# AGGRAVATED FELONY CASE SUMMARY

By Immigration Judge Bertha A. Zuniga (San Antonio)

November 15, 2010
(Summary updated regularly)

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# Abbreviations

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| Anti-Drug Abuse Act of 1988 | ADAA |
| Aggravated Felony | AF |
| Attorney General | AG |
| Board of Immigration Appeals | BIA |
| Circuit | Cir. |
| Controlled Substances Act | CSA |
| Crime of Violence | COV |
| Crime Involving Moral Turpitude | CIMT |
| Illegal Immigration Reform and Immigrant Responsibility Act of 1996 | IIRIRA |
| Immigration Act of 1990 | IMMAct |
| Immigration Judge | IJ |
| Immigration and Nationality Act | INA |
| Pre-Sentence Report | PSR |
| United States | U.S. |
| United States Sentencing Guidelines Manual | U.S.S.G. |

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# Immigration and Nationality Act § 101(a)(43)

**(A) Murder, Rape, or Sexual Abuse of a Minor**

- ***Murder***

  Note: There is little precedent on what constitutes murder under section 101(a)(43)(A) of the Act. However, existing case law has noted the importance of whether a state statute designates a crime as murder.

  Seale v. INS, 323 F.3d 150 (1st Cir. 2003) - Assault with intent to murder under Massachusetts law is an AF. Expanded definition of AF under IIRIRA eliminated any temporary limitations on convictions criminal alien was still removable for pre-IIRIRA conviction.

  Lettman v. Reno, 207 F.3d 1368 (11th Cir. 2000) - Third degree murder under FLA. STAT. § 782.04(4) constitutes an AF. The court found that intent to kill was not required, but that a person need only intend to commit/perpetrate a felony, with death resulting during the commission of the felony.

- ***Rape***

  Definition: (1) "At common law, unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will" and (2) "unlawful sexual activity (esp. intercourse) with a person (usually female) without consent and usually by force or threat of injury." Sexual activity (see sexual relations): "(1) Sexual intercourse (2) Physical sexual activity that does not necessarily culminate in intercourse. Sexual relations usu[ally] involve the touching of another's breast, vagina or penis, or anus. Both persons (the person touching and the person being touched) engage in sexual relations." Black's Law, (8th ed. 2004).

  Matter of B-, 21 I&N Dec. 287 (BIA 1996) - Second degree rape under Maryland Code, Article 21, § 463(a)(3) (person engages in vaginal intercourse with person under 14 years old, and person performing act is 4 years older than victim) for which a criminal alien was sentenced to 10 years in prison, is a COV under 18 U.S.C. § 16(b).

  Silva v. Gonzales, 455 F.3d 26 (1st Cir. 2006) - "Rape and Abuse of a Child" under MASS. GEN. LAWS ch 265, § 23 is an AF. All rape, including statutory rape, is an AF under the explicit language of the INA.

  United States v. Rodriguez-Guzman, 506 F.3d 738 (9th Cir. 2007) - Although the provision for unlawful sexual intercourse with a minor under CAL. PENAL CODE § 261.5(c) qualifies as a *per se* COV, it is overly inclusive since it sets the age of consent at 18, which exceeds the common and accepted definition of statutory

rape—setting the age of consent at 16—so it cannot be categorically applied to enhance a sentence. Under the modified categorical approach, the record was insufficient to establish that criminal alien's conviction satisfied the U.S.S.G.'s definition of statutory rape, which sets the age of consent at 16.

United States v. Yanez-Saucedo, 295 F.3d 991 (9th Cir. 2002) - Third degree rape under WASHINGTON REV. CODE § 9A.44.060 constitutes an AF even though the statute does not require the use of force. The court relied on the definition of rape in Black's Law Dictionary.

Castro-Baez v. Reno, 217 F.3d 1057 (9th Cir. 2000) - Rape under CAL. PENAL CODE § 261 (sexual intercourse where the respondent should have known victim's ability to resist was substantially impaired by drugs or alcohol) is an AF. The court relied on the definition of rape in Black's Law Dictionary.

- ***Sexual Abuse of a Minor***

Matter of Small, 23 I&N Dec. 448 (BIA 2002) - Misdemeanor offense of sexual abuse of a minor constitutes an AF. See also United States v. Gonzales-Vela, 276 F.3d 763 (6th Cir. 2001) (same under Kentucky law); Guerrero-Perez v. Ashcroft, 242 F.3d 727 (7th Cir. 2001) (same under Illinois law).

Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999) - Indecency with a child by exposure pursuant to TEX. PENAL CODE § 21.11(a)(2) constitutes sexual abuse of a minor and is therefore an AF.

United States v. Londono-Quintero, 289 F.3d 147 (1st Cir. 2002) - Lewd and lascivious assault on a child under FLA. STAT. § 800.04 is sexual assault and sexual abuse of a minor and is, therefore, an AF.

Ganzhi v. Holder, ___ F.3d ___, 2010 WL 3465604 (2d Cir. 2010) – N.Y. PENAL LAW § 130.20(1) criminalizing sexual misconduct – sexual intercourse with another without that person's consent – is divisible because it does not require that the victim be a minor. Review of the criminal alien's record of conviction showed that the victim was unable to consent because of her age and, therefore, the alien had been convicted of an AF of sexual abuse of a minor.

Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001) – The New York equivalent of statutory rape, N.Y. PENAL LAW § 130.25, constitutes sexual abuse of a minor. The court cites with favor the BIA's analysis of sexual abuse in Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999). Note: The Second Circuit has noted that the BIA was seeking a definition which captured a "broad . . . spectrum of sexually abusive behavior" against minors.

Restrepo v. U.S. Attorney Gen., 617 F.3d 787 (3d Cir. 2010) – Alien's conviction for "aggravated sexual contact" under New Jersey Statute 2C:14-3(a) is

categorically an AF for sexual abuse of a minor, as defined under 18 U.S.C. § 3509(a)(8), which provides that "the term 'sexual abuse' includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in ... sexually explicit conduct [.]"

Stubbs v. Attorney Gen., 452 F.3d 251 (3d Cir. 2006) - Conviction for endangering the welfare of children under N.J. STAT. ANN. § 2C:24-4 is not sexual abuse of a minor under INA § 101(a)(43)(A), and therefore, the criminal alien did not commit an AF.

Singh v. Ashcroft, 383 F.3d 144 (3d Cir. 2004) - Third degree unlawful sexual contact under Delaware law is not divisible and is not categorically an AF because the age of the victim is not specified as an element of the crime.

United States v. Diaz-Ibarra, 522 F.3d 343 (4th Cir. 2008) - Conviction under former GA. CODE ANN. § 16-6-4 (1992) for felony *attempted* child molestation is categorically "sexual abuse of a minor."

United States v. Castro-Guevarra, 575 F.3d 550 (5th Cir. 2009) - Consensual sexual intercourse with a child, defined as a person younger than the age of 17 under TEX. PENAL CODE ANN. §§ 22.011(a)(2)(A) and (c)(1) is sexual abuse of a minor.

United States v. Ayala, 542 F.3d 494 (5th Cir. 2008) - Indecency with a child under TEX. PENAL CODE ANN. § 21.11(a)(1) is classified as sexual abuse of a minor. The defendant argued that the term "minor" is inconsistent with the contemporary and ordinary meaning of "child." The court stated that a child younger than seventeen is clearly a minor and pointed out that it already addressed this issue in United States v. Zavala-Sustaita, 214 F.3d 601 (5th Cir. 2000).

United States v. Balderas-Rubio, 499 F.3d 470 (5th Cir. 2007) - Balderas-Rubio argued that his conviction for "Indecency or Lewd Acts with a Child Under the Age of Sixteen" under OKLA. STAT., tit. 21, § 1123(A)(4) fell outside the generic definition of sexual abuse of a minor because it could include the act of "merely lewdly or lasciviously looks upon a minor from afar, without the minor's knowledge." However, he failed to show a realistic probability that Oklahoma would in fact prosecute such an act. Thus, the court rejected his argument that the statute is overly broad and held that his conviction constituted "sexual abuse of a minor" as a matter of law.

United States v. Ramos-Sanchez, 483 F.3d 400 (5th Cir. 2007) - Soliciting or enticing a minor to perform an illegal sex act pursuant to KAN. STAT. ANN. § 21-3510(a)(1) constitutes sexual abuse of a minor because the elements of the offense constitute "sexual abuse of a minor" as the term is understood by its ordinary, contemporary, and common meaning.

United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005) - Taking indecent liberties with a child pursuant to N.C. GEN. STAT. § 14-202.1(a)(1) constitutes sexual abuse of a minor for purposes of sentencing enhancement because basic language and common sense indicate that the term "sexual abuse of a minor" would include indecent liberties with a child.

United States v. Zavala-Sustaita, 214 F.3d 601 (5th Cir. 2000) - Sexual indecency with a child by exposure under TEX. PENAL CODE ANN. § 21.11(a)(2) constitutes sexual abuse of a minor.

Uritsky v. Gonzales, 399 F.3d 728 (6th Cir. 2005) - Third degree criminal sexual conduct under MICH. COMP. LAWS § 750.520d(1)(a) is an AF; adjudication as a "youthful trainee" is a conviction under § 101(a)(48) because the criminal action is not vacated until probation is completed. But see Matter of Devison-Charles, 22 I&N Dec. 1362 (BIA 2000) (adjudication as a youthful offender under NY law is not a conviction because it does not involve a finding of guilt or innocence and cannot ripen into a conviction).

Sharashidze v. Gonzales, 480 F.3d 566 (7th Cir. 2007) - Indecent solicitation of a sex act pursuant to Illinois Statute, Title 720, § 5/11-14.1(a) constitutes sexual abuse of a minor.

Hernandez-Alvarez v. Gonzales, 432 F.3d 763 (7th Cir. 2005) - Indecent solicitation of a child in contravention of 720 ILL. COMP. STAT. 5/11-6(a) is an AF (sexual abuse of a minor), despite the impossibility of completing the offense as the crime involved an adult investigator posing as a child on the internet.

Gattem v. Gonzales, 412 F.3d 758 (7th Cir. 2005) - Solicitation of a sexual act under 720 ILL. COMP. STAT. 5/11-14.1(a) is sexual abuse of a minor.

Espinoza-Franco v. Ashcroft, 394 F.3d 461 (7th Cir. 2005) - A conviction under 720 ILL. COMP. STAT. 5/12-16(b), a statute that criminalizes an act of sexual conduct on family member younger than 18, and defined sexual conduct to include touching of any part of victim's body for purposes of sexual gratification or arousal if victim was under the age of 13, constitutes sexual abuse of a minor. Note: Case superseded by statute on other grounds.

Guerrero-Perez v. INS, 242 F.3d 727 (7th Cir. 2001) - Misdemeanor criminal sexual abuse is an AF. Therefore, criminal alien's conviction for criminal sexual abuse under 720 ILL. COMP. STAT. 5/12-15(c) – sexual penetration of a victim over 13 years but under 17 years of age when the perpetrator is less than 5 years older than the victim.

Lovan v. Holder, 574 F.3d 990 (8th Cir. 2009) - Retroactively applying the amended definition of AF to a pre-IIRIRA conviction for sexual abuse of a minor does not violate an alien's due process right.

Rivera-Cuartas v. Holder, 605 F.3d 699 (9th Cir. 2010) – A conviction under ARIZ. REV. STAT. ANN. § 13-1405, which criminalizes sexual conduct with a minor under 18, is not an AF of "sexual abuse of a minor" because the statute does not contain an element relating to an age difference requirement, applies to defendants under 18, and lacks an element of abuse.

United States v. Valencia-Barragan**,** 608 F.3d 1103 (9th Cir. 2010) - A conviction for rape of a child in the second degree under WASH. REV. CODE § 9A.44076(1) is categorically an AF for sexual abuse of a minor under INA § 101(a)(43)(A) for purposes of the U.S.S.G.

Ledezma-Galicia v. Holder, 599 F.3d 1055 (9th Cir. 2010) – Neither IMMAct nor IIRIRA repealed the ADAA's temporal limitation that its terms would apply only to those convictions occurring on or after its 1988 passage. Because the ADAA did not include "sexual abuse of a minor" as an enumerated AF offense and the alien was convicted of sodomy and sexually molesting a minor before the enactment of all three acts, the alien was not removable for his offense. But see Matter of Lettman, 22 I&N Dec. 365 (BIA 1998)(finding that the temporal limitation of the ADAA was repealed).

Pelayo-Garcia v. Holder, 589 F.3d 1010 (9th Cir. 2009) - Unlawful sexual intercourse with a minor under CAL. PENAL CODE § 261.5(d) is not categorically an AF because it contains no scienter requirement and "criminalizes sexual conduct that is not necessarily abusive."

United States v. Medina-Villa, 567 F.3d 507 (9th Cir. 2009) - Lewd and lascivious act on a child under 14 under CAL. PENAL CODE § 288(a) constitutes sexual abuse of a minor.

Nicanor-Romero v. Mukasey, 523 F.3d 992 (9th Cir. 2008) - Court reaffirmed the conclusion of United States v. Pallares-Galan, 359 F.3d 1088, 1102-03 (9th Cir. 2004) that a conviction under California law for "annoying or molesting a child under age 18" is not categorically an AF as defined in INA § 101(a)(43)(A) for sexual abuse of a minor. Note: Overruled on other grounds by Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

Estrada-Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. 2008) - Four statutory rape statutes— CAL. PENAL CODE §§ 261.5(c), 286(b)(1), 288a(b)(1), and 289(h)—are not AF. The federal crime of "sexual abuse of a minor" under 18 U.S.C. § 2243 requires: "(1) a *mens rea* level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years

between the defendant and the minor." *Overrules* Estrada-Espinoza v. Gonzalez, 498 F.3d 933 (9th Cir. 2007).

