Order Code RL32480

CRS Report for Congress
Received through the CRS Web

# Immigration Consequences of Criminal Activity

**Updated October 23, 2006**

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AILA InfoNet Doc. No. 06103163. (Posted 10/31/06)

# Immigration Consequences of Criminal Activity

## Summary

Congress has broad plenary authority to determine classes of aliens who may be admitted into the United States and the grounds for which they may be removed. Pursuant to the Immigration and Nationality Act (INA), as amended, certain conduct may either disqualify an alien from entering the United States ("inadmissibility") or provide grounds for his or her removal/deportation. Prominently included among this conduct is criminal activity. "Criminal activity" comprises acts violative of federal, state, or, in many cases, foreign criminal law. It does *not* cover violations of the INA that are not crimes, most notably, being in the U.S. without legal permission. Thus, the term "illegal alien" — an alien without legal status — is not synonymous with "criminal alien."

Most crimes affecting immigration status are not specifically mentioned by the INA, but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*. In addition, certain criminal conduct precludes a finding of *good moral character* under the INA, which is a requirement for naturalization and certain types of immigration relief.

In certain circumstances, grounds for inadmissibility or deportability may be waived. In some cases, aliens facing removal may be allowed to remain in the United States — for example, when they are granted discretionary or mandatory relief from removal for humanitarian reasons, such as through asylum, withholding of removal, or cancellation of removal. Aliens facing removal may also be permitted to depart the United States voluntarily, and thereby avoid the potential stigma and legal consequences of forced removal. Criminal conduct may affect an alien's eligibility for either voluntary departure or discretionary relief from removal. Additionally, criminal conduct is a key disqualifying factor under the character requirement for naturalization.

In the 109th Congress, a few proposals have been made to expand the immigration consequences of criminal activity. Two notable bills would expand the categories of criminal activity serving as grounds for inadmissibility and/or deportation and also make aliens who have committed certain crimes ineligible for certain forms of relief from removal: (1) H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which was introduced by Representative James Sensenbrenner on December 6, 2005, and passed the House as amended on December 16, 2005, by a vote of 239 to 182; and (2) S. 2611, the Comprehensive Immigration Reform Act of 2006, which was introduced by Senator Arlen Specter on April 7, 2006, and passed the Senate as amended on May 25, 2006, by a vote of 62 to 36. This report also briefly discusses the alien-street-gang-related provisions of H.R. 6094, the Community Protection Act of 2006, which was introduced by Representative Sensenbrenner on September 19, 2006, and passed the House on September 21, 2006, by a vote of 328 to 95.

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# Immigration Consequences of Criminal Activity

## Introduction

Congress has broad plenary authority to determine classes of aliens who may be admitted into the United States and the grounds for which they may be removed.[1] Pursuant to the Immigration and Nationality Act (INA),[2] as amended, certain conduct may either disqualify an alien from entering the United States or provide grounds for his or her removal. Prominently included among this conduct is criminal activity.

In general, aliens may legally enter the United States under one of three categories: (1) legal permanent residents (LPRs), who are also commonly referred to as immigrants; (2) nonimmigrants, who are aliens permitted to enter the United States temporarily for a specific purpose, such as for tourism, academic study, or temporary work; and (3) refugees, who are aliens facing persecution abroad and are of special humanitarian concern to the United States. There are two aspects for legal admission under each of these categories. First, an alien must fulfill the substantive requirements for admission under a specified category. For example, in order to enter the United States as a nonimmigrant student, an alien must demonstrate that he is a bona fide student at an approved school.[3] Second, aliens who fulfill substantive requirements for admission may nevertheless be denied admission if they fall within a class of inadmissable aliens listed under INA § 212.[4] Once admitted, aliens remain subject to removal if they fall within a class of deportable aliens listed under INA § 237.[5] The INA contains bars for admission and grounds for deportation based on criminal conduct.[6]

This report discusses the potential immigration consequences of criminal activity. "Criminal activity" generally refers to conduct for which an alien has been found or plead guilty before a court of law, though in limited circumstances consequences may attach to the *commission* of a crime or *admission of acts constituting the essential elements* of a crime. Consequences may flow from violations of either federal, state or, in many circumstances, foreign criminal law.

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[1] For further background on U.S. immigration policy, see CRS Report RS20916: *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

[2] 8 U.S.C. §§ 1101 *et seq.*

[3] INA § 101(a)(15)(F); 8 U.S.C. § 1101(a)(15)(F).

[4] 8 U.S.C. § 1182.

[5] 8 U.S.C. § 1227.

[6] *See* INA §§ 212(a)(2) 237(a)(2); 8 U.S.C. §§ 1182(a)(2), 1227(a)(2).

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Some federal crimes are set out in the INA itself — alien smuggling, for example. However, not all violations of immigration law are crimes. Notably, being in the U.S. without legal permission — i.e., being an "illegal alien" — is *not* a crime in and of itself.[7] Thus, for example, an alien who overstays a student visa may be an "illegal alien," in that the alien may be subject to removal from the U.S., but such an alien is not a "criminal alien."

