two rules help young persons who were convicted of a crime involving moral turpitude in adult proceedings and need to overcome the grounds of inadmissibility. One exception is called the "**youthful offender exception**" (not to be confused with youthful offender statutes described previously; they are not explicitly related.) This exception provides that a person is not inadmissible under the moral turpitude ground who committed only one moral turpitude offense while under the age of eighteen, if the commission of the offense and the release from any resulting imprisonment occurred over five years before the current application.[81] The automatic exception provides no limit on the seriousness of the offense or the sentence, so technically any offense is considered within the exception. Because this exception is not available until at least five years have passed since the offense, this would only assist individuals who are applying for relief after this time has elapsed.

Another rule that assists any individual with a conviction for a crime involving moral turpitude is the "**petty offense exception**." This exception provides that any person is automatically not inadmissible if they meet three requirements:

- The person only committed one crime involving moral turpitude (ever);
- The person must not have been "sentenced to a term of imprisonment in excess of six months" (sentenced defined as time ordered to be served in jail or prison and not on probation); and
- The offense must have a maximum possible sentence of one year.[82]

2. Procedural Requirements for an Effective "Admission"

A noncitizen who is convicted of "or who admits having committed, or who admits committing acts which constitute the essential elements" of a crime involving moral turpitude or any offense relating to controlled substances is inadmissible.[83] Thus a qualifying "admission" of a crime involving moral turpitude or controlled substance offense, or all of the elements of such an offense, will cause a noncitizen to be inadmissible even if there is no conviction.

Procedural Requirements for an Effective "Admission." Strict rules control what kinds of statements by a noncitizen constitute an "admission" of a controlled substance or moral turpitude offense[84] triggering inadmissibility. Failure to conform to these requirements can cause an admission to have no immigration effect.

First, the conduct must be a crime under the laws of the place where it was allegedly committed.[85] The admission must be to all elements of the offense.[86] Partial admissions will not suffice, such as an admission to possession of a controlled substance but not to criminal intent if the law at issue requires criminal intent. General admissions to broad statutes and/or statutes containing multiple offenses will not qualify. If the noncitizen does not admit sufficient facts, DHS or consular officials cannot use inferences.[87]

Second, the DHS or consular official must provide the noncitizen with an understandable definition of the elements of the crime at issue.[88] This "informed admissions" rule is to ensure that noncitizens receive "fair play."[89]

Third, the noncitizen's admission must be free and voluntary.[90]

Counsel should guard against formal admissions to a judge or other official of a crime that is not resolved in court proceedings. Advocates should also pay close attention to whether any information provided by a client encompasses all essential elements of an offense. If the client has only admitted to some of the "essential" elements of criminal conduct, or is unsure about any of them, the elements of a formal admission are not present, and the individual has not "knowingly" committed the offense.

> **Example**: Sandra is a 17-year-old living in San Diego, California. As you are completing the I-485 and come to the question asking about commission of "a crime of any kind," she informs you that she tried meth once at a party in high school but was never arrested. Must she answer "yes" to this question on the I-485? What about the question asking about violating "a controlled substance law or regulation"?
>
> It is the ILRC's position that there are legal arguments that support answering "no" in this instance. Disclosing one-time use of a controlled substance does not amount to an admission to all of the essential elements of a crime, which should be the standard in order to be required to answer "yes" to this question. Moreover, even if Sandra did admit to all of the essential elements of a criminal violation, if the offense would be required to be handled in delinquency proceedings under state and federal law (as it would be here), at most Sandra would be admitting to an act of delinquency rather than a crime, and thus you could argue that she is not inadmissible for this conduct.

3. Youth Convicted as Adults: Is It Authorized Under FJDA?

A caveat to the general rule that juvenile acts are not crimes is the case in which juvenile cases are transferred to adult (criminal) court. Certain juvenile prosecutions may be transferred to adult court. For example, as discussed in **Section V.C**, youth who are age sixteen or older and commit certain enumerated offenses are mandatorily subject to transfer to adult court under the FJDA. **Youth who are tried and convicted in adult court will generally be deemed to have convictions under immigration law**, which may trigger the criminal grounds of removal and mandatory bars to immigration relief.