Rebilas v. Mukasey, 527 F.3d 783 (9th Cir. 2008) - An offense of *attempted* public sexual indecency to a minor under ARIZ. REV. STAT. ANN. §§ 13-1001 and 13-1403(B) did not constitute sexual abuse of a minor, and thus was not an AF; offense did not categorically fall within federal generic definition of sexual abuse of minor because the Arizona statute did not require child to be touched or aware of offender's conduct. Neither the judgment of conviction nor plea agreement contained factual basis for crime.

United States v. Baza-Martinez, 464 F.3d 1010 (9th Cir. 2006) - A conviction for taking indecent liberties with a child pursuant to N.C. GEN. STAT. § 14-202.1 does not constitute sexual abuse of a minor. Ninth Circuit acknowledged this decision creates a circuit court conflict with Fifth and Eleventh Circuits. See Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005) and Bahar, 264 F.3d 1309 (11th Cir. 2001).

Parrilla v. Gonzales, 414 F.3d 1038 (9th Cir. 2005) - A conviction for communicating with a minor for immoral purposes under WASH. REV. CODE § 9.68A 090 is not categorically sexual abuse of a minor because some of the "immoral purposes," as determined by state courts, do not involve inducement of a child to engage in sexual conduct. Under a modified categorical approach using the information and guilty plea, the criminal alien was found to have been convicted of molesting a 7-year-old girl by touching her between the legs.

United States v. Alvarez-Gutierrez, 394 F.3d 1241 (9th Cir. 2005) - A conviction for violating NEV. REV. STAT. §§ 200.364 and 200.368 for statutory sexual seduction, a gross misdemeanor for which punishment is imprisonment up to one year, is an AF for sentence enhancement purposes.

United States v. Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004) - Annoying or molesting a child under 18 years old in violation of CAL. PENAL CODE § 647.6(a) is not to be sexual abuse of a minor nor an AF as the statute includes conduct that is not sexual abuse (words alone can constitute a violation of the statute). Affirmed by Nicanor-Romero v. Mukasey, 523 F.3d 992 (9th Cir. 2008).

Cedano-Viera v. Ashcroft, 324 F.3d 1062 (9th Cir. 2003) - A conviction under NEV. REV. STAT. § 201.230 for lewdness with a child under 14 years old was found to be sexual abuse of a minor and an AF. The court relied on its reasoning in United States v. Baron-Medina, 187 F.3d 1144 (9th Cir. 1999), in which the court explained that "[t]he use of young children as objects of sexual gratification is corrupt, improper, and contrary to good order. It constitutes maltreatment, no matter its form." Id. at 1066.

Lualhati v. INS, 217 F.3d 845 (9th Cir. 2000) - California lewd and lascivious acts and one count of unlawful sexual penetration with a minor are AFs.

Vargas v. DHS, 451 F.3d 1105 (10th Cir. 2006) - Contributing to the delinquency of a minor under COLO. REV. STAT. § 18-6-701 was found to be sexual abuse of minor in this case. The court found that delinquency of a minor does not categorically include sexual abuse of a minor, so court looked at the charging document, which referenced COLO. REV. STAT. § 18-3-404(1)(a), titled Unlawful Sexual Contact. The court concluded that Vargas was charged and convicted of encouraging a child to engage in non-consensual sexual contact, which is sexual abuse of a minor, an AF.

Chuang v. Attorney Gen., 382 F.3d 1299 (11th Cir. 2004) - Indecent assault on a child under 16 in violation of FLA STAT. ANN. § 800.04 was found to be a sexual abuse of a minor and therefore an AF.

United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir. 2001) - Sexual abuse of a minor means a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification. The court's decision cites Zavala-Sustaita, 214 F.3d 601 (5th Cir. 2000) with approval. See also Bahar v. Ashcroft, 264 F.3d 1309 (11th Cir. 2001).

Bahar v. Ashcroft, 264 F.3d 1309 (11th Cir. 2001) - Taking indecent liberties with a child under North Carolina law was an AF (no actual contact with the child required by the statute).

**(B) Illicit Trafficking in Controlled Substance (as defined in § 102 of the Controlled Substances Act), Including a Drug Trafficking Crime (as defined in 18 U.S.C. § 924(c))**

See Particularly Serious Crime (Matter of Y-L-, 23 I&N Dec. 270 (BIA 2002)).

Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010) - The Supreme Court reversed the Fifth Circuit, holding that "second or subsequent simple possession offenses are not aggravated felonies under §1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction." In its holding, the Court affirmed that recidivism must be found at the state level. *Overrules* Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir. 2009) (repeat conviction is deemed as an AF whether or not recidivism was admitted or determined by a judge or jury); Matter of Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007) (alien's status as a recidivist drug offender must be either admitted by the alien or determined by a judge or jury).

Lopez v. Gonzales, 549 U.S. 47 (2006) - A state drug offense is a "felony punishable under the Controlled Substances Act", and thus, an AF, "only if it proscribes conduct punishable as a felony under that federal law."

Matter of Sanchez-Cornejo, 25 I&N Dec. 273 (BIA 2010) - Delivery of a simulated controlled substance under Texas law is not an AF under INA § 101(a)(43)(B) because simulated cocaine, the simulated controlled substance the respondent trafficked, is not a federally-controlled substance and because the respondent's offense would not have been punishable under the CSA.

Matter of Aruna, 24 I&N Dec. 452 (BIA 2008) - Absent controlling precedent to the contrary, a state law misdemeanor offense of conspiracy to distribute marijuana qualifies as an AF under INA § 101(a)(43)(B) where its elements correspond to the elements of the federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana, as defined by 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846.

Matter of Thomas, 24 I&N Dec. 416 (BIA 2007) - Conviction for simple possession of marijuana under FLA. STAT. ANN. § 893.13(6)(b) did not qualify as an AF by virtue of being recidivist possession, even though it was committed after a prior drug conviction, because the conviction for the later offense did not arise from a state proceeding in which his status as a recidivist drug offender was either admitted or determined by a judge or jury.

Matter of Roberts, 20 I&N Dec. 294 (BIA 1991) - A sole conviction for the felony sale of a controlled substance makes respondent a drug trafficker, and as such, an AF.

Julce v. Mukasey, 530 F.3d 30 (1st Cir. 2008) - A conviction for possession with intent to distribute marijuana under MASSS GEN. LAWS ch. 94C, § 32C(a) is an AF under INA § 101(a)(43)(B) as a drug trafficking crime, unless the defendant meets his burden to show that the offense should be reduced to a misdemeanor under federal law.

Behre v. Gonzales, 464 F.3d 74 (1st Cir. 2006) - For purposes of determining whether a state drug offense was an AF under the INA, circuit precedent permitted an analysis that considered whether the underlying offense would have been punishable as a felony under federal law.

Urena-Ramirez v. Ashcroft, 341 F.3d 51 (1st Cir. 2003) - Court held that a person convicted under Travel Act (18 U.S.C. § 1952(a)(3)) for promoting an unlawful activity involving a controlled substance has been convicted of a violation of law relating to a controlled substance under the Act and has therefore committed an AF.

Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008) – A second conviction for simple controlled substance possession under the New York state law is not an AF under the CSA. The offense does not proscribe conduct punishable as a felony because it does not correspond in any meaningful way with the federal crime of recidivist possession, even if it could have been prosecuted in the state court as a recidivist offense. See also United States v. Ayon-Robles, 557 F.3d 110 (2d Cir. 2009)

(holding that a second offense of simple possession of a controlled substance is not a felony punishable under the CSA, and is therefore, not an AF conviction justifying an enhanced sentence).

Martinez v. Mukasey, 551 F.3d 113 (2d Cir. 2008) - A conviction under N.Y. PENAL LAW § 221.40 (criminal sale, including distribution, of a small amount of marijuana) is not an AF. The Second Circuit applied the categorical approach and looked at the necessary elements of the petitioner's state conviction. The court found that the minimum conduct for which the petitioner was convicted was not an AF.

Gousse v. Ashcroft, 339 F.3d 91 (2d Cir. 2003) - Alien's Connecticut conviction for sale of a hallucinogen/narcotic in contravention of § 21a-277(a) is a conviction for illegal trafficking in a controlled substance, and an AF. Applying the categorical approach, the court decided that the Connecticut definition of "narcotic substance" is not broader than the federal definition of "controlled substance."

Khan v. Ashcroft, 352 F.3d 521 (2d Cir. 2003) - Using a telephone to facilitate the distribution of heroin under New York law was found to be an AF.

Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996) – A crime is not an AF unless the state drug offense would have been a felony under federal law (hypothetical federal felony analysis).

Thomas v. Attorney Gen., --- F.3d ---, 2010 WL 4188242 (3d Cir. 2010) - Conviction of Fourth Degree Criminal Sale of Marijuana in violation of N.Y. PENAL LAW § 221.40 does not constitute a drug trafficking crime because state law classifies it as a misdemeanor. A conviction in violation of N.Y. PENAL LAW § 221.40 is not categorically a drug trafficking crime under the hypothetical felony route because the statute is divisible.

Catwell v. Attorney Gen., --- F.3d ---, 2010 WL 3987664 (3d Cir. 2010) - Pennsylvania conviction of Possession with Intent to Distribute in violation of 35 PA. CONS. STAT. § 780-113(a)(30) is not categorically an AF. Applying the modified categorical approach, the conviction in this case was an AF. The conviction record established intent to distribute, and a conviction for possessing 120.5 grams of marijuana was not a small amount subject to the exception in 21 U.S.C. § 841(b)(4).

Evanson v. Attorney Gen., 550 F.3d 284 (3d Cir. 2008) – The IJ held that possession of marijuana with intent to deliver (35 PA. CONS. STAT. § 780-113(a)(30)) and criminal conspiracy (18 PA. CONS. STAT. § 903) in violation of Pennsylvania law was an AF. The BIA reversed. The Third Circuit held that the BIA erred in failing to properly apply the modified categorical approach and

therefore erred in considering the sentencing document. The court remanded to the BIA to determine whether the petitioner's conviction was an AF.

Jeune v. Attorney Gen., 476 F.3d 199 (3d Cir. 2007) - Pennsylvania offense of "manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance" pursuant to 35 PA. CONS. STAT. § 780-113(a)(30) is not categorically an AF. Because the alien's conviction record did not indicate whether the offense had a "trafficking element," the government could not establish that he had been convicted of an AF.

Garcia v. Attorney Gen., 462 F.3d 287 (3d Cir. 2006) - The alien's conviction pursuant to 35 PA. CONS. STAT. § 780-113(a)(30) is an AF because the record of conviction made clear that the offense contained a trafficking element because the alien pled guilty to delivery and possession with intent to deliver.

Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002) - A conviction for trafficking cocaine under Delaware law, where factual basis for the plea was mere possession, does not constitute an AF. The crime must contain a trafficking element or be punished as a felony under federal law. Applies hypothetical felony theory from Matter of Davis, 20 I&N Dec. 536 (BIA 1992).

Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001) - An alien's second N.Y. misdemeanor conviction for distribution of 30 grams or less of marijuana without remuneration did not pass hypothetical federal felony test and was therefore not an AF.

United States v. Matamoros-Modesta, 523 F.3d 260 (4th Cir. 2008) - Conviction for simple possession is not an AF, even if labeled a felony by the convicting state. Court recognized that Lopez v. Gonzales, 549 U.S. 47 (2006) overruled prior circuit precedent.

United States v. Amaya-Portillo, 423 F.3d 427 (4th Cir. 2005) - Maryland misdemeanor conviction for cocaine possession is not an AF for sentence enhancement purposes because the offense is not classified as a felony by federal or state law.

Davila v. Holder, 381 F.App'x 413 (5th Cir. 2010) (unpublished): Conviction for selling cocaine in violation of N.Y. Penal Law § 220.41 is not a felony under the CSA and therefore is not categorically a drug trafficking crime because a conviction could result from a mere offer to sell cocaine.

United States v. Andrade-Aguilar, 570 F.3d 213 (5th Cir. 2009) - A second conviction for simple possession of a controlled substance does not qualify as an AF when the first conviction for simple possession was not "final" at the time the second offense occurred. A conviction is final when it is no longer subject to

examination on direct appeal and is not subject to discretionary review by any court.

Vasques-Martinez v. Holder, 564 F.3d 712 (5th Cir. 2009) - A conviction under the TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) for intentionally and knowingly possessing, with intent to deliver, a controlled substance, namely cocaine in, on, and within 1,000 feet of a school is an AF. AF includes a "drug trafficking crime," which is defined as any felony punishable under the CSA. The CSA defines "felony" as any "federal or state offense classified by applicable federal or state law as a felony." Relying on United States v. Ford, 509 F.3d 714 (5th Cir. 2007), the court found that a conviction for possession with intent to deliver under the TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) constitutes a controlled substance offense—a felony under the CSA.

United States v. Pillado-Chaparro, 543 F.3d 202 (5th Cir. 2008) - 21 U.S.C. § 843(b), federal offense of using a telephone to facilitate a conspiracy to distribute marijuana and/or cocaine, is a controlled substance offense. The issue before the Fifth Circuit was whether the defendant's offense was properly classified as a drug trafficking offense, and therefore, a controlled substance offense. This was a case of first impression for the Fifth Circuit; it relied on guidance from the Eleventh Circuit, United States v. Orihuela, 320 F.3d 1302 (11th Cir. 2003). In Orihuela, the court compared the definitions of "controlled substance offense" and "drug trafficking offense," which are interchangeable because the language in both definitions is essentially the same. The Fifth Circuit wholly agreed with the Eleventh Circuit's holding and reasoned that precedent interpreting "controlled substance offense" is analogous and applicable to the definition "drug trafficking offence." Because prior precedent recognized telephone facilitation offenses as controlled substance offenses, therefore, telephone facilitation offenses are also drug trafficking offenses.