**Administration of Immigration Law.** For several decades, the primary authority to interpret, implement, and enforce the provisions of the INA was vested with the Attorney General.[8] The Attorney General delegated most authority over immigration matters to two bodies within the Department of Justice (DOJ): the Immigration and Naturalization Service (INS), which was delegated authority over immigration enforcement and service functions, and the Executive Office of Immigration Review (EOIR), which was delegated adjudicatory functions over immigration matters. Following the establishment of the Department of Homeland Security (DHS), the INS was abolished and its functions were transferred to DHS. Pursuant to INA § 103(a)(1), as amended, the DHS Secretary is now "charged with the administration and enforcement of...[the INA] and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the ... [other executive officers and agencies including] the Attorney General...."[9]

Pursuant to INA § 103, as amended, EOIR retains adjudicative authority over immigration matters, and rulings by the Attorney General with respect to questions of immigration law remain controlling upon immigration authorities.[10] However, the precise scope of the Attorney General's continued authority over other immigration matters remains unclear, because most provisions of the INA have not been specifically amended to reflect the transfer of certain immigration functions to DHS.[11] As a result, many of the regulations implemented by DHS and EOIR are presently duplicative or otherwise overlapping.[12] The Homeland Security Act of

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[7] Unlawful presence is only a criminal offense when an alien is found in the United States after having been formally removed or after departing the United States while a removal order was outstanding. INA § 276; 8 U.S.C. § 1326.

[8] Primary authority over immigration matters was transferred from the Department of Labor to the Department of Justice in 1940. Reorg. Plan No. 5 of 1940, 5 Fed. Reg. 2223 (1940).

[9] 8 U.S.C. § 1103(a)(1).

[10] *Id.* at §§ 1103(a)(1), (g).

[11] For further background on the transfer of immigration authority to the DHS, see CRS Report RL31997: *Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues*, by Stephen R. Viña.

[12] According to the DOJ, which issued these regulations just prior to the transfer of certain immigration authority to the DHS, the duplication of regulations was intended "to ensure continuity, even though the Attorney General and Secretary may later amend their respective regulations to further separate the procedures and clarify those sections that affect each agency...[but] the duplication assures that interpretation will be consistent until coordinated decisions are made respecting these procedures." Department of Justice, Final Rule, Aliens

(continued...)

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2002, which established DHS and transferred to it many immigration functions previously conducted by the INS, provided a general guideline that immigration officials to whom immigration functions were transferred "may, for purposes of performing the function, exercise all authorities under any other provisions of law that were available with respect to the performance of that function to the official responsible for the performance of the function immediately before [transfer]."[13] As a practical matter, the DHS has primary day-to-day authority over immigration matters, while the Attorney General and EOIR maintain adjudicatory authority over immigration matters and questions of immigration law.

## Categories of Criminal Aliens

The INA lists a number of criminal grounds for designating an alien as inadmissible or deportable. Most crimes included under these grounds are not specifically mentioned, but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*. In addition, certain criminal conduct precludes a finding of *good moral character* under the INA, thereby preventing an alien from becoming either a naturalized U.S. citizen or a candidate for certain types of relief.

The class of *crimes involving moral turpitude*, the class of *aggravated felonies*, and the class of crimes that preclude a finding of *good moral character* are overlapping, but no two classes are coextensive. The types of crimes constituting *crimes of moral turpitude* are determined by case law. Crimes that are *aggravated felonies* are listed in statute, with case law illuminating the bounds of certain listed crimes. Crimes precluding a finding of *good moral character* are determined by a combination of case law and statutory law. These criminal classes are further modified for the purposes of specific INA provisions.[14] The following sections will describe these criminal categories in more detail.

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[12] (...continued)
and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9825 (Feb. 28, 2003) (codified at 8 C.F.R pts. I, V).

[13] Homeland Security Act of 2002, P.L. 107-296, § 456.

[14] For example, *crimes involving moral turpitude* that may make an alien *inadmissible* include all such crimes other than (1) a single such crime committed by a minor if the crime was committed, and any confinement ended, at least five years before applying for admission or (2) a single misdemeanor for which the term of imprisonment imposed, if any, did not exceed six months. INA § 212(a)(2)(A); 8 U.S.C. § 1182(a)(2)(A). On the other hand, *crimes involving moral turpitude* that may make an alien *deportable* include (1) one conviction of such a crime committed within five years of entry (ten years in the case of a small subcategory of aliens) if the crime is punishable by at least one year's imprisonment, and (2) the conviction of more than one such crime, whenever committed and whatever the potential punishment, if the crimes were not committed in a single scheme of criminal conduct. INA § 237(a)(2)(A); § 8 U.S.C. § 1227(a)(2)(A)

