

# Checklist of Non-Substantive Offenses

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## Introduction

(A) *Exclusive List Argument.* Crime-related grounds of inadmissibility and deportability do not invariably include non-substantive offenses, such as attempt or conspiracy to commit a listed offense, that can apply to any substantive offense. This gives rise to the argument that when Congress lists some non-substantive offenses, but not others, the unlisted ones do not trigger deportation under that ground. Congress knew how to list them when it wanted to do so, and when it did not list them, it did not include them within the ground of deportation or inadmissibility.

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The maxim of statutory interpretation, “*expressio unius est exclusio alterius*,” means that where a statute lists the items to which it applies, “all omissions should be understood as exclusions.”<sup>1</sup> Therefore, a statutory ground of removal which lists certain non-substantive offenses as triggering the ground of removal will be interpreted as excluding other jurisdictions which are not listed.

When Congress listed certain collateral offenses, i.e., attempt and conspiracy, it omitted others, i.e., accessory after the fact,<sup>2</sup> misprision of a felony,<sup>3</sup> solicitation,<sup>4</sup> and aiding and abetting.<sup>5</sup> Even attempt and conspiracy offenses were not deemed part of the firearms conviction ground of deportation until Congress expressly added them.<sup>6</sup> Therefore, the Board of Immigration Appeals and the federal courts, have often held that when a statute defining a ground of deportation expressly lists certain offenses as coming within the ground of deportation, other similar offenses are excluded and do not trigger deportation.

Congress more frequently included non-substantive offenses in grounds of inadmissibility, but many grounds of deportation do not list any non-substantive offenses and are thus limited to the substantive offenses that are described in the deportation ground.

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<sup>1</sup> N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:23, p. 307 (6th ed. 2002). See *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

<sup>2</sup> E.g., *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997) (aggravated felony drug trafficking ground of deportation lists attempt and conspiracy, but not accessory after the fact).

<sup>3</sup> *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999) (*en banc*) (conviction for misprision of a felony under 18 U.S.C. § 4 (1994) does not constitute a conviction for an aggravated felony under INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S) (Supp. II 1996), as an offense relating to obstruction of justice, distinguishing *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997)).

<sup>4</sup> *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (offer to sell is equivalent to solicitation, which is not listed in aggravated felony statute); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale in violation of Ariz. Rev. Stat. §§ 13-1002(A) & 13-3405(A)(2)(B)(5), did not constitute an aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), or trigger deportation, since the Controlled Substances Act neither mentions solicitation nor contains any broad catch-all provision that could even arguably be read to cover solicitation); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (attempt and conspiracy are listed as deportable controlled substances offenses, but solicitation is not); but see *Matter of Beltran*, 20 I. & N. Dec. 521 (BIA 1992) (solicitation to commit a controlled substances offense falls within the deportation ground as a crime relating to a controlled substance).

<sup>5</sup> But see *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815, 820 (Jan. 17, 2007). (generic definition of ‘theft’ for aggravated felony purposes includes aiding and abetting theft), overruling *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. Jan. 12, 2005), *et al.*

<sup>6</sup> *Matter of Hou*, 20 I. & N. Dec. 513 (BIA 1992) (conspiracy to possess a firearm held not a deportable offense under former INA § 241(a)(2)(C), prior to amendment adding conspiracy and attempt to the firearms ground of deportation); *Drax v. Ashcroft*, 178 F.Supp.2d 296, 307-308 (E.D.N.Y. 2001) (1994 amendment adding attempt and conspiracy to firearms conviction ground of deportation could not be applied retroactively, under the Supreme Court’s analysis in *INS v. St. Cyr*, 533 U.S. 289 (2001)).

(B) *Recent Cases.* There have been a number of cases on non-substantive offenses issued in the past few years – going both ways. Following is a brief description of some of the most significant cases. This case law should be kept in mind when examining the charts below.