Even if a youth is in fact transferred to an adult criminal court (either state or federal) for acts committed while under the age of majority, there is an argument that the resulting federal or state court conviction should not be considered a "conviction" for immigration purposes, but rather a delinquency adjudication, *unless* such transfer would have been allowed under the FJDA.

Pleas in the federal criminal legal system, if they would not have warranted transfer in the first place, have the strongest argument that they are not criminal convictions for immigration purposes. Unfortunately, the law is less clear for analogous transfers in the state system. The First, Second, Ninth, and Eleventh Circuits have either rejected or failed to consider the argument in this context.[91] Nevertheless, counsel may be able to distinguish these cases and argue that a plea that would not have warranted a transfer in the first instance should not be considered a conviction for immigration purposes because Congress did not intend it to be a conviction in light of 18 U.S.C. § 5032. Moreover, advocates could argue that calling for uniform treatment, similar occurrences in state court should also not qualify as convictions under equal protection grounds. For more discussion on this defense see Chapter 17 of ILRC's manual, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth* (ILRC 2018).

4. Other Arguments

Although many crimes for which youth are either convicted as adults or are eligible for adult prosecution do constitute CIMTs or controlled substance related offenses (CSO), arguments may exist that this is not the case. Some inquiries that should be made with the assistance of an immigration consequences of crimes expert include:

- Does the offense really meet the definition under immigration law of a CIMT or CSO?
- Does the record of conviction contain sufficient information to establish that the person is removable for a CIMT or CSO? E.g., does the record indicate the drug involved in the offense?
- Even if it is a CIMT or CSO, do any exceptions apply? See, e.g., Petty Offense Exception for CIMTs discussed above.
- Is there a waiver of the ground and if so, is the person eligible? See, e.g., INA § 212(h) waiver for possession of thirty grams or less or marijuana, and INA § 240A(a)(1) for cancellation of removal for permanent residents.

Many resources exist on the immigration consequences of crimes including technical assistance and regional and national manuals. Visit www.ilrc.org/crimes for further information.