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**Crimes Involving Moral Turpitude.** Immigration law has used the term "moral turpitude" in its criminal grounds for exclusion since 1891.[15] Whether a crime involves moral turpitude has been determined by judicial and administrative case law rather than a statutory definition. In general, if a crime manifests an element of baseness or depravity under current mores — if it evidences an evil or predatory intent — it involves moral turpitude. Thus, certain crimes such as murder, rape, blackmail, and fraud have been considered crimes involving moral turpitude, whereas crimes such as simple assault have not been considered to involve moral turpitude.[16]

**Aggravated Felonies.** Since 1988, Congress has designated specific offenses as aggravated felonies for immigration purposes, and it has made removal of aliens convicted of such crimes a priority through streamlined procedures and ineligibility for various types of relief. Aggravated felonies were initially listed under the INA pursuant to the Anti-Drug Abuse Act of 1988[17] as part of a broad effort to combat narcotics trafficking. The only crimes designated in the 1988 Act were murder, drug trafficking, and illegal trafficking in firearms or destructive devices.[18] Subsequent legislation has expanded the definition of "aggravated felony" a number of times, to include certain categories of crimes and many specific crimes.

Section 101(a)(43) of the INA defines "aggravated felony" through the listing of a number of criminal categories and specified crimes. The broadest categories of aggravated felonies under the INA are:

- any crime of violence (including crimes involving a substantial risk of the use of physical force) for which the term of imprisonment is at least one year;
- any crime of theft (including the receipt of stolen property) or burglary for which the term of imprisonment is at least one year; and
- illegal trafficking in drugs, firearms, or destructive devices.

Many specific crimes are also listed as aggravated felonies under the INA. These include:

- murder;
- rape;
- sexual abuse of a minor;

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[15] Prior to 1891, conviction of a "felonious crime" served as the basis of exclusion. Subsequently, conviction for a "felony or other infamous crime or misdemeanor involving moral turpitude" could constitute grounds for alien exclusion. Act of March 3, 1891, 26 Stat. 1084, ch. 551.

[16] For a more thorough listing of crimes found to involve moral turpitude, see Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425, 431-36 (1986).

[17] P.L. 100-690 (1988).

[18] *See id.* at § 7342.

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- illicit trafficking in a controlled substance, including a federal drug trafficking offense;
- illicit trafficking in a firearm, explosive, or destructive device;
- federal money laundering or engaging in monetary transactions in property derived from specific unlawful activity, if the amount of the funds exceeded $10,000;
- any of various federal firearms or explosives offenses;
- any of various federal offenses relating to a demand for, or receipt of, ransom;
- any of various federal offenses relating to child pornography;
- a federal racketeering offense;
- a federal gambling offense (including the transmission of wagering information in commerce if the offense is a second or subsequent offense) which is punishable by imprisonment of at least a year;
- a federal offense relating to the prostitution business;
- a federal offense relating to peonage, slavery, involuntary servitude, or trafficking in persons;
- any of various offenses relating to espionage, protecting undercover agents, classified information, sabotage, or treason;
- fraud, deceit, or federal tax evasion, if the offense involves more than $10,000;
- alien smuggling, other than a first offense involving the alien's spouse, child, or parent;
- illegal entry or reentry of an alien previously deported on account of committing an aggravated felony;
- an offense relating to falsely making, forging, counterfeiting, mutilating, or altering a passport or immigration document if (1) the term of imprisonment is at least a year and (2) the offense is not a first offense relating to the alien's spouse, parent, or child;
- failure to appear for service of a sentence, if the underlying offense is punishable by imprisonment of at least five years;
- an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers, for which the term of imprisonment is at least one year;
- an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
- an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two years' imprisonment or more may be imposed; and
- an attempt or conspiracy to commit one of the foregoing offenses.

Unless otherwise specified, an aggravated felony includes both state and federal convictions, as well as foreign convictions for which the term of imprisonment was completed less than 15 years earlier.[19]

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[19] INA § 101(a)(43); 8 U.S.C. § 1101(a)(43).

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**Crimes Affecting Assessment of Good Moral Character.** The possession of good moral character appears always to have been a statutory requirement for naturalization,[20] and good moral character now also bears on the eligibility for various forms of immigration relief.[21] Prior to 1952, the effect of criminal conduct upon assessments of good moral character was determined solely by case law and administrative practice. Following the enactment of the INA, certain criminal activities were statutorily designated as barring a finding of good moral character. The activities listed by the INA as prohibiting a finding of good moral character are not exclusive, and engaging in illegal activity that is not specifically designated by the INA may therefore still be considered when assessing character.[22]

Although not every activity listed by the INA as barring a finding of good moral character directly relates to illegal behavior,[23] most do. Pursuant to INA § 101(f), an alien is barred from being found to have good moral character if, during the period for which character is required to be established,[24] the alien:

- commits certain acts related to prostitution or another commercialized vice;
- knowingly encourages, induces, assists, abets, or aids any other alien to enter or to try to enter the United States in violation of law, except in limited circumstances;
- commits a crime of moral turpitude, unless the alien committed only one crime and either (1) the crime was committed while the alien was a minor and the crime (as well as the alien's release from any imprisonment for the crime) occurred at least five years prior to the pertinent application or (2) the maximum possible penalty for the crime did not exceed one year's imprisonment and the sentence imposed did not exceed six months;

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[20] Possession of "good moral character" was a requirement for naturalization under the original U.S. naturalization law. Act of March 26, 1790, 1 Stat 103-104.