(1) *Attempt.* Counsel should keep in mind that different jurisdictions define even common non-substantive offenses, such as attempt, differently. The Ninth Circuit, for example, has recently compared the federal definition of “attempt” with those of New York,<sup>7</sup> California<sup>8</sup> and Arizona.<sup>9</sup> In the case of Arizona, the court found that an Arizona conviction of attempted public indecency to a minor was not necessarily an aggravated felony attempted “sexual abuse of a minor” offense,<sup>10</sup> since the Arizona definition of attempt<sup>11</sup> includes *failure* to act, where the federal definition requires an overt act constituting a substantial step towards the commission of the crime.<sup>12</sup> The Fifth Circuit has also addressed this issue.<sup>13</sup>

(2) *Accessory After the Fact.* While the United States Supreme Court, held that the aggravated felony generic definition of “theft” included not only principals, aiders and abettors, it also strongly suggested that a conviction of accessory after the fact would not be included within the definition of a substantive aggravated felony offense, since neither Federal law, nor the law of the various states, treats such convictions as equivalent to a conviction of a substantive offense.<sup>14</sup> The Ninth Circuit has also found that accessory after the fact does not trigger removal as an aggravated felony,<sup>15</sup> or as a crime involving moral turpitude.<sup>16</sup>

(3) *Aiding and Abetting.* In *Gonzales v. Duenas-Alvarez*, the Supreme Court held that a noncitizen convicted of aiding and abetting should be treated the same, for immigration purposes, as a principal.<sup>17</sup> Other courts are following suit.<sup>18</sup>

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<sup>7</sup> *United States v. Rivera-Ramos*, 578 F.3d 1111 (9<sup>th</sup> Cir. Aug. 21, 2009).

<sup>8</sup> *United States v. Saavedra-Velazquez*, 578 F.3d 1103 (9<sup>th</sup> Cir. Aug. 21, 2009).

<sup>9</sup> *Revilas v. Keisler*, 506 F.3d 1161, 1164 (9<sup>th</sup> Cir. Nov. 2, 2007), amended and superceded, 527 F.3d 783 (9<sup>th</sup> Cir. May 16, 2008) (removing analysis of “attempt” as an issue that no longer needed to be addressed).

<sup>10</sup> INA § 1101(a)(43)(A), (U), 8 U.S.C. §§ 1101(a)(43)(A), (U).

<sup>11</sup> Arizona Revised Statutes § 13-1001.

<sup>12</sup> See *United States v. Morales-Perez*, 467 F.3d 1219, 1222 (9<sup>th</sup> Cir. 2006) (discussing federal definition of attempt).

<sup>13</sup> *United States v. Ellis*, 564 F.3d 370 (5<sup>th</sup> Cir. Mar. 26, 2009).

<sup>14</sup> *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815, 820 (Jan. 17, 2007).

<sup>15</sup> *United States v. Vidal*, 504 F.3d 1072 (9<sup>th</sup> Cir. Oct. 10, 2007) (en banc)

<sup>16</sup> *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9<sup>th</sup> Cir. Sept. 19, 2007) (California conviction for accessory after the fact, in violation of Penal Code § 32, is not a crime of moral turpitude as the minimum conduct required to violate the statute includes acts that are not necessarily “morally shocking,” such a mother providing food to her son, or being accessory after the fact to an offense that is not itself a crime of moral turpitude).

<sup>17</sup> *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815, 820 (Jan. 17, 2007).

<sup>18</sup> See, e.g., *Arteaga v. Mukasey*, 511 F.3d 940 (9<sup>th</sup> Cir. Dec. 27, 2007) (California conviction of unauthorized driving of a vehicle, in violation of Vehicle Code § 10851(a), constitutes an aggravated felony theft offense).

(4) *Misprision of a Felony*. The BIA has recently found that misprision of a felony is categorically a crime of moral turpitude.<sup>19</sup> The reasoning of this case was based, in part, upon a Ninth Circuit decision that was later taken *en banc*, vacated, and reversed.<sup>20</sup> Therefore, at least in the Ninth Circuit, this offense does not categorically constitute a CMT. The Fifth Circuit has also found that misprision of a felony, like accessory after the fact, is a separate offense distinct from, and does not take on the character of, the underlying offense.<sup>21</sup>