End Notes

[1] See 18 U.S.C. § 5031.
[2] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).
[3] *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005).
[4] *Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000), *citing, e.g., Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981), *Matter of C. M.*, 5 I&N Dec. 27 (BIA 1953).
[5] *Matter of Devison*, 22 I&N Dec. 1362, 1366 (BIA 2000).
[6] For example, a conviction is required to come within INA § 237(a)(2)(A)(i) (conviction for crime involving moral turpitude committed within five years of admission renders individual deportable); INA § 237(a)(2)(A)(iii) (conviction of an aggravated felony after admission renders individual deportable); INA § 237(a)(2)(C) (convictions for certain firearm offenses renders individual deportable); INA § 237(a)(2)(E) (convictions for crimes of domestic violence, stalking, or child abuse renders individual deportable).
[7] *See* **Section V.F(2)** for a discussion of what is legally required for a client to make a formal "admission."
[8] INA § 212(a)(2)(A)(i).
[9] 2 I&N Dec. 92 (BIA 1944). But see *U.S. v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997) (without discussion of issue of juvenile delinquency, finding that juvenile's guilty plea in adult criminal proceedings constituted an admission, regardless of whether adult criminal court prosecution was ineffective due to defendant's minority status). This case can be distinguished on the basis that the youth's case was handled in adult criminal proceedings and neither the parties nor the court raised cases holding that if the conduct required mandatory delinquency treatment, at most the admission should be construed to be one of delinquency and not crime.
[10] The BIA has also held that when a plea of guilty results in something less than a conviction, the plea, on its own, is not tantamount to admission of commission of a crime. *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980). (Although *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), modified *Matter of Seda*'s holding as to what constitutes a conviction for purposes of immigration law, the *Seda* holding regarding the significance of a plea that results in less than a conviction remains good law.) Because juvenile delinquency adjudications are considered less than a conviction for immigration purposes, even when a youth pleads guilty to an offense, any admissions of conduct underlying that guilty plea cannot, without more, be considered to constitute an admission triggering immigration consequences.
[11] *Compare* INA § 212(a)(2)(A)(i)(II) *with* INA § 212(a)(2)(A)(i)(I) (using same language regarding admissions).
[12] For further discussion of how to analyze whether unarrested or uncharged conduct – committed in the U.S. or abroad – would be treated as delinquency, see **Section V**.
[13] *See* State Assembl. 64, 2017 Leg., Reg. Sess. (Cal. 2017).
[14] *See, e.g.*, *Rice v. Holder*, 597 F.3d 952, 956 (9th Cir. 2010) (holding that use, under the influence are not federal offenses), *overturned on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (noting that being under the influence is not a possession offense or a lesser included offense to possession). *See also Hernandez-Munoz v. Sessions*, 718 Fed. App'x. 511 (9th Cir. Nov. 6, 2017) (unpublished) (holding that an applicant for adjustment who admitted to having used marijuana on several occasions was not inadmissible for having admitted the elements of the federal offense of possession, citing cases holding that use of a drug is at most circumstantial evidence of possession).
[15] *See Hernandez-Munoz,* 718 Fed. App'x. at 511*,* where, based on the language of the inadmissibility ground, the court dismissed the government's argument that the admission imposed a burden on the applicant to prove that he had not possessed marijuana.
[16] Some forms of relief, like asylum, also have conduct-based bars. Those are not addressed here.
[17] *See* INA § 212(d)(14); INA § 212(d)(13).
[18] INA § 212(a)(1)(A)(iii) (inadmissibility ground); INA § 237(a)(2)(B)(ii) (deportation ground).
[19] See Centers for Disease Control and Prevention, *Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-related Disorders for Panel Physicians*, https://www.cdc.gov/immigrantrefugeehealth/exams/ti/panel/mental-panel-technical-instructions.html (last updated Aug. 25, 2017).
[20] *See Matter of FSC*, 8 I & N Dec. 108 (BIA 1958) (a noncitizen's admission of addiction was held to be insufficient when contradicted by two physician's opinions and repudiated by the noncitizen).
[21] These instructions can be obtained at https://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/mental-civil-technical-instructions.html.
[22] INA § 237(a)(2)(E)(ii).
[23] INA § 212(a)(2)(D)(i).
[24] *Matter of R-M-*, 7 I & N Dec. 392 (BIA 1957).