United States v. Fuentes-Oyervides, 541 F.3d 286 (5th Cir. 2008) - OHIO'S REV. CODE ANN. § 2925.03(A)(2) constitutes a drug trafficking offense. When an offender prepares drugs for shipment, he knows or has reason to know that the drugs are intended for the sale or distribution by another. Preparation for shipment cannot simply involve the possessory act of one person moving his own drugs. Therefore, the Ohio statute meets the "possession with intent" clause of the "drug trafficking offense." In addition, an individual who prepares for shipment, ships, transports, delivers, prepares for distribution a controlled substance, while he knows or should know that the substance is intended for sale, commits an act of distribution—conduct included in the definition of the "drug trafficking offense."

United States v. Garcia-Arellano, 522 F.3d 477 (5th Cir. 2008) - A written judicial confession constitutes a "comparable judicial record" under Shepard v. United States, 544 U.S. 13 (2005) so that it may be considered in determining whether a defendant's prior conviction is a drug trafficking offense.

United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008) - The Supreme Court's decision in Lopez v. Gonzales, 549 U.S. 47 (2006) does not require the Fifth Circuit to abandon its holding in United States v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005) that a second conviction for simple possession qualifies as an AF.

United States v. Price, 516 F.3d 285 (5th Cir. 2008): Defendant's conviction for delivery of a controlled substance in violation of TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) was not a "controlled substance offense" for purposes of the USSG because the defendant could have been convicted merely for an offer to sell. The Court noted that the definition of a controlled substance offense was almost identical to the definition of a drug trafficking offense and then relied on cases determining whether convictions constitute a drug trafficking offense.

United States v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007) - Mere possession of a controlled substance is not an AF, regardless of how it is classified under state law. Approach of circuit in United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997) acknowledged as rejected by Lopez v. Gonzales, 549 U.S. 47 (2006).

Smith v. Gonzales, 468 F.3d 272 (5th Cir. 2006) - A judgment is not final within the meaning of the CSA until the time for seeking discretionary review of the conviction has elapsed. In this case, the respondent would be punishable as a felon under the CSA only through that Act's recidivist sentencing provision. Because the March 2004 offense that "qualified" the petitioner as a recidivist and thus enabled him to be punished as a felon had not become "final", it could not be used and thus the recidivist provision was not applicable.

Rashid v. Mukasey, 531 F.3d 438 (6th Cir. 2008) - A state drug offense constitutes an AF under INA § 101(a)(43)(B) by virtue of its correspondence to the federal felony offense of "recidivist possession" under 21 U.S.C. § 844(a) only if the individual has been convicted under a state's recidivism statute and that the elements of that offense included a prior drug-possession conviction that had become final at the time of the commission of the second offense.

United States v. Pacheco-Diaz (Pacheco-Diaz I), 506 F.3d 545 (7th Cir. 2007) - Because defendant was convicted of a prior drug possession offense, his subsequent Illinois conviction for possession of marijuana in violation of 720 ILL. COMP. STAT. § 550/4 could have been punished as a recidivist offense under federal law with a penalty of up to two years imprisonment, making it an AF had the charge been brought in federal court; thus, defendant's conviction for possession of marijuana was an AF.

United States v. Pacheco-Diaz (Pacheco-Diaz II), 513 F.3d 776 (7th Cir. 2007) - Seventh Circuit denied alien's petition for rehearing, affirmed its decision in

Pacheco-Diaz I, and expressed disagreement with the Board's approach in Matter of Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007), instead endorsing the concurring opinion of Board Member Pauley in that decision.

Gonzalez-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006) - Illinois state felony conviction for possession of a small amount of cocaine was found not to be an AF because the crime would be a misdemeanor under the Federal CSA.

Tostado v. Carlson, 481 F.3d 1012 (8th Cir. 2007) - Alien's convictions for possession of cocaine and possession of cannabis under Illinois law are not aggravated felonies because each offense would be punishable as a misdemeanor under the CSA.

Lopez-Jacuinde v. Holder, 600 F.3d 1215 (9th Cir. 2010) - A conviction for possession of pseudoephedrine with intent to manufacture methamphetamine in violation of the CAL. HEALTH AND SAFETY Code § 11383(c)(1) was categorically an AF. The use of a firearm is not a necessary element of a "drug trafficking crime" under 18 U.S.C. § 924(c) and the quantity requirement in the record-keeping provision does not relate to the criminal provisions.

Daas v. Holder, 620 F.3d 1050 (9th Cir. 2010) - An alien's conviction for distributing ephedrine and pseudoephedrine, which are List 1 chemicals used in the manufacturing of controlled substances but are not considered "controlled substances" under 21 U.S.C. § 802, with reasonable cause to believe the chemicals would be used to manufacture methamphetamine qualified as "drug trafficking crime," and thus constituted AF for removal purposes.

Cheuk Fung S-Yong v. Holder, 600 F.3d 1028 (9th Cir. 2010) – A single conviction for possession or sale of a controlled substance under CAL. HEALTH AND SAFETY CODE § 11379 is not categorically an AF. Under a modified categorical approach, a verbal admission of a second controlled substance conviction, by itself, without entering the conviction documents into the record, is insufficient to find that the alien committed an AF. See also

Mielewczyk v. Holder, 575 F.3d 992 (9th Cir. 2009) - Offering to transport heroin in violation of CAL. HEALTH AND SAFETY CODE § 11352(a) is a violation that relates to a controlled substance.

United States v. Almazan-Becerra, 537 F.3d 1094 (9th Cir. 2008) – Conviction for transporting or selling or offering to sell marijuana in violation of CAL. HEALTH & SAFETY CODE § 11360(a) does not constitute a drug trafficking offense for sentencing purposes. The Court relied on United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2000) (en banc) (superseded by statute on other grounds), holding that CAL. HEALTH & SAFETY CODE § 11360(a) is broader than the definition of a drug trafficking crime in INA § 101(a)(43)(B) because it prohibits

simple transportation for use, does not depend on profit motive, and criminalizes mere solicitation.

United States v. Reveles-Espinoza, 522 F.3d 1044 (9th Cir. 2008) - Conviction under CAL. HEALTH AND SAFETY CODE §11358 for "planting, cultivating, harvesting, drying, or processing any marijuana" categorically falls within the generic definition of a drug trafficking crime and is thus an AF, even if defendant was convicted under California's aiding and abetting theory.

Rendon v. Mukasey, 520 F.3d 967 (9th Cir. 2008) - Kansas conviction for possession of a controlled substance with intent to sell contains a trafficking element, making it an AF. Although KAN STAT. ANN. § 65-4163(a) is not categorically an AF because it criminalizes a solicitation offense, the record of conviction established that the alien had been convicted under a subsection of the statute (possession with intent to sell) that did contain a trafficking element.

United States v. Figueroa-Ocampo, 494 F.3d 1211 (9th Cir. 2007) - California offense of simple possession for personal use pursuant to CAL. HEALTH AND SAFETY CODE § 11350(a) is not an AF pursuant to Lopez v. Gonzales, 549 U.S. 47 (2006). United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000) recognized as overruled by United States v. Lopez, 549 U.S. 47 (2006).

Sandoval-Lua v. Gonzales, 499 F.3d 1121 (9th Cir. 2007) - Controlled Substance conviction under CAL. HEALTH AND SAFETY CODE § 11379(a) is categorically broader than the definition of 101(a)(43)(B), and under the modified categorical approach, the documents in the record satisfied the alien's burden of establishing by a preponderance of the evidence that his earlier conviction did not constitute an AF.

Salviejo-Fernandez v. Gonzales, 455 F.3d 1063 (9th Cir. 2006): Conviction for maintaining a place for selling or using controlled substances in violation of CAL. HEALTH & SAFETY CODE § 11366 is categorically an AF. Under the CSA, it is an offense to knowingly open, lease, rent, use, or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. The elements of CAL. HEALTH & SAFETY CODE § 11366 are (1) opening or maintaining a place (2) for the purpose of continuously or repeatedly using it for selling, giving away, or using a controlled substance. The Court concluded that the full range of conduct covered by § 11366 falls within 21 U.S.C. § 856(a) because § 11366 requires that the defendant act with purpose.

Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004) - Possession under CAL. HEALTH AND SAFETY CODE § 1137(a) lacks trafficking element and is not punishable under CSA and is not an AF.

United States v. Soberanes, 318 F.3d 959 (9th Cir. 2003) - A prior Arizona conviction for *attempted* possession of over 8 pounds of marijuana, where the

offense is a state law felony, is an AF under the sentencing guidelines. *Called into doubt by* United States v. Figueroa-Ocampo, 494 F.3d 1211 (9th Cir. 2007).

Olivera-Garcia v. INS, 328 F.3d 1083 (9th Cir. 2003) - Generic offense of solicitation to purchase drugs under Arizona statute was not a violation of the CSA and not an AF. See also Coronado-Durazo v. INS, 123 F.3d 1322 (9th Cir. 1997) (holding that solicitation to possess cocaine not an AF); Leyva-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999) (holding that solicitation to possess marijuana for sale is not an AF).

United States v. Martinez-Macias, 472 F.3d 1216 (10th Cir. 2007) - Kansas conviction for possession of cocaine is not an AF because possession is not a felony under the CSA pursuant to Lopez v. Gonzales, 549 U.S. 47 (2006). United States v. Cabrera-Sosa, 81 F.3d 998 (10th Cir. 1996) and progeny abrogated.

Batrez-Gradiz v. Gonzales, 490 F.3d 1206 (10th Cir. 2007) - The offense of manufacturing, delivering, or possessing with the intent to manufacture or deliver a controlled substance, in violation of WYO. STAT. ANN. § 35-7-1031(a) is an AF because each chargeable offense would be a felony under the CSA.

Gonzalez-Gonzalez v. Weber, 472 F.3d 1198 (10th Cir. 2006) - Colorado offense of simple possession of cocaine is not an AF because possession is not a felony under the CSA pursuant to Lopez v. Gonzales, 549 U.S. 47 (2006).

United States v. Madera-Madera, 333 F.3d 1228 (11th Cir. 2003) - Under sentencing guidelines, a prior Georgia state conviction under GA. CODE ANN. § 16-13-31(e) for trafficking-by-possessing more than 28 grams of methamphetamine constitutes a drug trafficking offense and an AF. The court found that the intent to distribute was inferred from the quantity of drugs possessed. See United States v. Orihuela, 320 F.3d 1302 (11th Cir. 2003) (holding that a conviction for telephone facilitation can constitute drug trafficking offense where underlying drug offense is a felony and sentence imposed for the facilitation crime exceeded 13 months).

**(C) Illicit Trafficking in Firearms/Destructive Devices (18 U.S.C. § 921) or Explosive Materials (18 U.S.C. §841(c))**

Kuhali v. Reno, 266 F.3d 93 (2d Cir. 2001) - Under 8 U.S.C. § 1227(a)(2)(C); § 237 (a)(2)(C), a conviction for conspiracy to export firearms and ammunition under 18 U.S.C. § 2778 inherently requires possession of firearms and qualifies as a firearm offense. The petitioner was therefore convicted of an AF. The court further held that the BIA has reasonably construed § 101(a)(43)(C) to include all firearms offenses that exhibits a business or merchant nature.

Joseph v. Attorney Gen., 465 F.3d 123 (3d Cir. 2006) - Applying the categorical approach, the court held that a conviction under 18 U.S.C. § 922(a)(3) is not an AF under the INA because § 922(a)(3) does not include a "trafficking element."

**(D) Laundering Monetary Instruments (18 U.S.C. § 1956) or Monetary Transactions over $10,000 in Property Derived from Unlawful Activities (18 U.S.C. § 1957)**

- ***Laundering Monetary Instruments (18 U.S.C. § 1956)***

**Discussion**: For purposes of 101(a)(43)(D), the amount of money laundered must exceed $10,000 to be an AF. The monetary loss to victim or the amount of restitution is not considered under this section. Loss to the victim is however considered for purposes of 101(a)(43)(M). See Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001).

**Note**: Determining the amount of money laundered: Circuit case law has not outrightly prohibited reliance on the PSR, but the narrative statement in the PSR cannot be used to determine if petitioner was convicted of a crime. See Dickson v. Ashcroft, 346 F.3d 44 (2d Cir. 2003). Also, statements in PSR cannot contradict explicit language in alien's plea agreement. See Chang v. INS, 307 F.3d 1185 (9th Cir. 2002). The BIA may not look to the PSR for proof of specific facts regarding the underlying conviction; the PSR can only be used as evidence of the existence of the underlying conviction. Conteh v. Gonzales, 346 F.3d 45 (1st Cir. 2006).

**(E) Explosive Materials Offenses (18 U.S.C. §§ 842(h)-(i), 844(d)-(i)), Firearms Offenses (18 U.S.C. §§ 922(g)(1)-(5), (j), (n)-(p), (r) and 924(b), (h)), or Firearms Offenses (IRS Code § 5861 (1986))**

Matter of Luviano-Rodriguez, 23 I&N Dec. 718 (A.G. 2005) - Conviction for a firearms offense violation that has been expunged pursuant to CAL. PENAL CODE § 1203.4 is a conviction for immigration purposes. Matter of Luviano, 21 I&N Dec. 235 (BIA 1996) *reversed*; Matter of Marroquin, 23 I&N Dec. 705 (A.G. 2005) followed.

Matter of Mendez-Orellana**,** 25 I&N Dec. 254 (BIA 2010) – In the context of determining removability under INA § 237(a)(2)(C) (firearm offense), the Board held that the DHS has met its burden where it presents evidence that an alien has been convicted of an offense involving a firearm. The burden then shifts to the respondent to show that the weapon was antique and, therefore, not a "firearm" under 18 U.S.C. § 921(a)(3) because it falls under the antique firearm exception.

Matter of Vasquez-Muniz, 23 I&N Dec. 207 (BIA 2002): Possession of a firearm by a felon in violation of CAL. PENAL CODE § 12021(a)(l) is an AF because it is described in 18 U.S.C. § 922(g)(l). Specifically, the BIA held that an offense

defined by state or foreign law may be an AF as "described in" a federal statute enumerated in section 101(a)(43) of the INA, even if it lacks the jurisdictional element of the federal statute. Overruling Matter of Vasquez-Muniz, 22 I&N Dec. 1415 (BIA 2000).