[21] For a more detailed discussion of good moral character, see 7 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, 7 IMMIGRATION LAW & PROCEDURE § 95.04[1] (2002) [*hereinafter* "GORDON & MAILMAN"].

[22] *See* 8 C.F.R. § 316.10(a)(2) (stating that naturalization officials "evaluate claims of good moral character on a case-by-case basis taking into account the elements enumerated [under the INA and corresponding regulations] ... and the standards of the average citizen in the community of residence").

[23] For example, an alien determined to be a habitual drunkard is statutorily barred from being considered to possess good moral character. INA § 101(f)(1); 8 U.S.C. § 1101(f)(1).

[24] The INA imposes different requirements on an alien to demonstrate good moral character depending upon what benefit he or she is seeking. For example, most LPRs petitioning for naturalization must have resided in the United States for at least five years and have shown good moral character during this period. INA § 316(a); 8 U.S.C. § 1427(a). For a non-LPR alien to be eligible for cancellation of removal from the United States, he or she must have had a continuous presence in the United States for at least 10 years and good moral character during that period. INA § 240A(b)(1); 8 U.S.C. § 1229b(b)(1).

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- violates a federal, state, or foreign law or regulation relating to a controlled substance, other than a single offense of possessing 30 grams or less of marijuana;
- commits two or more offenses for which the aggregate sentence imposed was at least five years;
- gives false information in attempting to receive a benefit under the INA;
- has an income principally derived from illegal gambling activities;
- commits at least two gambling offenses for which the alien is convicted;
- is in criminal confinement for at least 180 days; or
- has *at any time* been convicted of an aggravated felony.[25]

As previously mentioned, the INA's listing of conduct barring a finding of good moral character is not exclusive, and other activities — criminal or otherwise — may also bar an alien from citizenship or immigration benefits on character grounds. Among potential disqualifying conduct are an alien's deliberate non-support of his or her family, adultery that tended to destroy an existing marriage, and other notorious unlawful conduct.[26] Additionally, crimes committed before the "good moral character" period may be considered.[27]

## Major Immigration Consequences for Criminal Aliens

Certain criminal conduct may have a substantial impact upon an alien's ability to enter or remain in the United States, and it may also affect the availability of discretionary forms of immigration relief and the ability of an alien to become a U.S. citizen. The following sections describe the major immigration consequences for aliens who engage in certain criminal conduct.

**Designation as Inadmissible Alien.** The INA categorizes certain classes of aliens as inadmissible, making them "ineligible to receive visas and ineligible to be admitted to the United States."[28] Aliens who commit certain crimes are designated as inadmissible. Aliens designated as inadmissible include any alien who, *inter alia*:

- has been convicted of, admits having committed, or admits to acts comprising essential elements of a crime involving moral turpitude (other than a purely political offense), unless (1) the alien committed only one crime and (2)(a) the crime was committed when the alien was under the age of 18 and the crime was committed (and any related incarceration ended) more than five years prior to the

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[25] However, a conviction for an aggravated felony before November 29, 1990 (other than for murder) does not automatically preclude a finding of good moral character under INA § 101(f). 8 C.F.R. § 316.60(b)(1).

[26] *Id.* at § 316.60(b)(3). *See generally* GORDON & MAILMAN, *supra* note 21, § 95.04[1][b].

[27] 8 C.F.R. § 316.60(a)(2).

[28] INA § 212(a); 8 U.S.C. § 1182(a).

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application for admission or for a visa or (b) the maximum penalty for the crime at issue did not exceed one year's imprisonment and, if convicted, the alien was not sentenced to more than six months;

- has been convicted of, admits having committed, or admits to acts comprising essential elements of a federal, state, or foreign law violation relating to a controlled substance;
- based on the knowledge or reasonable belief of a consular officer or immigration officer, (1) is or has been an illicit trafficker in a controlled substance, or knowingly is or has been an aider or abettor of a controlled substance, or (2) is the spouse, son, or daughter of an alien inadmissible for the foregoing reasons, and has, within the previous five years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity;
- has been convicted of two or more offenses for which the aggregate sentence imposed was at least five years;
- is coming to the United States to engage in (or within 10 years of applying for admission has engaged in) prostitution (including procurement and receipt of proceeds) or is coming to the United States to engage in another form of unlawful commercialized vice;
- committed a serious crime for which diplomatic immunity or other form of immunity was claimed;
- (1) is listed as a trafficker in persons in a report under the Trafficking Victims Protection Act or is known or reasonably believed to have aided or otherwise furthered severe forms of human trafficking or (2) is known or reasonably believed to be the adult child or spouse of such an alien and knowingly benefitted from the proceeds of illicit activity while an adult;
- based on the knowledge or reasonable belief of a consular officer or immigration officer, is engaging, or seeks to enter the United States to engage, in a federal offense of money laundering, or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in such an offense; or
- based on the knowledge or reasonable belief of a consular officer or immigration officer, seeks to enter the United States to engage in espionage, sabotage, export control violations, unlawful opposition to the government, or other unlawful activity.[29]