[25] *Matter of Gonzalez-Zoquiapan*, 24 I & N Dec. 549 (BIA 2008); *Matter of T-*, 6 I & N Dec. 474 (BIA 1955).
[26] *Id.*; *see also* State Department regulations at 22 CFR § 40.24(b) which define prostitution as "engaging in promiscuous sexual intercourse for hire … that must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts."
[27] *Matter of Gonzalez-Zoquiapan*, 24 I & N Dec. 549; *see also Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006) (holding that prostitution for immigration purposes only encompasses offering sexual intercourse for a fee, as opposed to other sexual conduct).
[28] INA § 212(a)(6)(C); INA § 237(a)(3)(D).
[29] *See* INA § 212(a)(6)(C)(ii)(II); INA § 237(a)(3)(D)(ii).
[30] For example, INA § 245(a) provides that status "may" be adjusted, not that it "shall" or "must" be adjusted.
[31] This bar applies to people who have "committed an act of juvenile delinquency which if committed by an adult would be classified as— ''(A) a felony crime of violence that has an element the use or attempted use of physical force against another individual, or ''(B) a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense.'' See IIRIRA § 383 (amending the Immigration Act of 1990 § 301(e)(3) (8 U.S.C. § 1255a note)).
[32] See Immigration Act of 1990 § 301 (amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1992, Pub. Law No. 102-232). Relief in the form of Family Unity may still be available to some because of ongoing adjudication of certain classes of cases, as well as ongoing eligibility for some persons who have not yet become permanent residents through their legalized family member.
[33] INA §§ 204(a)(1)(A)(viii); (B)(i)(I)(I).
[34] Even if the prior delinquency contact was not raised at the time the lawful permanent resident (LPR) re-entered the country, if the person was actually inadmissible when they re-entered, this could later become an issue if they apply to naturalize because INA § 237(a)(1)(A) says that anyone who was inadmissible at the time of entry or adjustment of status is deportable. For this reason, an LPR who may come within the exceptions listed in INA § 101(a)(13)(C) and who is arguably inadmissible should not travel.
[35] For state-by-state information on cannabis laws, see, e.g. Legal Medical States and DC, https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Feb. 24, 2020).
[36] *See* USCIS, *Policy Alert: Controlled Substance Determinations and Naturalization* (April 19, 2019) at https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf; 12 USCIS-PM 5(C).
[37] A noncitizen is not deportable, is not barred from establishing good moral character, and might be eligible for a discretionary waiver of inadmissibility, if they admitted or were convicted of just one incident that involved possession for personal use of 30 grams or less marijuana. See INA §§ 237(a)(2)(xx), 101(f), and 212(h), respectively. Note that drug possession while under the age of 18 arguably is not a "crime," so that this conduct should not even need to take advantage of these special provisions.
[38] *Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000).
[39] INA § 212(a)(2)(A)(ii).
[40] See *Matter of M-U-,* 2 I&N Dec. 92, 93 (BIA 1944) (discussing that where respondent was unsure about the nature of his prior petty theft adjudication, since it was not chargeable in adult court under state law it must have been an act of juvenile delinquency); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981) (finding that where the conduct underlying a foreign conviction is under no circumstances chargeable in adult court under an analogous federal statute, it will not constitute a criminal conviction for immigration purposes); *Matter of De La Nues*, 18 I&N Dec. 140, 142 (BIA 1981) (holding that where a foreign offense might or might not have been transferred to adult court under the Federal Juvenile Delinquency Act, it must be treated as an adult conviction in the foreign jurisdiction in order to be held as a criminal conviction for immigration purposes).
[41] *Matter of Devison*, 22 I&N Dec. at 1365.
[42] *Id.* at 1372 (citing *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)).
[43] *Id.* at 1366-67.
[44] *Uritsky v. Gonzales*, 399 F.3d 728, 734 (6th Cir. 2005) (citing *Devison,* 22 I&N at 1371-72).
[45] *Hanna v. Holder*, 740 F.3d 379, 391-392 (6th Cir. 2014).
[46] 252 Fed. Appx. 473 (3rd Cir. 2007) (unpublished).
[47] *Id.* at 477.
[48] *Id.* In *Dung Phan v. Holder*, the United States District Court for the Eastern District of Virginia held that an adjudication under the DCYRA was a conviction under the INA and accordingly upheld USCIS's denial of naturalization because his conviction was an aggravated felony that barred him from establishing good moral character. *Dung Phan v. Holder*, 722 F.Supp.2d 659, 663 (E.D. Va. June 29, 2010).