Nieto-Hernandez v. Holder**,** 592 F.3d 681 (5th Cir. 2009) – A conviction under TEX. PENAL CODE ANN. § 46.04 for unlawful possession of a firearm is an AF under INA § 101(a)(43)(E)(ii) because it includes the substantive elements of 18 U.S.C. § 922(g)(1), even if it lacks the interstate commerce element, because the interstate element is purely jurisdictional. See Matter of Vasquez-Muniz**,** 23 I&N Dec. 207 (BIA 2002)(holding that an offense defined by state law may be classified as an AF "described in" a federal statute enumerated under INA § 101(a)(43) even if it lacks the jurisdictional element of the federal statute).

United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir. 2003) - Conviction for possession of short-barrel firearm under TEX. PENAL CODE § 46.05 is almost identical to federal statute and qualifies as an offense described in § 5861 (relating to firearms offenses) and is therefore an AF.

Negrete-Rodriguez v. Mukasey, 518 F.3d 497 (7th Cir. 2008) - A conviction for unlawful possession of a firearm by a felon under 720 ILL. COMP. STAT. § 5/24-1.1(a) is an AF under INA § 101(a)(43)(E)(ii) because it is the state law counterpart to 18 U.S.C. § 922(g)(1) even without having an element of affecting interstate commerce. The court approved the BIA's decision in Matter of Vasquez-Muniz, 22 I&N Dec. 207 (BIA 2002).

Alvarado v. Gonzales, 484 F.3d 535 (9th Cir. 2007) - Conviction for possession of firearms and ammunition by an unlawful user of a controlled substance pursuant to 18 U.S.C. § 922(g)(3) is an AF, regardless of whether the alien possessed the firearms for sporting purposes.

United States v. Castillo-Rivera, 244 F.3d 1020 (9th Cir. 2001) - Conviction under CAL. PENAL CODE § 12021(a) for being a felon in possession of a handgun is an AF even though the offense lacks the commerce element of 18 U.S.C. 922(g) (requiring foreign or interstate shipment of firearm). The court noted that CAL. PENAL CODE § 12021(a) is divisible statute, and not all conduct under it is an AF. Rather, one must use the categorical approach and look to the conviction record to determine specific offense. See Matter of Vasquez-Muniz, 23 I&N Dec. 207 (BIA 2002) (BIA affirms Castillo, saying the element of commerce in the federal statute is jurisdictional, and need not be present in either a state or foreign offenses firearms statute).

United States v. Sandoval-Barajas, 206 F.3d 853 (9th Cir. 2000) - Possession of unlicenced firearm under WASH. REV. CODE § 9.41.170 is not an AF. The full range of conduct proscribed by the state statute was not similar enough to federal statute to be an offense described in 18 U.S.C. § 922.

**(F) Crimes of Violence (18 U.S.C. § 16) (Not including purely political offenses)– Term of imprisonment at least 1 year.**

**18 U.S.C. § 16(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, or **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See U.S.S.G. § 2L1.2 (using the identical language in 18 U.S.C. § 16(a) to define COV for sentencing purposes).

- ***Indeterminate Sentences***

Matter of Jean, 23 I&N Dec. 373 (A.G. 2002) - Indeterminate sentences are generally measured by the maximum period that could be imposed.

Matter of D-, 20 I&N Dec. 827 (BIA 1994) - Under Massachusetts law, for immigration purposes, an indeterminate sentence of imprisonment is measured by the maximum term imposed.

United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997) – Under the sentencing guidelines, an indeterminate sentence is measured by the maximum term imposed, such a sentence of 30-90 months constituted a sentence of "at least five years" even though time actually served was less than five years.

United States v. Frias, 338 F.3d 206 (3d Cir. 2003) - An indeterminate sentence is measured by the maximum term of imprisonment rather than the sentence actually served.

Shaya v. Holder, 586 F.3d 401 (6th Cir. 2009) **–** Indeterminate prison sentences in Michigan must be measured by the term actually served or the minimum sentence, whichever is greater, rather than by the maximum term.

- ***Abduction/Kidnapping***

United States v. Moreno-Florean, 542 F.3d 445 (5th Cir. 2008) - A kidnapping conviction under CAL. PENAL CODE § 207(a) is not categorically a COV under U.S.S.G. § 2L1.2 because kidnapping can be carried out by instilling fear in a victim rather than with physical force. As part of the modified categorical approach, the court could not find whether physical force was used because a guilty plea, by itself, does not constitute an averment of all the facts in the indictment and it did not have the plea agreement, transcript of the plea colloquy, or judicial factual findings to determine otherwise.

United States v. Soto-Sanchez, --- F.3d ----, 2010 WL 3894467 (6th Cir. 2010) - Michigan conviction of Kidnapping in violation of MICH. COMP. LAWS § 750.349

constitutes a COV for federal sentencing purposes. The statute requires that the kidnapping be committed forcibly, which is an element requiring the use, attempted use, or threatened use of physical force against the person of another.

- ***Armed with Intent***

  United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002) - Iowa conviction for being armed with any dangerous weapon (hammer) with intent was found to be a COV.

  Reyes-Alcaraz v. Ashcroft, 363 F.3d 937 (9th Cir. 2004) - Exhibiting a deadly weapon with the intent to resist arrest in violation of CAL. PENAL CODE § 417.8 is a COV and therefore an AF.

- ***Arson***

  Matter of Palacios, 22 I&N Dec. 434 (BIA 1998) - Intentional starting of fire or causing explosion has substantial risk of harm to person or property and is a COV. Arson in the first degree under ALASKA STAT. § 11.46.400 is therefore a COV.

  United States v. Mitchell, 23 F.3d 1 (1st Cir. 1994) - Conspiracy to commit arson under 18 U.S.C. § 371, and aiding/abetting arson under 18 U.S.C. § 844 are COV's because they both involve substantial risk force will be used.

  Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007) - Arson as defined by D.C. CODE § 22-401 is a COV because the malicious setting of fire to homes, public buildings, and churches has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another.

  United States v. Velez-Alderete, 569 F.3d 541 (5th Cir. 2009) - An arson conviction under TEX. PENAL CODE ANN. § 28.02 is a COV. The generic definition of arson involves willful and malicious burning of property, personal or real, without requiring that the burning threaten harm to a person. The Texas arson statute proscribes starting a fire with intent to destroy or damage various types of property. These variations involve willful and malicious burning of property. Therefore, the Texas arson statute falls within that definition and constitutes a COV.

  Jordison v. Gonzales, 501 F.3d 1134 (9th Cir. 2007) - Conviction under CAL. PENAL CODE § 452(c) for recklessly setting fire to a structure or forest land is not categorically a COV because the statute is not limited to fires that damaged the property of others. Under the modified categorical approach, nothing in the record precluded the possibility that the alien was convicted for setting fire to his own property, so conviction was not a COV and thus not an AF.

- ***Assault (Misdemeanor)***

  Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010) - A conviction under 18.2-57.2(A) of the Virginia Code for misdemeanor assault and battery against a family or household member is not categorically a COV under 18 U.S.C. § 16(a) because the offense does not include as an element the actual, attempted, or threatened use of "violent force" that is capable of causing pain or injury. *See Johnson v. U.S.*, 130 S. Ct. 1265 (2010) (the physical force necessary for a COV must be "violent" force).

  Matter of Martin, 23 I&N Dec. 491 (BIA 2002) - Third degree assault under CONN. GEN. STAT. § 53a-61 (class A misdemeanor) involves the intentional infliction of physical injury is a COV. But see Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003); Flores v. Ashcroft, 350 F. 3d 666 (7th Cir. 2003).

  Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003) - Court ruled that third degree assault under CONN. GEN. STAT. § 53a-61 does not require use of force (statute requires intent to, and causation of injury) and is not a COV (18 U.S.C. § 16(a) requires the use of force). The court rejects Matter of Martin, 23 I&N Dec. 491 (BIA 2002) where the BIA addressed the same Connecticut statute.

  Popal v. Gonzalez, 416 F.3d 249 (3d Cir. 2005) - A violation of 18 PA. CONS. STAT. § 2701(a) for misdemeanor simple assault is not a COV. The offense requires a *mens rea* of recklessness, which the Third Circuit held in Tran v. Gonzales, 414 F.3d 464 (3d Cir. 2005), does not meet the use of force requirement. Also, because the violation is not a felony, it does not qualify as a COV under 16(b).

  Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2005) - Simple assault, as defined by 18 PA. CONS. STAT. § 2701(a)(3) requires specific intent to use, threaten to use, attempt to use force against an individual and is therefore a COV within 18 U.S.C. § 16(a).

  United States v. Ramirez, 557 F.3d 200 (5th Cir. 2009) - A third degree aggravated assault under N.J. STAT. ANN. § 2C:12-(1)(b)(7) is a COV because it requires a significant serious injury. Although significant bodily injury requirement differs from the substantial bodily injury requirement, however it is not enough to take the NJ statute out of the common-sense definition of the enumerated offense of an aggravated assault.

  United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006) - Misdemeanor assault under TEX. PENAL CODE ANN. § 22.01(a)(1) does not have as an element the "use of physical force against the person of another" and thus is not a COV under section 16(a). United States v. Shelton, 325 F.3d 553 (5th Cir. 2003) *rejected*.

Suazo Perez v. Mukasey, 512 F.3d 1222 (9th Cir. 2008) - Misdemeanor domestic violence assault in the fourth degree in violation of the WASH. REV. CODE § 9A.36.041 is not categorically a COV because it can be committed by nonconsensual offensive touching.

- ***Assault***

  Lopes v. Keisler, 505 F.3d 58 (1st Cir. 2007) - Conviction under R.I. GEN. LAWS § 11-5-3 for simple assault or battery was a COV because the conviction records established that Lopes committed an assault, which, as defined by Rhode Island (RI) case law, qualifies as a COV. Because § 11-5-3 does not provide a definition of assault, the BIA appropriately looked to Rhode Island case law to determine how the state defines the crime. RI case law defines assault as "an unlawful attempt or offer, with *force or violence,* to do a *corporal hurt* to another, whether from malice or wantonness." Thus, the conviction was a COV because it has as an element the "attempted use, or threatened use of physical force against the person or property of another."

  Ramirez v. Mukasey, 520 F.3d 47 (1st Cir. 2008) - Conviction for indecent assault and battery on a person 14 years or older, in violation of MASS. GEN. LAWS ch. 265, § 13H, is an AF COV because the offense, by its nature, presents a substantial risk that force may be used to overcome the victim's lack of consent. The Court approves/adopts the same conclusion reached by the Second Circuit in Sutherland v. Reno, 228 F.3d 171 (2d Cir. 2000).

  Canada v. Gonzales, 448 F.3d 560 (2d Cir. 2006) - Alien's conviction for assault of a peace officer in violation of CONN. GEN. STAT. § 53a-176c(a)(1) is a COV and therefore an AF as the statute involved a substantial risk of the use of physical force.

  Dale v. Holder, 610 F.3d 294 (5th Cir. 2010) – Assault in the first degree under N.Y. PENAL LAW § 120.10 – intent to cause serious physical injury to a another, with a deadly weapon, or recklessly engaging in conduct with a depraved indifference to human life, and causing serious physical injury or causing serious physical injury in the course of a felony– is divisible, as defendants are routinely allowed to plead to the legally impossible crime of attempted reckless assault. Case remanded.

  United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006) - Assault under TEX. PENAL CODE ANN. § 22.01(a)(1) is not a COV because the use of force is not an element of that subsection.

  United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004) - Intoxication assault under TEX. PENAL CODE ANN. § 49.07 (Drunk person by accident/mistake causes serious bodily injury) lacks intentional use of force and is not a COV.

Camacho-Cruz v. Holder, 621 F.3d 941 (9th Cir. 2010) – An alien's conviction of assault with use of a deadly weapon under NEV. REV. STAT. § 200.471 is a COV because the statute requires that the alien, by using a deadly weapon, intentionally create in another person a reasonable fear of immediate bodily harm. Whether the alien actually intended to harm the victim or whether harm resulted is irrelevant.

United States v Laurico-Yeno**,** 590 F.3d 818 (9th Cir. 2010) – A conviction for willful infliction of corporal injury on a spouse/cohabitant/etc. under CAL PENAL CODE § 273.5(a) is categorically a COV under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because it "has as an element the use, attempted use, or threatened use of physical force against the person of another."

Prakash v. Holder, 579 F.3d 1033 (9th Cir. 2009) - Soliciting another to commit and join in the commission of assault by means of force likely to produce great bodily injury with intent that the crime be committed in violation of CAL. PENAL CODE § 653f(a) is a COV under 18 U.S.C. § 16(b), even if the actual violence occurs after the solicitation itself. Although the crime of solicitation can be committed without the use of force and before any actual force is used, this does not diminish the substantial risk of violence that solicitation of assault inherently presents.

United States v. Heron-Salinas, 566 F.3d 898 (9th Cir. 2009) - Assault with a firearm under CAL. PENAL CODE § 245(a)(1) is a COV under 18 U.S.C. § 16(a) and (b). See also Ortiz-Magana v. Mukasey, 523 F.3d 1042 (9th Cir. 2008) (aiding and abetting under CAL. PENAL CODE § 245(a)(1) a COV and AF).

Ortiz-Magana v. Mukasey, 542 F.3d 653 (9th Cir. 2008) - A conviction for assault with a deadly weapon under CAL. PENAL CODE § 245(a)(1) as an aider and abettor (instead of as a principal) is a COV and thus an AF because no principled distinction can be drawn for immigration purposes between an alien's status as an accessory and his role as a principal under that California statute. See also United States v. Heron Salinas, 566 F.3d 898 (9th Cir. 2009).

United States v. Sandoval, 390 F.3d 1077 (9th Cir. 2004) - Third degree assault in Washington is not a COV for sentencing enhancement purposes. It was possible under Washington law to commit third degree assault by an unlawful touching that did not include substantial physical force or serious risk of physical injury.