Although not expressly listed as such, a conviction for an aggravated felony may also make an alien inadmissible.[30] Other types of unlawful conduct (which may also be covered under criminal grounds) precluding admission include terrorist activities, alien smuggling (with limited exception), immigration document fraud, illegal entry

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[29] INA § 212(a); 8 U.S.C. § 1182(a).

[30] As previously mentioned, a conviction for an aggravated felony bars an alien from being found to have good moral character. Good moral character is a requisite for naturalization. Aliens who are permanently ineligible for citizenship are inadmissible. INA § 212(a)(8); 8 U.S.C. § 1182(a)(8).

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into the United States, unlawful voting, international abduction of a child who is a U.S. citizen, participation in genocide, and severe violations of religious freedom while serving as a foreign government official.

***Waivers.*** Various criminal grounds for inadmissibility are, by their own terms, subject to exception. For example, the crime of moral turpitude category does not cover certain juvenile or minor offenses.[31] Further, even if a crime is covered, most criminal grounds for inadmissibility may nevertheless be waived in a number of circumstances. Authority to waive certain criminal grounds of inadmissibility is contained in INA § 212(h).[32] Criminal grounds for inadmissibility that may be waived are:

- crimes involving moral turpitude;
- a single offense of simple possession of 30 grams or less of marijuana;
- multiple convictions for which at least five year's imprisonment was imposed;
- prostitution or other unlawful commercialized vices; and
- serious criminal activity for which the alien has asserted immunity.

INA § 212(h)(1) establishes that relevant immigration officials have discretion to waive a designation of inadmissibility on account of the foregoing conduct if four requirements are met. These requirements are that:

- the alien is seeking admission as an LPR;
- the conduct making the alien inadmissible either involved prostitution or another unlawful commercial vice or, in the case of other criminal conduct, occurred more than 15 years before the date of the alien's application for a visa, entry or adjustment of status;
- the alien's admission into the United States would not be contrary to the national welfare, safety, or security of the United States; *and*
- the alien has been rehabilitated.[33]

An additional waiver is available for immediate family members under INA § 212(h)(1)(B) if:

- the alien is seeking admission as an LPR;
- the alien is the spouse, parent, son, or daughter of a U.S. citizen or LPR; *and*
- denial of admission would cause extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter.[34]

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[31] INA § 212(a)(2)(A)(ii); 8 U.S.C. § 1182(a)(2)(A)(ii).

[32] 8 U.S.C. § 1182(h).

[33] INA § 212(h)(1)(A); 8 U.S.C. § 1182(h)(1)(A).

[34] 8 U.S.C. § 1182(h)(1)(B).

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A further circumstance where a waiver is available for inadmissible criminal conduct involves alien spouses or children of U.S. citizens or LPRs, when those aliens have been battered or subjected to extreme cruelty by the citizen or LPR.[35]

Certain aliens are barred from consideration for § 212(h) waivers. No waiver is permitted for aliens who have been convicted of murder or criminal acts involving torture, as well as attempts or conspiracies to commit murder or a criminal act involving torture.[36] Further, a waiver under § 212(h) is not available in the case of an alien who has previously been admitted to the United States as an LPR if either (1) since the date of such admission the alien has been convicted of an aggravated felony or (2) the alien has not lawfully resided continuously in the United States for at least seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States.[37]

In addition to § 212(h) waivers, criminal grounds may be waived for aliens seeking temporary admission as nonimmigrants, such as those seeking to enter the United States as tourists.[38] Also, certain permanent residents may seek waivers through cancellation of removal, which will be discussed later.[39]

**Deportation.** The criminal grounds for deportation cover both broad categories and specific crimes. Among those deportable on criminal grounds is any alien who:

- is convicted of a single crime involving moral turpitude that was committed within five years of admission and that is punishable by imprisonment of at least one year;
- is convicted of two or more crimes involving moral turpitude not arising from a single scheme of misconduct;
- is convicted of an aggravated felony at any time after admission into the United States;
- is convicted after admission of any violation of a federal, state, or foreign law or regulation relating to a controlled substance (other than a single offense for possessing 30 grams or less of marijuana for personal use);
- is, or at any time after admission has been, a drug abuser or drug addict;
- is convicted at any time after admission of an offense related to a firearm or destructive device (including unlawful commerce relating to, possession, or use of a firearm or destructive device);

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[35] INA § 212(h)(1)(C); 8 U.S.C. § 1182(h)(1)(C).