(5) *Solicitation*. Solicitation has been the subject of a number of recent cases. In the aggravated felony context, the circuit courts are tending to treat solicitation the same as the principal offense, despite the fact that INA § 101(a)(43)(U) lists only attempt and conspiracy, but does not list solicitation. The Seventh and Ninth Circuits have recently held, in the context of sexually motivated offenses, that solicitation crimes may be considered aggravated felonies.<sup>22</sup> The Ninth Circuit specifically rejected the exclusion argument:

There is no reason to conclude that the existence of subsection (U) forces courts to analyze inchoate offenses only under that provision. Each subsection of § 1101(a)(43) provides an independent basis for determining what qualifies as an aggravated felony. See, e.g., *Leyva-Licea*, 187 F.3d at 1150 (examining whether solicitation to possess marijuana for sale is an aggravated felony under § 1101(a)(43)(B)); *Ramsey v. INS*, 55 F.3d 580, 583 n.5 (11th Cir. 1995) (holding that although § 1101(a)(43)(U) was not added to the statute until after petitioner's conviction, his conviction for attempted lewd assault still was an aggravated felony because it was a “crime of violence” under § 1101(a)(43)(F)). As in *Ramsey*, Prakash's crimes each qualify as a “crime of violence” under subsection 43(F). That they are not covered within subsection 43(U) does not matter, just as it does

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<sup>19</sup> *Matter of Robles*, 24 I. & N. Dec. 22 (BIA 2006) (federal conviction of misprision of a felony, in violation of 18 U.S.C. § 4, was a CMT), overruling *Matter of Sloan*, 12 I. & N. Dec. 840 (BIA/A.G. 1968; BIA 1966).

<sup>20</sup> *Navarro-Lopez v Gonzales*, 455 F.3d 1055 (9th Cir. 2006), opinion vacated following rehearing *en banc*, 503 F.3d 1063 (9th Cir. Sept. 19, 2007).

<sup>21</sup> *Patel v. Mukasey*, 526 F.3d 800 (5<sup>th</sup> Cir. Apr. 29, 2008).

<sup>22</sup> *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. Aug. 26, 2009) (California conviction for violation of Penal Code § 653f(c), solicitation to commit rape by force, and Penal Code § 653f(a), solicitation to commit assault by force likely to produce great bodily injury, are aggravated felony crimes of violence for immigration purposes, since solicitation of rape by force creates a substantial risk of the use of force); *Sharashidze v. Gonzales*, 480 F.3d 566 (7th Cir. March 16, 2007), following *Gattem v. Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005). See also, *United States v. Ramos-Sanchez*, 483 F.3d 400 (5th Cir. Apr. 2, 2007) (Kansas conviction for violation of K.S.A. 21-3510(a)(1), solicitation of a child to perform an illegal sex act is “sexual abuse of a minor” and thus a “crime of violence” for illegal re-entry sentencing purposes, on the basis that the act “is abusive because of the psychological harm it can cause, even if any resulting sex is consensual”).

not matter that they are not covered within subsection 43(A) (murder, rape, or sexual abuse of a minor), subsection 43(B) (illicit trafficking in a controlled substance), or any other subsection of that statute. One is enough.<sup>23</sup>

In the controlled substances context, the courts have likewise found solicitation crimes to trigger removal. In *Barragan-Lopez*,<sup>24</sup> Ninth Circuit found solicitation to possess a controlled substance for sale to be a crime involving moral turpitude for deportation purposes since the CMT ground of deportation, unlike the CMT ground of inadmissibility, does not list *any* non-substantive offenses. Because the deportation ground did not list attempt or conspiracy, the court reasoned, it could not impliedly exclude solicitation.<sup>25</sup>

The BIA reaffirmed *Matter of Beltran*,<sup>26</sup> in finding that a conviction under a state “generic” solicitation statute can constitute an offense “relating to” a controlled substance under INA § 273(a)(2)(B)(i).<sup>27</sup> The Second Circuit also followed *Beltran* in finding a conviction under a generic solicitation statute, where the underlying offense was a drug offense, to trigger inadmissibility as a controlled substances offense.<sup>28</sup> In *Mielewczyk*,<sup>29</sup> the Ninth Circuit distinguished years of positive case law on solicitation,<sup>30</sup> and found that solicitation to commit a drug offense under California’s non-generic, controlled substances solicitation statute<sup>31</sup> was an offense “related to” a controlled substance to trigger deportability for a controlled substances conviction under INA § 237(a)(2)(B)(i).<sup>32</sup>

## § 1 Non-Substantive Offense Chart

The following Chart lists various grounds of Inadmissibility, and Deportability, and indicates whether each ground specifically includes various non-substantive offenses, such as attempt, aiding and abetting, conspiracy, solicitation, and the like. For example, the CMT ground of inadmissibility specifically lists attempt and conspiracy, but no other

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<sup>23</sup> *Prakash v. Holder*, 579 F.3d at 1038-1039.