United States v. Rodriguez-Enriquez, 518 F.3d 1191 (10th Cir. 2008) - Conviction for assault two (drugging a victim) under COLO. REV. STAT. ANN. § 18-3-203(1)(e) is not a crime that has as an element the use, attempted use, or threatened use of physical force and thus is not a COV.

United States v. Zuniga-Soto, 527 F.3d 1110 (10th Cir. 2008) - In determining whether a prior conviction is a COV as a crime that has as an element the use, attempted use, or threatened use of physical force against the person of another, a

court's inquiry is limited to the statutory definition of the prior offense, and not the facts underlying a defendant's prior conviction; a court may examine certain judicial records only for the limited purpose of determining which part of the statute was charged against a defendant if the statute includes multiple definitions of an offense. A conviction for assaulting a public servant under TEXAS PENAL CODE ANN. § 22.01(b)(1) is not a COV because the statute permits convictions for reckless conduct.

United States v. Palomino Garcia, 606 F.3d 1317 (11th Cir. 2010) – A conviction for aggravated assault for intentionally, knowingly, or recklessly causing physical injury to an officer while in custody pursuant to ARIZ. REV. STAT. ANN. § 13-1204(A)(7) is not a COV under the sentencing guidelines because the statute criminalized *recklessly* causing injury, which does not satisfy the "use of physical force" requirement.

- ***Battery***

Johnson v. United States, __ U.S. __, 130 S. Ct. 1265 (2010) – Alien's conviction of battery under FLA. STAT. § 776.08 was not categorically a "violent felony" under the Career Criminal Act, 18 U.S.C. § 922(g)(1) because the term "physical force" under § 922(g)(1) requires as an element the application of strength, power, or violence, not simply slight touching. ("Violent felony" is defined as any crime that is punishable by more than 1 year in prison and that "has as an element, the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). This language replicates most of 18 U.S.C. § 16(a) but omits force against properly and includes a minimum punishment threshold).

United States v. Earle, 488 F.3d 537 (1st Cir. 2007) - Massachusetts offense of assault and battery by means of a dangerous weapon pursuant to MASS. GEN. LAWS ch. 265 § 15A(b) is a COV as it involves the use of physical force against another person.

Blake v. Gonzales, 481 F.3d 152 (2d Cir. 2007) - Massachusetts offense of assault and battery on a police officer pursuant to MASS. GEN. LAWS ch. 265 § 13D is a COV, regardless of whether it is committed intentionally, or wantonly and recklessly because the offense inescapably involves a substantial risk that physical force may be used.

Wireko v. Reno, 211 F.3d 833 (4th Cir. 2000) - Misdemeanor sexual battery in Virginia is a COV.

Larin-Ulloa v. Gonzales, 462 F.3d 456 (5th Cir. 2006) - Kansas aggravated battery conviction was found not to be an AF (not a COV). The alien had been convicted of "intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner

whereby great bodily harm, disfigurement or death can be inflicted." The Court found that physical contact is not the same as physical force as is required for a finding of COV.

U.S. v. Rodriguez-Gomez, 608 F.3d 969 (7th Cir. 2010) - Aggravated battery under Illinois law, 720 ILL. COMP. STAT 5/12-4(b)(6) – intentionally or knowingly causes physical harm or makes physical contact of an insulting or provoking nature against a person the defendant knows to be a community policing volunteer – is divisible. Under a modified categorical approach, the indictment showed that the defendant had been convicted under the first prong of the statute for kicking the victim, a police officer, which the court found required the "use, attempted use, or threatened use of physical force" and, therefore, constituted a COV.

United States v. Evans, 576 F.3d 766 (7th Cir. 2009) - Aggravated battery involving harm to a pregnant individual under 720 ILL. COMP. STAT. §§ 5/12-3(a) and 5/12-4(b)(II) is not a COV. The battery statute can be violated through physical contact that is "insulting or provoking." "'Insulting or provoking' physical contact, though intentional, could be no more violent than spitting" or kissing.

LaGuerre v. Mukasey, 526 F.3d 1037 (7th Cir. 2008) - A conviction for domestic battery under 720 ILL. COMP. STAT. 5/12-3.2(a)(1) is a COV because it has as an element the use of physical force.

Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003) - Misdemeanor battery under IND. CODE § 35-42-2-1 (any touching in a rude, insolent, or angry manner) even if it causes bodily injury is not a COV because intent to use violent force (force intended to cause bodily injury, or likely to do so) must be an element of offense.

Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. 2006) - Alien convicted of simple battery under CAL. PENAL CODE § 242 did not commit a COV. Although § 242 defined battery as "any willful and unlawful use of force or violence upon the person of another," state courts had interpreted "force" to mean a "harmful or offensive touching." Because a mere "offensive touching" does not rise to the level of COV in the Ninth Circuit, simple battery under § 242 is not a COV.

United States v. Gonzales-Tamariz, 310 F.3d 1168 (9th Cir. 2002) - In a case involving substantial bodily harm, battery was found to be a COV even as a misdemeanor because the sentence was a year or more.

Hernandez v. U.S. Attorney Gen., 513 F.3d 1336 (11th Cir. 2008) - Conviction for simple battery in violation of GA. CODE ANN. § 16-5-23(a)(2) is a COV because the offense requires intentionally causing physical harm to the victim through physical contact, and thus has, as an element, the use or attempted use of physical force.

- ***Burglary of a Habitation***

  United States v. Cardenas-Cardenas, 543 F.3d 731 (5th Cir. 2008) - The U.S. Supreme Court in James v. United States, 550 U.S. 192 (2007) did not overrule the Fifth Circuit precedent finding that a conviction for burglary under TEX. PENAL CODE ANN. § 30.02(a)(1) was a COV. In James, the Court dealt with a Florida burglary statute that criminalizes unlawful entry onto the curtilage of a structure. The Texas burglary statute, on the other hand, criminalizes entry into habitation or a building.

  United States v. Constante, 544 F.3d 584 (5th Cir. 2008) - A Texas burglary conviction under TEX. PENAL CODE ANN. § 30.02(a)(3) a not a COV. Because there is no element of specific intent, section 30.02(a)(3) is not a generic burglary under Taylor v. United States, 495 U.S. 575, 598 (1990) (holding that generic burglary requires that a state statute contain, at minimum, the elements of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.").

  United States v. Castillo-Morales, 507 F.3d 873 (5th Cir. 2007) - Burglary conviction under FLA. STAT. § 810.02(1), (3) includes crimes beyond COVs by defining dwelling to include cartilage. The Court held that "when a defendant stipulates that a "factual basis" for his plea is present in "court documents," courts may use any uncontradicted facts in those documents to establish an element of a prior conviction." Thus, the conviction was a COV under modified categorical approach.

  United States v. Carbajal-Diaz, 508 F.3d 804 (5th Cir. 2007) - MO. ANN. STAT. §§ 569.160, 569.010(2), under which Carbajal-Diaz was convicted for burglary, swept more broadly than COV offense of "burglary of dwelling" by including buildings that may not be considered dwellings. However, under the modified categorical approach, the burglary indictment specified burglary of an apartment, and because the apartment in question was a dwelling, the offense was a COV.

  United States v. Guadardo, 40 F.3d 102 (5th Cir. 1994) - Burglary of a habitation under TEX. PENAL CODE ANN. is a *per se* COV under 18 U.S.C. § 16(b). The court relies on reasoning in United States v. Flores, 875 F.2d 1110 (5th Cir. 1989) (whenever a private residence is broken into, there is always a substantial risk that force will be used).

  United States v. Snellenberger, 548 F.3d 699 (9th Cir. 2008) - A conviction for burglary in violation of CAL. PENAL CODE § 459 is a COV. The circuit court held that courts could rely on clerk's minute orders in determining if a prior state burglary conviction qualified as predicate COV if the minute order was prepared by a neutral officer of the court, and the defendant had the right to examine and challenge its content.

United States v. Cornelio-Pena, 435 F.3d 1279 (10th Cir. 2006) - Solicitation to commit burglary of a dwelling is a COV and AF for sentencing enhancement purposes because COV's include crimes that are sufficiently similar to aiding and abetting, conspiracy, and attempt when the underlying crime is a COV, and solicitation (commanding, encouraging or requesting another person to commit a crime with intent to promote the commission of crime) is sufficiently similar to each.

- ***Burglary of a Nonresidential Building***

United States v. Rodriguez-Rodriguez, 388 F.3d 466 (5th Cir. 2004) - Texas conviction for burglary of a building pursuant to 1974 TEX. PENAL CODE ANN. § 30.02 is not a COV because it does not have, as an element, the use, attempted use, or threatened use of physical force. Note: Overruled by United States v. Turner, 305 F.3d 349 (5th Cir. 2002) on other grounds.

United States v. Rodriguez-Guzman, 56 F.3d 18 (5th Cir. 1995) - Texas conviction for burglary of nonresidential building is a COV under 18 U.S.C. § 16(b) because the offense often involves the application of destructive physical force to the property of another.

- ***Burglary of a Vehicle***

Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000) - Burglary of vehicle with intent to commit theft in violation of TEX. PENAL CODE ANN. § 30.04(a) is a COV. Note: Conviction was neither a burglary nor a theft offense under 101(a)(43)(G).

United States v. Alvarez-Martinez, 286 F.3d 470 (7th Cir. 2002) - Burglary [of a vehicle] under Ill. law where person pried open the window of a locked car and stole a stereo was a COV under 18 U.S.C. §16(a) (physical force used). Note: This case interprets old case law and reading actual case is suggested before relying upon holding.

Solorzano-Patlan v. INS, 207 F.3d 869 (7th Cir. 2000) - Illinois offense of burglary of automobile was not a "burglary offense" nor a COV. IJ is required to review and analyze charging papers, not just language and title of statute. The Illinois statute broadly defines burglary. The case was remanded to determine whether petitioner's conduct involved substantial risk that physical force be used. See (G) for further discussion.

Sareang Ye v. INS, 214 F.3d 1128, (9th Cir. 2000) - Vehicle burglary under CAL. PENAL CODE § 459 was found not to be burglary nor a COV. Vehicle burglary can be accomplished without physical force. No substantial risk that violent physical force will be used against person/property. See also Ngaeth v. Mukasey, 545 F.3d 796 (9th Cir. 2008). See also (G) for further discussion.

- ***Child Abuse***

  Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999) - Conviction for criminally negligent child abuse under COLO. REV. STAT. § 18-6-401(1) (a divisible statute), for unreasonably placing child in situation which poses a threat (child left in bathtub and drowned) is a crime that does not involve a threat that a substantial risk that physical force would be used in its commission, and was therefore found not to be a COV. No force or violence is necessary. Instead, only an act of omission is required for a conviction under this portion of the state criminal statute.

  Fregozo v. Holder, 576 F.3d 1030 (9th Cir. 2009) - A misdemeanor child endangerment conviction under CAL. PENAL CODE § 273a(b) is not categorically a crime of child abuse.

  United States v. Saenz-Mendoza, 287 F.3d 1011 (10th Cir. 2002) - Misdemeanor conviction for child abuse (cruelty toward child) under Utah state law was found to be a COV.

- ***Child Abduction***

  United States v. Patterson, 576 F.3d 431 (7th Cir. 2009) - Knowingly transporting a minor in interstate commerce with intent that the minor engage in prostitution in violation of 18 U.S.C. § 2423(a) is a COV. The crime is purposeful and aggressive. The violator also exposes the victim to a foreseeable risk of violence, physical injury, and disease.

  United States v. Franco-Fernandez, 511 F.3d 768 (7th Cir. 2008) - The Illinois offense of "putative father" child abduction under 720 ILL. COMP. STAT. 5/10-5(b)(3) is not a COV and thus not an AF.

  United States v. Martinez-Jimenez, 294 F.3d 921 (7th Cir. 2002) - Luring a child into a motor vehicle in contravention of Illinois law was found to be a COV and therefore an AF.

- ***Contempt (criminal)***

  Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999) - Criminal contempt in the first degree under N.Y. PENAL LAW § 215.51(b)(i) was found to be a COV under 18 U.S.C. § 16(b).

- ***Criminal Coercion***

  Cortez-Guillen v. Holder, 623 F.3d 933 (9th Cir 2010) - Alaska conviction of Criminal Coercion in violation of ALASKA STAT. § 11.41.530(a)(1) is not

categorically a COV. The statute permits a conviction based on either fear of physical injury or any other crime, which may not involve violence or the use of force.

- ***Criminally Negligent Homicide***

  United States v. Dominguez-Ochoa, 386 F.3d 639 (5th Cir. 2004) - Texas criminally negligent homicide is not a COV under sentencing guidelines because it requires a *mens rea* of negligence, not intentional force.

- ***Criminal Mischief***

  United States v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001) - Defendant's conviction for violation of Texas "criminal mischief" statute, TEX. PENAL CODE ANN. § 28.03(a)(3), for the intentional marking of another's property was not a COV under 18 U.S.C. § 16(b) because it lacked substantial risk that destructive/violent force would be used.

- ***Criminal Sexual Misconduct***

  United States v. Rosas-Pulido, 526 F.3d 829 (5th Cir. 2008) - A conviction for criminal sexual conduct under MINN. STAT. ANN. § 609.345(1)(c) does not have as an element the use, attempted use, or threatened use of physical force against the person of another "for the same reasons" as it is not a "forcible sex offense," that is, because it can include conduct that is not "forcible" as that term is commonly understood.

  United States v. Fernandez-Cusco, 447 F.3d 382 (5th Cir. 2006) - Conviction for third degree sexual misconduct in violation of MINN. STAT. ANN. § 609.344(1)(c) for criminal sexual misconduct, which includes the use of force or coercion to accomplish penetration was found to be a COV for sentencing enhancement purposes.