[36] 8 U.S.C. § 1182(h).

[37] *Id.*

[38] INA § 212(d)(3); 8 U.S.C. § 1182(d)(3).

[39] *See infra* at 12-13.

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- is convicted at any time of an offense related to espionage, sabotage, or treason or sedition, if the offense is punishable by imprisonment of five years or more;
- is convicted of an offense under the Military Selective Service Act or the Trading with the Enemy Act;
- is convicted of an offense under 18 U.S.C. § 758 (high-speed flight from an immigration checkpoint);
- is convicted of an offense related to launching an expedition against a country with which the United States is at peace;
- is convicted of threatening by mail the President, Vice President, or other officer in the line of presidential succession;
- is convicted at any time after entry of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment; or
- violates a protection order related to violence or harassment.[40]

***Waivers.*** Crimes involving moral turpitude, aggravated felonies, and high-speed flight from an immigration checkpoint may all be automatically waived as grounds for deportability upon the alien receiving a full and unconditional pardon by the President or governor.[41] *Cancellation of removal* as a form of discretionary relief, which is discussed below, and *§ 212(h) waivers of inadmissibility*, which are discussed above, may also be relevant in deportation cases.

**Denial of Discretionary Relief.** In addition to providing for discretionary waivers, the INA provides designated immigration authorities with the power to grant an alien asylum, cancel removal proceedings against him, permit his voluntary departure from the United States, or adjust the alien's status under registry provisions. However, authority to grant these remedies is circumscribed with respect to certain types of criminal aliens.

***Asylum.*** Although asylum is a discretionary remedy for aliens who face persecution, it is unavailable to an alien who (1) "[h]aving been convicted...of a particularly serious crime" (including an aggravated felony[42] or an offense designated by the Attorney General as "particularly serious"), constitutes a danger to the community;" or (2) is reasonably believed to have committed a serious nonpolitical offense outside the United States (including such offenses as may be designated by the Attorney General).[43] Further, an alien who is involved in terrorist activities, is a danger to national security, or has engaged in persecution of any person on account of race, religion, nationality, political opinion or membership in a particular social group is also ineligible for asylum.[44]

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[40] INA § 237(a)(2); 8 U.S.C. § 1227(a)(2).

[41] INA § 237(a)(2)(A)(v); 8 U.S.C. § 1227(a)(2)(A)(v).

[42] For purposes of § 208, an alien who has been convicted of an aggravated felony is considered to have been convicted of a particularly serious crime. INA § 208(b)(2)(B)(i); 8 U.S.C. § 1158(b)(2)(B)(i).

[43] INA § 208(b)(2); 8 U.S.C. § 1158(b)(2).

[44] INA § 208(b)(2); 8 U.S.C. § 1158(b)(2).

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***Withholding of Removal.*** Apart from asylum is the separate remedy of *withholding of removal*. Like asylum, withholding of removal is premised upon a showing of prospective persecution of an alien if removed to a particular country.[45] Withholding of removal differs from asylum in (1) requiring a higher standard of proof; (2) limiting relief to the claimant (as opposed to also including the claimant's spouse and minor children); (3) failing to allow for adjustment to LPR status; and (4) being a mandatory rather than discretionary form of relief for qualifying aliens. Although the remedy of withholding is stated in mandatory terms, otherwise eligible aliens are, with limited exception, disqualified under criminal grounds similar to those that apply to asylum.[46] The primary difference, however, is that not all aggravated felonies automatically bar withholding of removal. Instead, relief is barred only if the alien has been convicted of one or more aggravated felonies for which the aggregate sentence imposed was five years or more.[47]

***Cancellation of Removal.*** In 1996, the INA was amended to combine two types of discretionary relief for long-term alien residents — *"§ 212(c)" relief* for LPRs who had resided in the U.S. for an extended period and *suspension of deportation* for other long-term aliens — into a new remedy called *cancellation of removal*. Cancellation of removal, in turn, maintains some of the distinctions that appeared under the forms of relief that preceded it.

Under provisions corresponding with earlier INA provisions concerning *suspension of deportation*, the Attorney General may cancel the removal of certain otherwise inadmissible or deportable non-LPRs if they have been in the United States continuously for at least 10 years and their removal would result in exceptional and extremely unusual hardship for immediate family members.[48] However, certain criminal activity makes an alien ineligible for cancellation of removal despite whatever roots the alien has established in the United States. Disqualifying criminal activity includes convictions of crimes that preclude a finding of good moral character and crimes that fall within the criminal grounds for inadmissibility or deportation.[49] Civil immigration document fraud also precludes relief.[50] Additionally, "continuous residence" for purposes of qualifying for relief stops on the *commission* of an offense that would render the alien inadmissible.[51]

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[45] *See* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3). *See also* 8 C.F.R. § 208.16.