<sup>24</sup> *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9<sup>th</sup> Cir. Nov. 21, 2007).

<sup>25</sup> *Barragan-Lopez v. Mukasey*, 508 F.3d at 904-905.

<sup>26</sup> *Matter of Beltran*, 20 I. & N. Dec. 521 (BIA 1992).

<sup>27</sup> *Matter of Zorilla-Vidal*, 24 I. & N. Dec. 768 (BIA 2009).

<sup>28</sup> *Mizrahi v. Gonzalez*, 492 F.3d 156 (2d Cir. Jun. 27, 2007).

<sup>29</sup> *Mielewczyk v. Holder*, 575 F.3d 992 (9<sup>th</sup> Cir. Aug. 5, 2009).

<sup>30</sup> *United States v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001) (California non-generic solicitation not aggravated felony trafficking); *Leyva-Licea v. INS*, 187 F.3d 1147 (9<sup>th</sup> Cir. 1999) (Arizona generic solicitation not aggravated felony drug trafficking); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9<sup>th</sup> Cir. 1997) (Arizona generic solicitation not “related to” a controlled substances offense).

<sup>31</sup> Health & Safety Code § 11352(a) (“... transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport . . .”).

<sup>32</sup> 8 U.S.C. § 1227(a)(2)(B)(i).

non-substantive offenses. The number of the ground of inadmissibility, e.g., (1) CMT Conviction, indicates where on the following pages the exact statutory text of the non-substantive offense language of the ground appears.

### **INADMISSIBILITY**

- (1) CMT Conviction – AT, CO
- (2) Drug Conviction – AT, CO
- (3) Multiple Conviction – ALL
- (4) Reason to Believe Conduct – AB, CO
- (5a) Prostitution Conduct
- (5b) Procure Conduct – AT
- (6) Trafficker in Persons Conduct – AB, CO
- (7) Money Laundering Conduct – AB, CO
- (8) Terrorist Conduct – AT, CO, threat, SO
- (9) Genocide Conduct – AB, SO, + ?
- (10) Visa Fraud Conduct – AT?
- (11) Alien Smuggling Conduct – AB, AT, SO
- (12) Document Fraud Civil Penalty – AT partial
- (13) Assist Child Abductor Conduct – AB

### **DEPORTABILITY**

- (1) Alien Smuggling Conduct – AB, SO
- (2) CMT Conviction
- (3) Multiple CMT Conviction
- (4) Aggravated Felony – AT, CO
- (5) High Speed Flight Conviction
- (6) Controlled Substances – AT, CO
- (7) Firearms – AT, CO, SO (sale only)
- (8) Miscellaneous (sedition, etc.) – AT, CO
- (9) Domestic Violence Conviction
- (10) Failure to Register Conviction
- (11) Foreign Agent Reg. Act – AT, CO
- (12) Visa Fraud Conviction
- (13) Doc. Fraud Civil Penalty – AT partial
- (14) Terrorist Conduct – AT, CO, threat, SO
- (15) Genocide Conduct – AB, SO, + ?
- (16) Unlawful Voting Conduct

#### **KEY:**

AB = Aiding and abetting

CO = Conspiracy

AT = Attempt

SO = Solicitation

Threat = Threat to X

Partial = Only one of a number of listed

Offenses is listed (e.g. – offer to sell excludes

Offer to do something else)

+ = more

NOTE: Accessory after the fact, misprision of a felony, and facilitation are not listed anywhere. These are only included in inadmissibility (3) multiple convictions, which includes all convictions without limitation.