- ***Criminal Trespass***

  United States v. Delgado-Enriquez, 188 F.3d 592 (5th Cir. 1999) - Criminal trespass under a divisible COLO. REV. STAT. § 18-4-502 (knowingly & unlawfully entering/remaining in a dwelling) creates substantial risk that physical force will be used against residents of dwelling and is, therefore, a COV under 18 U.S.C. § 16(b). Case was approved by United States v. Venegas-Ornelas, 348 F.3d 1273 (10th Cir. 2003) (dealing with same divisible part of COLO. REV. STAT. § 18-4-502).

- ***Discharging a Firearm/Shooting into an Occupied Dwelling***

  United States v. Alfaro, 408 F.3d 204 (5th Cir. 2005) - Shooting into an occupied dwelling in violation of VA. CODE ANN. § 18.202-79 (1993) -is not a COV for

sentence enhancing purposes, because a defendant could violate the statute by shooting a gun at a building without actually shooting, attempting to shoot, or threatening to shoot another.

United States v. Gear, 577 F.3d 810 (7th Cir. 2009) - Reckless discharge of a firearm under 720 ILL. COMP. STAT. § 5/24-1.5(a) is not a COV under 18 U.S.C. § 16(b) because it does not encompass any purposeful, aggressive, and violent conduct.

Quezada-Luna v. Gonzales, 439 F.3d 403 (7th Cir. 2006) - Aggravated discharge of a firearm in violation of 720 ILL. COMP. STAT. § 5/24-1.2(a)(1) was found to be a COV and thus an AF, because the offense required discharge of a firearm into a building with reasonable knowledge that the building was occupied and therefore involved a substantial risk of force against the person or property of another.

United States v. Jaimes-Jaimes, 406 F.3d 845 (7th Cir. 2005) - Violation of WIS. STAT. ANN. § 941.20(2)(a) for discharging firearm into a vehicle or building was not a COV for sentence enhancement purposes, because elements did not require the defendant to use or threaten to use physical force against the person of another.

Covarrubias Teposte v. Holder, 623 F.3d 1094 (9th Cir. 2010) - California conviction of Shooting at Inhabited Dwelling or Vehicle in violation of CAL. PENAL CODE § 246 is not a COV under the categorical approach. A conviction can be based on a reckless *mens rea*, which is not the same as the intentional use of physical force.

- ***Domestic Violence***

Banuelos-Ayon v. Holder, 611 F.3d 1080 (9th Cir. 2010) – A conviction under California's domestic violence statute, CAL. PENAL CODE § 273.5(a) – criminalizing willful infliction of corporal injury on the mother or father or his child resulting in traumatic injury – is a COV, as it requires more than simple battery for conviction.

Matter of Perez Ramirez, 25 I&N Dec. 203 (BIA 2010) – Where a criminal alien's sentence has been modified to include a term of imprisonment following a violation of probation, the resulting sentence is part of the penalty imposed for the original underlying crime, rather than punishment for a separate offense. Additionally, a misdemeanor conviction under CAL. PENAL CODE § 273.5(a) – willfully inflicting corporal injury upon the perpetrator's spouse resulting in a traumatic condition – is a COV under 18 U.S.C. §16(a), as it requires as an element that the criminal alien have "willfully and directly appl[ied] upon another person a force that is of such violence as to cause a wound or external or internal injury to the victim."

- ***DWI/DUI***

  Begay v. United States, 553 U.S. 137 (2008) - Driving under the influence of alcohol under N. M. STAT. ANN. §§ 66-8-102(A) and (C) is not a COV. Courts must examine the way the law defines the offense, not how an individual offense committed it. The offense contains no element of "use, attempted use, or threatened use of physical force against the person of another." While drunk driving presents a serious risk of physical injury, the offense falls outside conduct involving purposeful, violent, and aggressive conduct.

  Leocal v. Ashcroft, 543 U.S. 1 (2004) - State DUI offenses, such as Florida's, that do not have a *mens rea* component, or require only a showing of negligence in the operation of a vehicle, are not COV's under 18 U.S.C. § 16.

  Matter of Ramos, 23 I&N Dec. 336 (BIA 2002) - Cases in Circuits that have not decided whether driving under the influence is a COV, DUI is a COV if committed at least recklessly and involves a substantial risk that perpetrator may resort to the use of force to carry out the crime. BIA ruled in Ramos that Massachusetts DWI (MASS. GEN. LAWS ch. 90, § 24(1)(a)(1)) does not involve substantial risk that physical force will be used against person/property while committing the offense and is not a COV. For cases arising in the circuits that have ruled on DWI/DUI as a COV, defer to the circuit law.

  Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001) - N.Y. DWI (NY VEH. & TRAF. LAW § 1192.3) is not a COV since a COV involves application of force in the course of committing the offense.

  United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004) - Use of force under 18 U.S.C. § 16 requires that a person intentionally avail himself of that force. Intoxication Assault under TEX. PENAL CODE ANN. § 49.07 was not a COV because intent need not be proven, only that offense happened "by accident or mistake."

  United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) - A felony conviction for driving while intoxicated (DWI) in violation of TEX. PENAL CODE ANN.§ 49.09 is not a COV for sentencing purposes. See United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001) (federal statutes interpreted uniformly for sentencing/immigration purposes); Matter of Oliveras-Martinez, 23 I&N Dec. 148 (BIA 2001) (*affirming* Chapa-Garza for Fifth Circuit cases).

  Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001) - COV requires use of force in the commission of the offense. 18 U.S.C. § 16(b) means there is a substantial risk that person will intentionally employ physical force during commission of offense. DWI is not therefore a COV.

United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001) - Use of force is an element of both prongs of 18 U.S.C. § 16. The use of force requires a volitional act. California DUI contains no intent requirement, and can be violated through mere negligence and is therefore not a COV. See also United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001).

United States v. Lucio-Lucio, 347 F.3d 1202 (10th Cir. 2003) - DWI in Texas, by its nature, does not pose a substantial risk that physical force may be used in the commission of the offense is not a COV under 18 U.S.C. 16(b). This case notes distinction between crimes that create a risk of intentionally causing harm (like burglary) and crimes that create risk of accidentally causing harm (like DWI). *Declined to extend* Tapia v. INS, 237 F.3d 1216 (10th Cir. 2001) (which deferred DWI issue to BIA's analysis in Matter of Puente, 22 I&N Dec. 1006 (BIA 1999), *overruled by* Matter of Ramos, 23 I&N Dec. 336 (BIA 2002) .

- ***Endangerment***

United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) - Endangering a child under TEX. PENAL CODE ANN. § 22.041(c) (intentionally, recklessly, through criminal negligence, or by act/omission, places child in imminent danger of death/bodily injury) is not a COV. Endangerment can, but need not, involve application of force. Includes conduct that does not require the intentional use of, or risk that force will be used. The court cites Chapa-Garza, 243 F.3d 921. See United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) (injury to child under TEX. PENAL CODE ANN. § 22.04(a) is not a COV).

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002) - For reckless conduct to satisfy 18 U.S.C. § 16(b) the conduct must require recklessness as to, or conscious disregard of, a risk that physical force will be used against another, not merely the risk that another might be injured. Endangerment under ARIZ. REV. STAT. ANN. § 13-1201 (substantial risk of imminent death or physical injury) does not mean "substantial risk that physical force may be used." Endangerment could be caused by failure to act. Arizona endangerment is not a COV.

- ***Escape***

United States v. Hopkins, 577 F.3d 507 (3d Cir. 2009) - A second degree misdemeanor escape under 18 PA. CONST. STAT. ANN. § 5121 is not a COV. Escape from detention is purposeful conduct, however, the "crime of conviction is unaccompanied by 'force, threat, deadly weapon, or other dangerous instrumentality.'" And since the detention relates to an unadjudicated misdemeanor, it is expected that the office will employ force that will present materially less of a potential for physical injury to the officer than if it were a felony crime.

United States v. Hart, 578 F.3d 674 (7th Cir. 2009) - A federal escape conviction under 18 U.S.C. § 751(a) is not a COV. The federal escape statute covers a wide range of conduct, from violent jailbreaks to quiet walkaways.

United States v. Park, 620 F.3d 911 (8th Cir. 2010) – A class D felony for escape under MO. REV. STAT. § 575.210 can be a COV the residual clause of U.S.S.G. § 4B1.2(a)(2) ("involves conduct that presents a serious potential risk of physical injury to another)" if the criminal alien escaped from *guarded* confinement. Under a modified categorical approach, the court determined that the criminal alien had escaped from guarded confinement and was convicted of a COV for running past a guard who was opening the confinement door at a specific time.

- ***Evading Arrest of an Officer***

United States v. Harrimon, 568 F.3d 531 (5th Cir. 2009) - Evading arrest or detention by use of a vehicle under TEX. PENAL CODE ANN. § 38.04(b)(1) is a COV. The conviction requires fleeing that is purposeful, violent, and aggressive. Fleeing by vehicle (1) requires disregarding an officer's lawful order, which is a challenge to the officer's authority and initiates pursuit; (2) is violent because the use of a vehicle to evade arrest involves a violent force, which an arresting officer must in some way overcome; (3) will typically lead to a confrontation with the officer being disobeyed, which contains a risk of violence; and (4) poses a serious risk of injury to others—as a fleeing offender evading arrest will not hesitate to endanger others to make the escape.

United States v. Hudson, 577 F.3d 883 (8th Cir. 2009) - Resisting arrest by fleeing in such a manner that created a substantial risk of serious physical injury or death to any person under MO. REV. STAT. § 575.150.5 is a COV. Knowingly fleeing a police officer who is attempting to make an arrest is purposeful conduct. The statute also involves conduct that is purposeful and aggressive because resting arrest by fleeing inevitably invites confrontation as it calls the officer to give chase and endangers him needlessly in the pursuit.

Penuliar v. Mukasey, 528 F.3d 603 (9th Cir. 2008) - Evading an officer under CAL. VEH. CODE § 2800.2 is not categorically a COV and charging document and abstract of judgment were insufficient to show COV under modified categorical approach. Conviction for unlawful driving or taking of a vehicle under CAL. VEH. CODE § 10851(a) is not categorically a theft offense and charging documents were insufficient to show theft offense.

- ***Facilitation***

Nguyen v. Ashcroft, 366 F.3d 386 (5th Cir. 2004) - Facilitation in drive-by shooting under OKLA. STAT. tit. 21, § 652(b) (person uses vehicle to facilitate intentional discharge of any kind of firearm) is a COV under 18 U.S.C. § 16(b).

Intentional discharge of firearm is required for conviction, even if driver of car did not discharge firearm, he facilitated, and committed a COV.

- ***Failure to Report***

  Chambers v. United States, 129 S. Ct. 687 (2009) - Failure to report under 720 ILL. COMP. STAT. § 5/31-6(a) is not a COV. The offense contains no element of "use, attempted use, or threatened use of physical force against the person of another." The offense does not involve conduct that presents a serious potential risk of physical injury to another, and is a "far cry from the 'purposeful, violent, and aggressive conduct'" because an individual who fails to report would unlikely call attention to his whereabouts by engaging in additional violent or unlawful conduct.

- ***False Imprisonment***

  United States v. Hernandez-Hernandez, 431 F.3d 1212 (9th Cir. 2005) - A conviction under CAL. PENAL CODE §§ 236 and 237 for unlawfully violating the personal liberty of another by violence, menace, fraud or deceit was found to be a COV. The court utilized the modified categorical approach, and relied on a stipulated motion in determining that the petitioner had violently violated the personal liberty of another and was thus guilty of a COV. The court noted that had the crime been committed by use of fraud or deceit, the offense would not have been a COV.

  United States v. Ruiz-Rodriguez, 494 F.3d 1273 (10th Cir. 2007) - False imprisonment pursuant to NEB. REV. STAT. § 28-314(1) is not categorically a COV because the offense may be committed by restraint through deception and thus, it does not require the use, attempted use, or threatened use of physical force.

  Brooks v. Ashcroft, 283 F.3d 1268 (11th Cir. 2002) - False imprisonment under FLA. STAT. § 787.02 is a COV. The court relied on Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994). Note: Superseded by statute on other grounds.

- ***Grand Theft***

  Van Don Nguyen v. Holder, 571 F.3d 524 (6th Cir. 2009) - Grand theft of an automobile under CAL. PENAL CODE § 487 is not a COV under 18 U.S.C. § 16(b). The statutory elements do not mention violent conduct and encompass inherently nonviolent conduct. While there is a chance that violent force could be used, however, the risk is not substantial in the commission of the offense.

- ***Harassment***

Scucz-Toldy v. Gonzales, 400 F.3d 978 (7th Cir. 2005) - Harassment by telephone under 720 ILL. COMP. STAT. § 135/1-1(2)) is not a COV under 18 U.S.C. § 16(a) because it is not necessary to prove the use or threatened use of physical force to sustain a conviction.

Singh v. Ashcroft, 386 F.3d 1228 (9th Cir. 2004) - Oregon misdemeanor crime of harassment was found not to be a COV since the crime did not require force.

- ***Indecency with a Child***

United States v. Castro-Guevarra, 575 F.3d 550 (5th Cir. 2009) - Consensual sexual intercourse with a child, defined as a person younger than the age of 17 under TEX. PENAL CODE ANN. §§ 22.011(a)(2)(A) and (c)(1) is a COV. The Texas statute meets a common sense definition of statutory rape. Further, sexual assault under the TEX PENAL CODE ANN. § 22.011(a)(2) also qualifies as sexual abuse of a minor. Finally, the "use of force" element is not required because the Fifth Circuit has previously held that sexual abuse of a minor is a COV even if no element of physical force is shown.

United States v. Munoz-Ortenza, 563 F.3d 112 (5th Cir. 2009) - Oral copulation with a minor under CAL. PENAL CODE § 288a(b)(1) is not a COV. In a "crime of violence" context, the court must follow the Taylor v. United States, 495 U.S. 575 (1990) "common sense approach." In view of Taylor, the California Penal Code definition of a minor (an individual under the age of eighteen) is overbroad, thus, criminalizing conduct that normally not be criminalized under the generic, contemporary meaning of "sexual abuse of a minor."