[46] INA § 241(b)(3)(B); 8 U.S.C. § 1231(b)(3)(B). However, under regulations implementing the United Nations Convention Against Torture, no alien is permitted be removed to a country when it is more likely than not that he would face torture there, regardless of whether he or she would be otherwise ineligible for withholding of removal. 8 C.F.R. §§ 208.16-18, 1208.16-18.

[47] INA § 241(b)(3); 8 U.S.C. § 1231(b)(3).

[48] INA § 240A(b)(1); 8 U.S.C. § 1229b(b)(1).

[49] INA §§ 240A(b)(1)(B)-(C); 8 U.S.C. §§ 1229b(b)(1)(B)-(C).

[50] INA § 240A(b)(1)(C); 8 U.S.C. § 1229b(b)(1)(C).

[51] INA § 240A(d); 8 U.S.C. § 1229b(d).

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Under provisions that correspond to *relief previously available under INA § 212(c)*, the Attorney General may cancel the removal of an alien who has been an LPR for at least five years, if the alien has resided in the United States continuously for at least seven years and has not been convicted of an aggravated felony.[52] Further, "continuous residence" for purposes of qualifying for relief stops upon the *commission* of an offense that would render the alien inadmissible.[53]

***Voluntary Departure.*** Through a grant of voluntary departure, an otherwise deportable alien may depart the United States without the stigma and legal consequences that would attach to a compulsory removal order. There are two standards for voluntary departure, depending on whether permission to leave voluntarily is sought before or after removal proceedings against the alien are completed. If voluntary departure is sought before proceedings are initiated (e.g., upon the alien being arrested by an immigration enforcement officer) or completed, the only criminal disqualification is for conviction of an aggravated felony (terrorist activities are also disqualifying).[54] If voluntary departure is sought after removal proceedings are completed, the alien must not have been convicted of an aggravated felony and must also have been a person of good moral character for at least five years preceding.[55]

***Temporary Protected Status.*** In order to qualify for asylum or withholding of removal, an alien must show that he or she would personally face persecution. Aliens whose lives have been disrupted by generalized violence or natural disaster may not qualify on that basis alone. However, the INA permits temporary haven for nationals of countries that have been designated as experiencing widespread upheaval.[56] At the same time, relief is granted on an individual basis, and an otherwise eligible alien shall be denied protection if he or she is inadmissible on criminal grounds related to (1) crimes involving moral turpitude, (2) multiple criminal convictions, (3) or drug offenses (other than a single offense for possessing 30 grams or less of marijuana).[57] Additional, overlapping categories of aliens who are disqualified from receiving temporary protected status are those who (1) have been convicted of one felony or two or more misdemeanors in the United States or (2) who would be disqualified from asylum due to criminal conduct.[58]

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[52] INA § 240A(a); 8 U.S.C. § 1229b(a).

[53] INA § 240A(d); 8 U.S.C. § 1229b(d).

[54] INA § 240B(a)(1); 8 U.S.C. § 1229c(a)(1).

[55] INA § 240B(b)(1); 8 U.S.C. § 1229c(b)(1).

[56] INA § 244; 8 U.S.C. § 1254a. For further background on the availability of temporary protected status for certain aliens, see CRS Report RS20844: *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[57] INA § 244(c)(2)(A); 8 U.S.C. § 1254a(c)(2)(A).

[58] INA § 244(c)(2)(B); 8 U.S.C. § 1254a(c)(2)(B).

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***Adjustment of Status.*** Under certain circumstances, an alien with nonimmigrant status may adjust to LPR status.[59] Certain aliens without legal status may also adjust if they had a preference petition or labor certification application filed on their behalf as of April 30, 2001, or under certain other circumstances.[60] Otherwise eligible aliens are barred from adjustment if they are inadmissible, including those who are inadmissible on criminal grounds.

***Registry.*** The INA has long contained authority for the adjustment to LPR status for aliens who have lived in the United States for an extended period. Known as the registry provision,[61] this authority now allows for the adjustment of aliens who have lived in the United States since before 1972.[62] However, aliens who are inadmissible on criminal grounds are ineligible for adjustment, as are aliens who lack good moral character.[63]

**Naturalization Restrictions.** An essential requirement for becoming a U.S. citizen through naturalization is that the applicant establish that he or she has been, and continues to be, a person of good moral character.[64] An LPR seeking naturalization is required to maintain good moral character for *at least five years* preceding his or her application for naturalization; five years being the minimum period of time that a person lawfully admitted into the United States must continuously reside in the country before applying for naturalization.[65]

As discussed previously, certain criminal acts may disqualify an alien from being found to possess good moral character.[66] Pursuant to INA § 101(f), certain listed categories of criminal conduct automatically preclude an alien from being found to possess good moral character. This listing is not exclusive, and other conduct — criminal or otherwise — may also prevent a finding of good moral character, including crimes that occur before the statutory period requiring "good moral character" actually begins. For a more detailed discussion of the crimes that preclude a finding of good moral character, refer to the section of this report entitled *Crimes Affecting Assessment of Good Moral Character*.