## **§ 2 Inadmissibility Grounds**

(1) CMT Conviction Inadmissibility

“or an attempt or conspiracy to commit such a crime” 212(a)(2)(A)(i)(I)

AT, CO

(2) Controlled Substance Conviction

“(or a conspiracy or attempt to violate) any law...relating to a controlled substance....”

212(a)(2)(A)(i)(II)

AT, CO

(3) Multiple Conviction Inadmissibility

Based on convictions for “offenses” regardless of single scheme or CMT – attempt and conspiracy not listed but “offenses” unrestricted and therefore does not exclude attempt or conspiracy conviction 212(a)(2)(B)

AA, MF, AT, CO, AE, SO (though not express), ALL

(4) Illicit Trafficker Conduct Inadmissibility

“or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking...” 212(a)(2)(C)

– lists conspirator and aider and abettor

– does not list attempt

AB, CO

(5) Prostitution and Commercialized Vice Conduct Inadmissibility

(5a) Engaged in prostitution 212(a)(2)(D)(i)

– does not list attempt or conspiracy or aider

(5b) Procures “or attempts to procure” 212(a)(2)(D)(ii)

– no conspiracy or aiding but “directly or indirectly”

AT

(6) Trafficker In Persons Conduct Inadmissibility

“has been a knowing aider, abettor, assister, conspirator, or colluder” 212(a)(2)(H)(i)

AB, CO

(7) Money Laundering Conduct Inadmissibility

“or seeks to enter the United States to engage” 212(a)(2)(I)(i)

“or has been, a knowing aider, abettor, assister, conspirator, or colluder” 212(a)(2)(I)(ii)

AB, CO

(8) Terrorist Conduct Inadmissibility

“A threat, attempt, or conspiracy to do any of the foregoing.” 212(a)(3)(B)(iii)(VI)

AT, CO, threat

“to solicit any individual – (aa) to engage in conduct otherwise described in this clause”  
212(a)(3)(B)(iv)(V)(aa)  
SO

(9) Genocide Conduct Inadmissibility  
“ordered, incited, assisted, or otherwise participated in” 212(a)(3)(B)(i)  
SO, AB, + ?

(10) Visa Fraud Conduct Inadmissibility  
“seeks to procure” 212(a)(6)(C)(i)  
AT?

(11) Alien Smuggling Conduct Inadmissibility  
“knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter  
or try to enter” 212(a)(6)(E)(i)  
SO, AB, AT

(12) Document Fraud Order Inadmissibility  
212(a)(6)(F)(i), 274C  
“to use, attempt to use, possess” etc. any false document 274C(a)(2) AT partial  
“to use or attempt to use or to provide or attempt to provide any document” issued to  
someone else 274C(a)(3)  
“to prepare, file or assist another” 274C(a)(5)

(13) Alien Assisting Child Abductors Conduct Inadmissibility  
“intentionally assisted” in international child abduction 212(a)(10)(C)(ii)(I)  
AB

### **§ 3                    Deportability Grounds**

(1) Alien Smuggling Conduct Deportability  
“knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter  
or to try to enter the United States in violation of law” 237(a)(1)(E)(i)  
SO, AB

(2) CMT Conviction Deportability  
no mention of attempt or conspiracy or solicitation 237(a)(2)(A)(i)

(3) Multiple CMT Conviction Deportability  
no mention of attempt or conspiracy or solicitation 237(a)(2)(A)(ii)

(4) Aggravated Felony Conviction Deportability  
no mention of attempt, conspiracy, or solicitation 237(a)(2)(A)(iii) but aggravated felony definition includes “an attempt or conspiracy to commit an offense described in this paragraph” 101(a)(43)(U)

AT, CO

(5) High Speed Flight Conviction Deportability  
no mention of collateral offense 237(a)(2)(A)(iv)

(6) Controlled Substances Conviction Deportability  
“(or a conspiracy or attempt to violate)” a law relating to a controlled substance  
237(a)(2)(B)(i)

AT, CO

(7) Firearms Conviction Deportability  
“offering for sale...or of attempting or conspiring to purchase, sell, offer for sale [etc.]”  
237(a)(2)(C)

SO, partial, AT, CO, case law

(8) Miscellaneous Conviction Deportability  
“or has been so convicted of a conspiracy or attempt to violate” 237(a)(2)(D)  
(espionage, sabotage, treason, sedition, etc.)