United States v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996) - Texas felony for indecency with a child involving sexual contact is a COV under 18 U.S.C. § 16(b) because the offense entails a substantial risk that physical force may be used against the victim. The court relied on United States v. Wood, 52 F.3d 272 (9th Cir. 1995) (holding that the threat of violence is implicit in the size, age and authority position of the adult in dealing with such a young and helpless child).

- ***Injury to a Child***

United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010) – Even an intentional act of injury to a child under TEX. PENAL CODE § 22.04(a) (as opposed to injury by omission) is not a COV because it does not require "as an element" the use or attempted use of physical force. Because the statute is not divisible, no modified categorical approach was taken.

Perez-Munoz v. Keisler, 507 F.3d 357 (5th Cir. 2007) - An offense for injury to a child under TEX. PENAL CODE § 22.04(a)(3) is not categorically a COV since it can be committed in two ways: first, by one who by act causes injury to a child, and second, by one who by omission causes injury to a child. Under the modified categorical approach, the charging document revealed that Perez-Munoz was

charged with an intentional act rather than an omission, and, thus, the conviction was a COV.

United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) - Injury to a child under TEX. PENAL CODE § 22.04(a) is not a COV under 18 U.S.C. § 16(b). The offense is result oriented and does not require the use or attempted use of force.

- ***Involuntary Manslaughter***

Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994) - Conviction for involuntary manslaughter under ILL. REV. STAT. ch. 38, para. 9-3(a) is a COV under 18 U.S.C. § 16(b). Section 16(b) does not require a specific intent to do violence, but at minimum a reckless behavior which poses a substantial risk of harm to person or property. Note: This dicta is often not followed by Circuits which require an intentional use of force, not recklessness.

Bejarano-Urrutia v. Gonzales, 413 F.3d 444 (4th Cir. 2005) - Simple involuntary manslaughter under VA. PENAL CODE § 18.2-36 is not a COV because, although the offense intrinsically involved a substantial risk of physical harm, it did not intrinsically involve a substantial risk that force would be applied as a means to an end.

United States v. Woods, 576 F.3d 400 (7th Cir. 2009) - Involuntary manslaughter under 720 ILL. COMP. STAT. § 5/9-3 is not a COV under § 18 U.S.C. 16(b) because the offense is not a purposeful crime but rather requires recklessness as *mens rea*. See also United States v. Booker, 579 F.3d 835 (7th Cir. 2009).

United States v. Springfield, 829 F.2d 860 (9th Cir. 1987) - Involuntary manslaughter (unlawful killing of a person without malice) is a COV under 18 U.S.C. § 16(b). Offense carries a substantial risk of physical force.

- ***Manslaughter***

Matter of Vargas-Sarmiento, 23 I&N Dec. 651 (BIA 2004) - First degree manslaughter under N.Y. PENAL LAW § 125.20(1) or § 125.20(2) is a COV under 18 U.S.C. § 16(b). Conviction requires proof of intent to cause serious injury or death, and there is a substantial risk that intentional force will be used. Note: A conviction under § 125.20(3) (causing death of pregnant mother while performing abortion) is not a COV–ignoring Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994) (stating that reckless behavior can be a COV).

Vargas-Sarmiento v. USDOJ, 448 F.3d 159 (2d Cir. 2006) - Conviction of alien for first-degree manslaughter in violation of N.Y. PENAL LAW § 125.20, based on alien's conduct of stabbing victim and causing wounds from which she died, constituted COV for which alien was removable because inherent in the nature of the offense was the substantial risk that the perpetrator could intentionally use

physical force in committing the crime, since the perpetrator had to cause death while acting with the specific intent to do so, or with the specific intent to cause serious physical injury.

Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003) - Second degree manslaughter under N.Y. PENAL LAW § 125.15(1) (recklessly cause the death of another person) is not a COV. Substantial risk of intentional use of force is required to be a COV under 18 U.S.C. § 16(b). Unintentional accident caused by recklessness cannot involve a substantial risk of intentional use of force.

United States v. Torres-Villalobos, 487 F.3d 607 (8th Cir. 2007) - Second degree manslaughter under MINN. STAT. ANN. § 609.205(1), punishing a person who causes the death of another by "the person's culpable negligence" whereby the person "creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another," is not a COV because the offense does not have as an element the use of force nor does it involve a risk that the perpetrator will intentionally use physical force in the course of committing the offense. United States v. Moore, 38 F.3d 977 (8th Cir. 1994) & Omar v. INS, 298 F.3d 710 (8th Cir. 2002) recognized as superseded by Leocal v. Ashcroft, 543 U.S. 1 (2004).

- ***Mayhem***

Ruiz-Morales v. Ashcroft, 361 F.3d 1219 (9th Cir. 2004) - Mayhem (unlawfully and maliciously depriving person of a member of his body, or disables/disfigures/or renders it useless, or cuts/disables tongue or puts eye out or slits nose/ear/lip) under CAL. PENAL CODE § 203 is a COV under 18 U.S.C. § 16(b) because it involves substantial risk that force will be used.

- ***Menacing***

United States v. Melchor-Meceno, 620 F.3d 1180 (9th Cir. 2010) – a conviction for felony menacing under COL. REV. STAT. § 18-3-206, which requires knowingly placing another in fear of imminent serious bodily injury, is a COV for sentencing purposes under USSG § 2L1.2 because it requires both active violent force and a *mens rea* of intent.

United States v. Drummond, 240 F.3d 1333 (11th Cir. 2001) - Menacing, under N.Y. PENAL LAW § 120.14 (intentionally places/attempts to place person in fear of physical injury/serious death by displaying deadly weapon/instrument) is a COV under 18 U.S.C. § 16(a) because it involves the use or attempted use of force.

- ***Murder for Hire***

Ng v. Attorney Gen., 436 F.3d 392 (3d Cir. 2006) - Respondent's conviction under 18 U.S.C. § 1958, the use of interstate commerce facilities in the

commission of a murder-for-hire, constitutes an AF under INA § 101(a)(43)(F) (COV under 18 U.S.C. § 16(b)). The court stated that the respondent committed a COV within the meaning of the Act, regardless of whether the person solicited to commit the murder agrees to the plan or not because the natural consequence of using interstate commerce facilities in the commission of a murder-for-hire is that physical force will be used upon another.

- ***Possession of a Deadly Weapon***

  Brooks v. Holder, 621 F.3d 88 (2d Cir. 2010) – A conviction for second-degree criminal possession of a weapon under N.Y. PENAL LAW § 265.03(1)(b), is COV under 18 U.S.C. § 16(b) because possession of a loaded firearm with intent to use it involves a "substantial risk" that force will be used.

  United States v. Gamez, 577 F.3d 394 (2d Cir. 2009) - Second degree criminal possession of a weapon under N.Y. PENAL LAW § is not a COV under the sentencing guidelines. The offense lacks the element of "use, attempted use, or threatened use of physical force." *See* 18 U.S.C. § 16(a).

  United States v. Polk, 577 F.3d 515 (3d Cir. 2009) - Possession of a shank in prison under 18 U.S.C. § 1791(a)(2) is not a COV. While possession of a weapon in prison does present inherent dangers, this alone cannot transform it into a COV.

  United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003) - California conviction for possession of a deadly weapon (dagger) is not a COV under 18 U.S.C. § 16(a) (in that possession of deadly weapon does not involve use/attempted use of force) or 18 U.S.C. § 16(b) (no substantial risk that an offender may use violence to perpetrate the offense (knowingly possessing & concealing weapon). The court relied on United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001).

- ***Possession of a Firearm***

  United States v. Lipscomb, 619 F.3d 474 (5th Cir. 2010) – For sentencing purposes under U.S.S.G. § 4B1.2, a conviction under 18 U.S.C. § 922(g), possessing a firearm as a felon, is a COV if the indictment specifically charged that the firearm was a "sawed-off shotgun." The categorical approach in *Taylor v. U.S.*, 495 U.S. 575 (1990) did not apply because Application Note 1 of § 4B1.2 contained specific language that possession of a sawed-off shotgun by a felon was a COV.

  United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir. 2003) - Conviction of possession of short barrel firearm under TEX. PENAL CODE ANN. § 46.05(a)(3) is not a COV under 18 U.S.C. § 16(b) because force need not be used to complete offense.

United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001) - Unlawfully carrying a firearm on premises licensed or permitted to sell alcoholic beverages under TEX. PENAL CODE ANN. § 46.02 is not a COV under 18 U.S.C. § 16(b). Crime is committed/completed upon entry of premises with firearm. There is no supposed intentional use of force against person/property in the commission of the offense and no substantial risk of harm that force would be used.

United States v. Rivas-Palacios, 244 F.3d 396 (5th Cir. 2001) - Unlawful possession of any unregistered firearm (in this case a sawed-off shotgun) is a COV. Registration is required for certain firearms because of the virtual inevitability that such possession will result in violence.

United States v. Vincent, 575 F.3d 820 (8th Cir. 2009) - Possession of a sawed-off shotgun under ARK. CODE. ANN § 5-73-104(a) is a COV because it presents a serious potential risk of physical injury to another and enables violence or a threat of violence.

United States v. Serafin, 562 F.3d 1105 (10th Cir. 2009) - A conviction for knowingly possessing of an unregistered firearm under 26 U.S.C. §§ 5841, 5845(a), 5861(d), and 5871, is not a COV. The statute does not have an element accounting for the time of possession and the use or risk of force is not implicated in an individual's possession of the unregistered firearm. Possession of a firearm does not make the possession offense violent.

- ***Rape/Statutory Rape***

Matter of B-, 21 I&N Dec. 287 (BIA 1996) - Second degree rape under MD. CODE, ART. 21, § 463(a)(3) (repealed 2002) (engaging in vaginal intercourse with person under 14 years old and person performing act is 4 years older than victim) for which a criminal alien was sentenced to 10 years in prison, is a COV under 18 U.S.C. § 16(b).

Aguiar v. Gonzales, 438 F.3d 86 (1st Cir. 2006) - Conviction under Rhode Island's third degree sexual assault statute (11-36-6 person over the age of 18 engages in sexual penetration with person over 14 and under 16) was found to be a COV and AF as use of force was inherent in the minor's inability to give consent. Joined the Second, Fifth, Eighth, Tenth, and Eleventh Circuits in interpreting similar statutes to be COV's because there is a substantial risk of the use of physical force given the minor's age.

Cherry v. Ashcroft, 347 F.3d 404 (2d Cir. 2003) - Second degree sexual assault under CONN. GEN STAT. § 53a-71 (sexual intercourse with someone 13-16 years old and perpetrator over 2 years older than victim) is a COV under 18 U.S.C. § 16(b). Offense involves substantial risk that force will be used in committing offense.

United States v. Chacon, 533 F.3d 250 (4th Cir. 2008) - A conviction for second-degree rape under MD. CODE, ART. 27, § 463 (repealed 2002) has as an element the use, attempted use, or threatened use of physical force against the person of another, and thus is a COV, if the offense is committed under the statute's first and third subsections, namely, 1) engaging in sexual intercourse with another by force or threat of force and 2) sexual intercourse with a person who is under 14 years of age and the defendant is at least four years older than the victim. The statute's third subsection, sexual intercourse with another who is mentally defective, mentally incapacitated, or physically helpless and the defendant knows or should reasonably know of such disability, however, can be violated without the use or threat of physical force.

United States v. Gomez-Gomez, 547 F.3d 242 (5th Cir. 2008) - A conviction under California's rape statute, CAL. PENAL CODE § 261(a)(2), qualifies as a forcible sex offense, and therefore, a COV, even if the perpetrator used constructive, non-physical force of duress. The plain meaning of "force" is defined, *inter alia*, as pressure directed against a person or thing. Since pressure can be both physical or mental in nature, a sex offense committed using constructive force qualifies as a forcible sex offense and is a COV.

United States v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996) - Indecency with a child (sexual contact with child) under TEX. PENAL CODE ANN. § 21.11 is a COV under 18 U.S.C. § 16(b). Adult sexually touching a child involves substantial risk that force will be used against child.

Jimenez-Gonzalez v. Mukasey, 548 F.3d 557 (7th Cir. 2008) - Criminal recklessness for "shooting a firearm into an inhabited building or other building or place where people are likely to gather," under IND. CODE ANN. § 35-42-2-2(b)(1), (c)(3), is not an AF as a COV. The court found that reckless crimes are not AF as crimes of violence under 18 U.S.C. § 16(b). The court's ruling accords with decisions by the Third, Fourth, Sixth, Ninth, and Tenth Circuits.

Xiong v. INS, 173 F.3d 601 (7th Cir. 1999) - Statutory rape/second degree sexual assault of child under WIS. STAT. ANN. § 948.02(2) (sexual contact or sexual intercourse with person under 16) is not a COV. The statute includes conduct that does not involve a risk that force will be used (i.e. consensual sex between 16 and 15 year old couple).

United States v. Alas-Castro, 184 F.3d 812 (8th Cir. 1999) - Sexual abuse of child under NEV. REV. STAT. § 28-320.01 (person subjects another 14 or younger to sexual contact and actor is 19 or older) is a COV under 18 U.S.C. § 16(b). Conviction requires intentional sexual contact, and there is substantial risk that force will be used.

Prakash v. Holder, 579 F.3d 1033 (9th Cir. 2009) - Soliciting another to commit rape by force and violence with the intent that the crime be committed in violation of CAL. PENAL CODE § 653f (c) is a COV under 18 U.S.C. § 16(b). Although the crime of solicitation can be committed without the use of force and before any actual force is used, this does not diminish the substantial risk of violence that solicitation of rape inherently presents.