[49] Note that in *Cole v. U.S. Att'y Gen.*, the Eleventh Circuit held that the respondent's conviction in criminal court pursuant to the South Carolina Youthful Offender Act (SCYOA) constituted a conviction for immigration purposes by looking at the definition of conviction in 8 U.S.C. 1101(a)(48)(a), and did not engage in the analysis set forth in *Matter of Devison*. *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 526 (11th Cir. 2013).
[50] *See, e.g. Matter of V-X-*, 26 I&N Dec. 147, 152 (BIA 2013).
[51] *Matter of Devison*, 22 I&N Dec. 1362, 1366 (BIA 2000).
[52] Charles Doyle, Cong. Research Serv., RL30822, *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters in Short* 2 (Nov. 1, 2018).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 98 Stat. 2027, 2014 (1984).
[58] 18 U.S.C. § 5031.
[59] 18 U.S.C. § 5032.
[60] The statutory definition also includes a felony "that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense…" See 18 U.S.C. § 5032 ¶ 4, quoted at next footnote. However, the Supreme Court has struck down this language in other statutes as being void for vagueness, so it should not apply here. See *Sessions v. Dimaya,* 138 S.Ct. 120 (2018); *Johnson v. United States*, 135 S.Ct. 2551 (2015).
[61] 18 U.S.C. § 5032 ¶ 4. ". . . [A] juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32 [relating to the destruction of aircraft and aircraft facilities], 81 [relating to arson in the special maritime and territorial jurisdiction of the United States], 844(d), (e), (f), (h), (i) [relating to various explosives offenses] or 2275 [relating to arson on ships of American registry] of this title, subsection (b)(1) (A), (B), or (C), (d), or (e) of section 401 of the Controlled Substances Act [relating to illicit drug trafficking, or section 1002(a), 1003, 1009, or 1010(b) (1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 959, 960(b) (1), (2), (3)) [relating to illicit drug smuggling], and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution."
[62] 18 U.S.C. § 5032 ¶4.
[63] Under federal statute, a felony is defined as an offense for which a sentence in excess of one year may be imposed. 18 U.S.C. § 3559(a)(5). If the maximum is one year in custody, the offense is defined as a misdemeanor. 18 U.S.C. § 3559(a)(6).
[64] These are an offense "described in" 21 U.S.C. § 841 (manufacture, distribution, or possession with intent to distribute a controlled or counterfeit substance), 21 U.S.C. § 952(a) (importation of controlled substances or narcotic drugs but not others), 21 U.S.C. § 955 (possession of certain undeclared controlled substances or narcotic drugs on vessels or aircraft arriving in United States), 21 U.S.C. § 959 (manufacture or distribution of certain chemicals with knowledge or intent that they be illegally imported into the United States).
[65] These are 18 U.S.C. § 922(x) (sale or transfer of handgun or handgun ammunition to juvenile; knowing possession by juvenile of handgun or handgun ammunition), 18 U.S.C. § 924(b) (transportation or receipt of firearm or ammunition in interstate or foreign commerce with intent or knowledge that it will be used to commit a felony), 18 U.S.C. § 924(g) (interstate or foreign travel to attempt to obtain a firearm with intent to commit RICO offense, crime of violence, or any state or federal controlled substance offense), and 18 U.S.C. § 924(h)(transfer of firearm with knowledge it will be used to commit a crime of violence or drug trafficking offense).
[66] Transfer is allowed if the offense is a crime of violence under 18 U.S.C. § 113(a) (presumably this refers to assault with intent to commit murder, sexual abuse, or aggravated sexual abuse, currently under § 113(a)(1), as listed under prior statutory numbering system), § 113(b) (presumably this refers to assault with intent to commit any felony, currently under §113(a)(2), as listed under prior statutory numbering system), § 113(c) (presumably this refers to assault with a dangerous weapon, with intent to do bodily harm, currently under § 113(a)(3), under prior statutory numbering system), § 1111 (first- and second-degree murder), and § 1113 (attempt to commit murder or manslaughter).
[67] These are an offense described in 18 U.S.C. § 2111 (robbery and attempted robbery), § 2113 (bank robbery and attempted robbery), § 2241(a) (aggravated sexual abuse by force or threat), or § 2241(c) (child sexual abuse).
[68] *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978) (citing 37 Op. Att'y Gen. 293 (1933)).
[69] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) (holding that since the juvenile's foreign crime could not be transferred to adult court under the FJDA, it will not be considered a conviction for immigration purposes regardless of how the foreign country treated it); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) (finding that foreign offense which might or might not be transferred

to adult court under FJDA must be treated as adult conviction by foreign jurisdiction in order to be held a conviction for immigration purposes). See also *Matter of O'N–-,* 2 I&N Dec. 319 (BIA 1945) (holding that even though the person was not tried as a juvenile offender in Canada because a juvenile court had not been set up in the locality where it was committed, the offense should not be considered a conviction because under prevailing norms in most states in the United States, as well as under the FJDA, the person would have been treated as a juvenile delinquent and under the substantive law of the foreign country, his offense constituted delinquency rather than crime).

[70] *Matter of Ramirez-Rivero*, 18 I&N Dec. at 137.

[71] *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981).

[72] *Id.* at 143.

[73] *Id.*

[74] *Matter of O'N–-,* 2 I&N Dec. at 319.

[75] *Matter of F*, 4 I&N Dec. 726, 728 (1952). *See also*, *Matter of M-U-*, 2 I&N Dec. 92 (1944), which does not appear to directly address the issue, as although it dealt with formal admission of a previous offense, the respondent had been arrested, charged, and had his case adjudicated; thus, the BIA merely sought to determine the nature of this adjudication, and did not begin from an analysis of the conduct itself.