AT, CO

(9) Domestic Violence Conviction/Court Finding Deportability  
no mention of attempt, conspiracy, solicitation, etc. 237(a)(1)(i), (ii)

(10) Failure to Register Conviction Deportability  
No mention of attempt or conspiracy. 237(a)(3)(B)(i).

Compare (ii) and (iii), each of which includes “or an attempt or a conspiracy to violate.”

(11) Foreign Agents Registration Act Conviction Deportability  
“or an attempt or a conspiracy to violate” 237(a)(3)(B)(ii)

AT, CO

(12) Visa Fraud Conviction Deportability  
“or an attempt or a conspiracy to violate” 237(a)(3)(B)(iii)

AT, CO

(13) Document Fraud Civil Order Deportability  
See Inadmissibility (12) *supra*. 237(a)(3)(C)(i)

AT, partial  
(14) Terrorist Conduct Deportability  
See Inadmissibility (8) *supra*. 237(a)(4)(B).  
AT, CO, threat, SO

(15) Genocide Conduct Deportability  
See Inadmissibility (9) *supra*.  
SO, AB, + ?

(16) Unlawful Voting Conduct Deportability  
no mention of attempt or conspiracy 237(a)(6)(A)

#### **§ 4 Grounds that List No Non-Substantive Offenses**

The following grounds of deportation do not list any non-substantive offenses, not even attempt or conspiracy:

- (1) One CMT conviction
- (2) Multiple CMT convictions
- (3) High speed flight conviction
- (4) Domestic violence conviction
- (5) Failure to register conviction
- (6) Visa fraud conviction
- (7) Unlawful voting conduct

In contrast, only the prostitution ground of inadmissibility fails to list any non-substantive offenses as triggering inadmissibility.

Rationale: (1) It is easier to exclude someone from the United States, and harder to deport someone. It therefore makes sense to include more non-substantive offenses for grounds of inadmissibility. Non-substantive offenses are less serious in general than the substantive offenses, so there is less reason to make them trigger deportation.

(2) Congress treats less serious crimes more leniently. For example, many attempt statutes provide the maximum sentence is one-half that for the substantive offense. Congress also imposes less serious immigration penalties for less serious offenses. For example, there is no mandatory detention for Crimes of Moral Turpitude, Domestic Violence, border chase grounds of deportation, etc.

**§ 5                    Aiding and abetting is expressly included only in the following grounds:**

Grounds of Inadmissibility:

- (4) Reason to Believe Conduct
- (6) Trafficker in Persons Conduct
- (7) Money Laundering Conduct
- (9) Genocide Conduct
- (11) Alien Smuggling Conduct
- (13) Assist Child Abductor Conduct

Grounds of Deportation:

- (1) Alien Smuggling Conduct
- (15) Genocide Conduct

By contrast, Congress did list aiding and abetting in certain other grounds of deportation<sup>33</sup> and inadmissibility.<sup>34</sup>

**§ 6                    Attempt is expressly included in the following grounds:**

Grounds of Inadmissibility:

- (1) CMT Conviction
- (2) Drug Conviction

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<sup>33</sup> INA § 237(a)(1)(E)(i), 8 U.S.C. § 1227(a)(1)(E)(i) (alien smuggling conduct ground of deportation: “Any noncitizen who: before, at or within five years after any entry, knowingly encouraged, induced, assisted, *abetted*, or *aided* any other noncitizen to enter or try to enter the United States in violation of law.” (Emphasis supplied)); INA § 237(a)(4)(D), 8 U.S.C. § 1237(a)(4)(D) (genocide conduct ground of deportation).