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[59] INA § 245; 8 U.S.C. § 1255. *See generally* CRS Report RL32235: *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

[60] INA § 245(i)(1); 8 U.S.C. § 1255(i)(1).

[61] A more detailed explanation on the registry provision can be found in CRS Report RL30578: *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by Andorra Bruno.

[62] INA § 249; 8 U.S.C. § 1259.

[63] INA § 249; 8 U.S.C. § 1259.

[64] INA § 316; 8 U.S.C. § 1427.

[65] INA § 316(a); 8 U.S.C. § 1427(a).

[66] *See supra* at 5-7.

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## Recent Legislative Developments

A few proposals have been made in the 109th Congress that would expand the criminal grounds for alien inadmissibility and deportation and deny aliens eligibility for certain forms of relief from removal on account of criminal activity. Two such proposals are: (1) H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which was introduced by Representative James Sensenbrenner on December 6, 2005 and passed the House as amended on December 16, 2005 by a vote of 239-to-182; and (2) S. 2611, the Comprehensive Immigration Reform Act of 2006, which was introduced by Senator Arlen Specter on April 7, 2006 and passed the Senate as amended on May 25, 2006 by a vote of 62-to-36. Among other things, these bills would:

- expand the INA's definition of "aggravated felony" to include (1) the unlawful entry or reentry of an alien for which the term of imprisonment was at least a year; (2) any offense under chapter 75 of title 18, United States Code (concerning immigration document and passport fraud) for which the term of imprisonment is at least one year, except for most first-time offenses committed to assist a family member in violating the INA; and (3) soliciting, aiding, abetting, counseling, commanding, inducing, or procuring the commission of any crime constituting an "aggravated felony" for purposes of the INA (H.R. 4437, S. 2611);
- make a third drunk driving conviction an aggravated felony (S. 2611);
- expressly make inadmissible an alien who commits an aggravated felony at any time (H.R. 4437);
- make inadmissible aliens who have committed certain fraud-related offenses, including those who have (1) falsely claimed U.S. nationality (currently, aliens are inadmissible only if they falsely claim U.S. citizenship, but not U.S. nationality) (H.R. 4437, S. 2611);[67] (2) been convicted of defrauding, attempting to defraud, or conspiring to defraud the Social Security Administration (H.R. 4437); (3) been convicted of committing, attempting to commit, or conspiring to commit identification document-related fraud under 18 U.S.C. § 1028 (H.R. 4437); or (4) unlawfully procured U.S. citizenship (H.R. 4437);
- make inadmissible and deportable aliens who have been convicted of a violation of, or an attempt or a conspiracy to violate, any section of chapter 75 of title 18, United States Code (concerning fraud and misuse related to visas, passports, and other travel and immigration documents) (H.R. 4437, S. 2611);
- make inadmissible aliens who have committed certain domestic violence or child abuse-related offenses (H.R. 4437);
- prohibit refugees and asylees with aggravated felonies from adjusting to permanent resident status (H.R. 4437);

[67] INA § 212(a)(6)(C)(ii); 8 U.S.C. § 1182(a)(6)(C)(ii).

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- make deportable unlawfully present aliens who are either convicted of drunk driving or refuse a Breathalyzer or other test of blood-alcohol content in violation of state law (H.R. 4437);
- make deportable aliens who have (1) unlawfully procured U.S. citizenship (H.R. 4437); (2) been convicted of defrauding, attempting to defraud, or conspiring to defraud the Social Security Administration (H.R. 4437); or (3) been convicted of committing, attempting to commit, or conspiring to commit passport or immigration document-related fraud under chapter 75 of title 18, United States Code (H.R. 4437, S. 2611);
- make aliens who are members of criminal street gangs inadmissible, deportable, and ineligible for TPS (H.R. 4437, S. 2611) as well as ineligible for asylum and withholding of removal (H.R. 4437); and
- clarify that an alien who is convicted of an aggravated felony shall not be considered to have good moral character for naturalization purposes, regardless of whether the crime was classified as an aggravated felony at the time of conviction (H.R. 4437, S. 2611).[68]

Another notable bill that would affect the immigration consequences of criminal activity is H.R. 6094, the Community Protection Act of 2006, which was introduced by Representative Sensenbrenner on September 19, 2006, and passed the House on September 21, 2006, by a vote of 328 to 95. The bill contains provisions relating to alien street gang members that are largely identical to those found in the House-passed H.R. 4437. Each bill would make aliens who are members of criminal street gangs or involved in unlawful gang activities subject to exclusion and removal. Such aliens would also be ineligible for asylum, withholding of removal, or TPS. Further, the bills would provide the Attorney General with authority to designate certain groups as "criminal street gangs" in a manner similar to that used to designate terrorist organizations under INA § 219.

[68] S. 2611 would provide a waiver authority over this provision.

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