[76] At the time, federal law defined "juvenile delinquency" as "an offense against the law of the United States committed by a juvenile and not punishable by death or life imprisonment." *Matter of F*, 4 I&N Dec. at 728.

[77] *Matter of M-U-*, 2 I&N Dec. at 92.

[78] *Id.* at 93.

[79] *Rangel-Zuazo v. Holder*, 678 F.3d 967 (9th Cir. 2012) (citing *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 922-23 (9th Cir. 2007) (finding that state court conviction as an adult for voluntary manslaughter committed when the petitioner was sixteen constituted a conviction for purposes of immigration law without analyzing either the FJDA argument, or the fact that because of his age and the nature of the offense petitioner would not have benefited from it in any event. Instead the Court found that the adjudication by the state court, in either juvenile or adult proceedings, controls in immigration proceedings.); *Singh v. US Attorney Gen.*, 561 F.3d 1275 (11th Cir. 2009) (finding that a Florida conviction, in adult court, of defendant who was a juvenile at the time the offense was committed is still a "conviction" for immigration purposes, even though the defendant could not have been tried as an adult under the FJDA); *Savchuck v. Mukasey*, 518 F.3d 119 (2d Cir. 2008) (holding that New York grand larceny conviction committed while the noncitizen was under the age of eighteen was a conviction and rejected the FJDA argument because there is no support in the INA for such an interpretation); *Vieira Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (holding that Rhode Island state court conviction for an offense committed when the person was nearly eighteen years old constituted a conviction for purposes of immigration law, and the fact that he might have been treated as a juvenile under federal law was not a violation of his right to equal protection).

[80] For further information on Crimes Involving Moral Turpitude, see *Inadmissibility & Deportability* (ILRC 2019), https://www.ilrc.org/inadmissibility-deportability.

[81] INA § 212(a)(2)(A)(ii)(I).

[82] INA § 212(a)(2)(A)(ii)(II).

[83] INA § 212(a)(2)(A)(i).

[84] Note that most of the cases cited in this section involve formal admissions of crimes involving moral turpitude, not controlled substance offenses. Before 1990, only formal admissions relating to crimes involving moral turpitude carried immigration penalties, so earlier case law dealt only with that issue. As a matter of statutory construction, the same rules developed by moral turpitude case law should apply to controlled substances, which simply were added as the category second to moral turpitude offenses in the "formal admission" section at INA § 212(a)(2)(A)(i)(II).

[85] *Matter of R-*, 1 I&N Dec. 118 (BIA 1941) (fraud in itself not a crime); *Matter of M-*, 1 I&N Dec. 229 (BIA 1942) (remarriage not punishable as bigamy).

[86] *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). *See also* 8-USCIS-PM B.11(D)(2), n. 8 (noting that USCIS does not consider an acknowledgement to a civil surgeon or panel physician of drug use to be a valid admission that would make an applicant inadmissible on criminal grounds, but that it could open a line of questioning to determine criminal inadmissibility).

[87] *See generally Matter of G-M-*, 7 I&N Dec. 40, 43 (BIA 1956); *Matter of E-N-*, 7 I&N Dec. 153, 155 (BIA 1956); *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA 1962).

[88] *Matter of K–*, 7 I&N Dec. at 597. *But see Matter of W-*, 5 I&N Dec. 578 (BIA 1953) (holding that the absence of a precise definition of the term "gross indecency" due to the indelicacy of the subject matter did not render the admission inoperative).

[89] *Id.*

[90] *Matter of G-*, 1 I&N Dec. 225 (BIA 1942); *Matter of M-Y C-*, 3 I&N Dec. 76 (BIA 1947).

[91] *Rangel-Zuazo v. Holder*, 678 F.3d 967 (9th Cir. 2012) (citing *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 922-23 (9th Cir. 2007); *Singh v. US Att'y Gen.*, 561 F.3d 1275 (11th Cir. 2009); *Savchuck v. Mukasey*, 518 F.3d 119 (2d Cir. 2008); *Vieira Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001).

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