<sup>34</sup> INA § 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i) (reason to believe illicit trafficker ground of inadmissibility: “Any alien who the consular officer or the Attorney General knows or has reason to believe -- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing *aider*, *abettor*, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.”) (emphasis supplied); INA § 212(a)(2)(H)(i), 8 U.S.C. § 1182(a)(2)(H)(i) (trafficker in persons ground of inadmissibility: “Any alien who is listed in a report submitted pursuant to section 7108(b) of Title 22, or who the consular officer or the Attorney General knows or has reason to believe is or has been a knowing *aider*, *abettor*, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.”) (emphasis supplied); INA § 212(a)(2)(I), 8 U.S.C. § 1182(a)(2)(I) (money laundering ground of inadmissibility: “knowing *aider*, *abettor*, assister, conspirator, or colluder with others”); INA § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D) (genocide conduct ground of inadmissibility); INA § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E) (alien smuggling conduct ground of inadmissibility: “encouraged, induced, assisted, *abetted*, or *aided*”); INA § 212(a)(10)(C)(ii), 8 U.S.C. § 1182(a)(10)(C)(ii) (assister of child abductor ground of inadmissibility).

- (3) Multiple Convictions
- (4) Reason to Believe Conduct
- (5b) Procure Conduct
- (8) Terrorist Conduct
- (10) Visa Fraud Conduct
- (11) Alien Smuggling Conduct
- (12) Document Fraud Civil Penalty – partial

Grounds of Deportation:

- (4) Aggravated Felony
- (6) Controlled Substances
- (7) Firearms
- (8) Miscellaneous (sedition, etc.)
- (11) Foreign Agent Reg. Act
- (13) Doc. Fraud Civil Penalty – partial
- (14) Terrorist Conduct

Congress specifically listed as eligible for a U visa immigrants who have suffered physical or mental abuse as a result of a long list of criminal offenses, or *attempt*, conspiracy or solicitation to commit one of these offenses.<sup>35</sup>

**§ 7            Conspiracy is expressly included in the following grounds:**

Grounds of Inadmissibility:

- (1) CMT Conviction
- (2) Drug Conviction
- (3) Multiple Convictions
- (4) Reason to Believe Conduct
- (6) Trafficker in Persons Conduct
- (7) Money Laundering Conduct
- (8) Terrorist Conduct

Grounds of Deportation:

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<sup>35</sup> INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (emphasis supplied).

- (4) Aggravated Felony
- (5a) Prostitution Conduct
- (6) Controlled Substances
- (7) Firearms
- (8) Miscellaneous (sedition, etc.)
- (11) Foreign Agent Reg. Act
- (14) Terrorist Conduct

Congress specifically listed as eligible for a U visa immigrants who have suffered physical or mental abuse as a result of a long list of criminal offenses, or attempt, *conspiracy* or solicitation to commit one of these offenses.<sup>36</sup>

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<sup>36</sup> INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (emphasis supplied).

**§ 8 Solicitation<sup>37</sup> is expressly listed in the following grounds:**

Grounds of Inadmissibility:

- (3) Multiple Conviction
- (8) Terrorist Conduct
- (9) Genocide Conduct
- (11) Alien Smuggling Conduct

Grounds of Deportation:

- (1) Alien Smuggling Conduct
- (7) Firearms – (sale only)
- (14) Terrorist Conduct
- (15) Genocide Conduct

Congress specifically listed as eligible for a U visa immigrants who have suffered physical or mental abuse as a result of a long list of criminal offenses, or attempt, conspiracy or *solicitation* to commit one of these offenses.<sup>38</sup>

**§ 9 Threat**

Convictions of threatening to commit a substantive offense are listed in the following grounds:

Ground of Inadmissibility:

- (8) Terrorist Conduct

Ground of Deportation:

- (14) Terrorist Conduct

In addition, threat to use force is expressly listed in the crime of violence aggravated felony definition.<sup>39</sup>

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<sup>37</sup> A.k.a. convictions of offering to commit a certain offense. See *United States v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001).

<sup>38</sup> INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (emphasis supplied).

<sup>39</sup> 18 U.S.C. § 16(a) (“The term ‘crime of violence’ means—(a) an offense that has as an element the use, attempted use, or *threatened use* of physical force against the person or property of another . . . .”) (emphasis added).

**§ 10            Other Non-Substantive Offenses**

Accessory after the fact, misprision of a felony, and facilitation are not listed anywhere. These are only included in inadmissibility (3) multiple convictions, which includes all convictions without limitation.