Valencia v. Gonzales, 439 F.3d 1046 (9th Cir. 2006) - The court held that felony unlawful sexual intercourse with a person under eighteen, who was more than three years younger than he in violation of CAL. PENAL CODE § 261.5(c) was not a COV. The Court stated that "absent aggravating factors such as incest or a substantial age difference, a violation of [§261.5(c)] does not, 'by its nature, involve [ ] a substantial risk that [violent] physical force against the person or property of another may be used in the course of committing the offense." The Court cited Xiong v. INS, 173 F.3d 601 (7th Cir. 1999) and United States v. Sawyers, 409 F.3d 732 (6th Cir. 2005) (unlawful sexual contact between a twenty-year-old perpetrator and sixteen-year-old victim not a COV under Armed Career Criminal Act) in support of the need for some aggravating factor. The Court also distinguished the present case from Chery v. Ashcroft, 347 F.3d 404 (2d Cir. 2003), and Wood v. United States, 52 F.3d 272 (9th Cir. 1995).

United States V. Chavarriya-Mejia, 367 F.3d 1249 (11th Cir. 2004) -Third degree rape (statutory rape) under KY. REV. STAT. § 510.060 is a COV for sentencing purposes because it has as an element the use, attempted use, threatened use, or substantial risk that force will be used.

- ***Reckless Conduct***

Massis v. Mukasey, 549 F.3d 631 (4th Cir. 2008) - Under 1995 Maryland law, an offense of reckless endangerment and criminal contempt is a COV.

United States v. White, 258 F.3d 374 (5th Cir. 2001) - An offense of reckless conduct under TEX. PENAL CODE ANN. § 22.05 does not contain the element of the use or attempted use of physical force and is therefore not a COV.

Saqr v. Holder**,** 580 F.3d 414 (6th Cir. 2009) – for purposes of determining whether the pre- or post-IIRIRA definition of AF applies, "actions taken" derives from the point at which the removal action begins. This point is the date upon which the alien is served with the notice to appear before an IJ, not when jurisdiction vests with the IJ. Under the pre-IIRIRA imprisonment requirement, neither a conviction for reckless homicide nor a conviction for second degree assault in violation of Kentucky law constituted an AF. See Alanis-Bustamante v. Reno, 201 F.3d 1303, 1310 (11th Cir. 2000); Wallace v. Reno, 194 F.3d 279, 287 (1st Cir. 1999); But see Garrido-Morato v. Gonzales, 485 F.3d 319, 324 (5th Cir. 2007).

- ***Recklessly Burning or Exploding***

  Tran v. Gonzalez, 414 F.3d 464 (3d Cir. 2005) - Conviction for recklessly burning or exploding under 18 PA. CONS. STAT. § 3301(d)(2) is not a COV. The court held that § 16(a) requires specific use of force, and 18 U.S.C. § 16(b) requires a substantial risk that the actor will intentionally use physical force.

- ***Resisting Arrest***

  Reyes-Alcaraz v. Ashcroft, 363 F.3d 937 (9th Cir. 2004) - Exhibiting a deadly weapon with intent to resist arrest in violation of CAL. PENAL CODE § 417.8 was found to be a COV.

- ***Retaliation***

  United States v. Martinez-Mata, 393 F.3d 625 (5th Cir. 2004) - Texas state law offense of retaliation does not have has an element the use of physical force and is not a COV.

  United States v. Acuna-Cuadros, 385 F.3d 875 (5th Cir. 2004) - Retaliation (knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the services of another) under Texas law is not a COV. Causing harm does not mean force will be used or that there is a substantial risk force will be used in committing the offense.

- ***Rioting***

  United States v. Hernandez-Rodriguez, 388 F.3d 779 (10th Cir. 2004) - Utah conviction for attempted riot is a COV and therefore an AF.

- ***Robbery***

  Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997) – A conviction for the federal crime of robbery with a deadly weapon (handgun) is a COV.

  United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997) - First degree robbery under N.Y. PENAL LAW § 160.15 is a COV under 18 U.S.C. § 16(a). One element of the crime is forcibly stealing property which involves the use of force.

  Thap v. Mukasey, 544 F.3d 674 (6th Cir. 2008) – Alien was convicted for robbery in the second degree under CAL. PENAL CODE § 211 in 1996. The Circuit Court held that the conviction for robbery was a COV/AF, as it is a crime which categorically and by its nature involves the substantial risk that physical force may be used in committing the offense. See also United States v. Valladares, 304 F.3d 1300 (9th Cir. 2002).

Nieves-Medrano v. Holder, 590 F.3d 1057 (9th Cir. 2010) – A California conviction for carjacking under CAL. PENAL LAW § 215 is categorically a COV under 18 U.S.C. § 16(a).

United States v. Rivera-Ramos, 578 F.3d 1111 (9th Cir. 2009) - *Attempted* robbery under N.Y. PENAL LAW §§ 101.00 and 160.15(3) is a COV. The operational meaning of 'attempt' under New York law is no broader than the common law definition.

United States v. Saavedra-Velazquez, 578 F.3d 1103 (9th Cir. 2009) - *Attempted* robbery under CAL. PENAL CODE § 211 is a COV. California's definition of 'attempt' is coextensive with the common-law definition.

United States v. Valladares, 304 F.3d 1300 (9th Cir. 2002) - Second degree robbery under CAL. PENAL CODE § 211 (felonious taking of personal property of another, from his person or immediate presence, against his will, accomplished by force or fear) is a COV under 16(b) (involves substantial risk force will be used). See also United States v. Saavedra-Velazquez, 578 F.3d 1103 (9th Cir. 2009); Thap v. Mukasey, 544 F.3d 674 (6th Cir. 2008).

- ***Sexual Abuse***

United States v Remoi, 404 F.3d 789 (3d Cir. 2005) - Sexual abuse pursuant to N.J. STAT. ANN. § 2C: 14-2(c)(2)(1990) where the defendant penetrated a physically helpless, mentally defective, or mentally incapacitated victim is a COV for sentence enhancement purposes, because it is a "forcible sex offense" enumerated in U.S.S.G. § 2L1.2(II).

United States v. Medina-Villa, 567 F.3d 507 (9th Cir. 2009) - Lewd and lascivious act on a child under fourteen under CAL. PENAL CODE § 288(a) constitutes sexual abuse of a minor, qualifying it as a COV and an AF.

United States v. Beltran-Munguia, 489 F.3d 1042 (9th Cir. 2007) - Sexual abuse pursuant to OR. REV. STAT. § 163.425 is not a COV because the offense, which punishes penetration when the victim is incapable of giving consent (under 18, mentally defective, mentally incapacitated, or physically helpless), neither has, as an element, the use, attempted use, or threatened use of physical force, nor constitutes a forcible sex offense.

United States v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007) - Conviction for misdemeanor unlawful sexual contact in violation of COLO. REV. STAT. § 18-3-404(1) is categorically a forcible sex offense, and thus a COV under § 2L1.2. This conduct includes non-consensual sexual contact that is not necessarily achieved by physical force.

- ***Sexual Assault***

Costa v. Holder, 611 F.3d 110 (2d Cir. 2010) – CONN. GEN. STAT. § 53a-71, for sexual assault in the second degree – sexual intercourse with a person between 13 years and 16 years of age when the perpetrator is more than 3 years older than the victim or intercourse with a victim with mental deficiencies – is not divisible because "when the victim cannot consent, the statute *inherently* involves a substantial risk that that physical force may be used in the course of committing the offense." Therefore, a conviction under any section of § 53a-71 is a COV.

United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004) - Sexual assault (having sexual intercourse knowing there has been no consent) under MO. REV. STAT. § 566.040(1) is not a COV. The statute does not require use of force (only lack of consent, which can occur due to deception or impaired judgment due to drugs; this type of assent does not require physical coercion, or risk of force). The court notes that Missouri has a forcible rape statute where use of force is an element.

United States v. Rayo-Valdez, 302 F.3d 314 (5th Cir. 2002) - Aggravated sexual assault of a child under 14 years old under TEX. PENAL CODE ANN. § 22.021 is a COV. Sexual abuse of a minor inherently requires use of force.

Ramsey v. INS, 55 F.3d 580 (11th Cir. 1995) - *Attempted* lewd assault under FLA. STAT. § 777.04(1) and lewd assault under § 800.04 (lewd conduct on/in presence of person under 16 years old) is a COV under 18 U.S.C. § 16(b). Substantial risk that force will be used to commit lewd assault, the same is true for an attempt.

- ***Sexual Battery***

Zaidi v. Ashcroft, 374 F.3d 357 (5th Cir. 2004) - Sexual battery (intentional touching, mauling or feeling of the body or private parts of any person 16 or older, in a lewd/lascivious manner and without consent) under 21 OKLA. STAT. ANN. § 1123(B) is a COV under 18 U.S.C. § 16(b) because it creates substantial risk force may be used to overcome lack of consent.

U.S. v. Espinoza-Morales, 621 F.3d 1141 (9th Cir. 2010) - Convictions of Sexual Battery in violation of CAL. PENAL CODE § 243.4(a) and Penetration with a Foreign Object in violation of CAL. PENAL CODE § 289(a)(1) do not categorically constitute a COV for purposes of the U.S.S.G. Specifically, the Court held that the use, attempted use, or threatened use of physical force is not an element required for conviction under either statute. .

Lisbey v. Gonzales, 420 F.3d 930 (9th Cir. 2005) - Violation of CAL. PENAL CODE § 243.4(a) for sexual battery is a COV under 18 U.S.C. § 16(b), because the intimate touching of an unlawfully restrained person involves a substantial risk that physical force may be used.

United States v. Yanez-Rodriguez, 555 F.3d 931 (10th Cir. 2009) - An aggravated sexual battery (a forcible sex offense) under the KAN. CRIM. CODE ANN. § 21-3518 is a COV. A conviction is a forcible sex offense when the statute prohibits non-consensual sexual contact with another person. Note: Overruled by United States v. Bullcoming, 579 F.3d 1200 (10th Cir. 2009) on other grounds

- ***Stalking***

Matter of Malta, 23 I&N Dec. 656 (BIA 2004) – A stalking offense for harassing conduct under CAL. PENAL CODE § 646.9(b) (willfully, maliciously, and repeatedly following or harassing another person and making a credible threat with intent to place person in reasonable fear for his or his family's safety in violation of restraining order) is a COV under 16(b). Conduct that is serious, continuing, and poses a credible threat to another's safety poses substantial risk that force will be used. But see Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th Cir. 2007) (*reversing and remanding* Matter of Malta, 23 I&N Dec. 656 (BIA 2004)) for improper application of categorical & modified categorical approach.

De Hoyos v. Mukasey, 551 F.3d 339 (5th Cir. 2008) - A stalking offense pursuant to S.C. CODE ANN. § 16-3-1700(B) (a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear: 1. death of the person or a member of his family; 2. assault upon the person or a member of his family; 3. bodily injury to the person or a member of his family; 4. criminal sexual contact on the person or a member of his family; 5. kidnaping of the person or a member of his family; or 6. damage to the property of the person or a member of his family) is a COV. The outcome of the stalking offense is analogous to the enumerated offenses which comprise violent felonies (i.e. COV). Also if a state judgment contains a checkmark inside a box next to "non-violent" rather than a box which states "violent," that by itself is immaterial.

Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th Cir. 2007) - Stalking offense pursuant to CAL. PENAL CODE § 646.9(a) (willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family) is not a COV. Although the charging document listed the conduct as "following and harassing", an offense written in the disjunctive but plead in the conjunctive may be proven in the disjunctive. Under California law, a person can be convicted for harassing on account of conduct carried only at a long distance, by mail or telephone. *Reversed and remanded* Matter of Malta, 23 I&N Dec. 656 (BIA 2004) as improper application of categorical & modified categorical approach.

- ***Tampering with Consumer Goods***

Cunningham v. Scibana, 259 F.3d 303 (4th Cir. 2001) - A person employed in the medical field replaced Demerol with saline to satisfy an addiction and was charged with tampering with consumer products. The court found this to be a COV.

- ***Terrorism***

  Matter of S-S-, 21 I&N Dec. 900 (BIA 1997) – A conviction for terrorism under IOWA CODE ANN. § 708.6 (shooting or discharging a dangerous weapon at or into building where there are people, or threatening to do so, placing people in fear of harm) involves a substantial risk that physical force may be used against victim and is a COV under 18 U.S.C. § 16(b).

  Bovkun v. Ashcroft, 283 F.3d 166 (3d Cir. 2002) – A conviction for making terrorist threats under 18 PA. CONS. STAT. § 2706 is a COV under 18 U.S.C. § 16(a). Conviction requires proof of a threat to commit a COV (even if *mens rea* was reckless disregard), and that equals threat to use force.

  United States v. White, 258 F.3d 374 (5th Cir. 2001) - An offense for a terrorist threat under TEX. PENAL CODE ANN. § 22.07 does not contain the element of "the use or attempted use of physical force" and is not a COV under 18 U.S.C. § 16(a).

  Olmsted v. Holder, 588 F.3d 556 (8th Cir. 2009) – A conviction for making terrorist threats under MINN. STAT. § 609.713(1) (threatening violence with the intent to terrorize or with reckless disregard of the risk of causing such terror) is not categorically a COV because the *mens rea* requirement for the statute is divisible. Reviewing the complaint, which was included with the plea colloquy, the offense was found to be a COV under a modified categorical analysis.

  Rosales-Rosales v. Ashcroft, 347 F.3d 714 (9th Cir. 2003) – A conviction for making terrorist threats under CAL. PENAL CODE § 422 (threats to commit crime which would result in death or great bodily injury, with the specific intent statement to be taken as threat) is a COV under 18 U.S.C. § 16(a).

- ***Unauthorized Use of a Motor Vehicle***

  Matter of Brieva-Perez, 23 I&N Dec. 766 (BIA 2005) - The offense of unauthorized use of a motor vehicle in violation of TEX. PENAL CODE ANN. § 31.07(a) is a COV under 18 U.S.C. § 16(b) and is therefore an AF under 101(a)(43)(F). Affirmed by Brieva-Perez v. Gonzales, 482 F.3d 356 (5th Cir. 2007), reaffirming United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999).

  United States v. Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009) – Unauthorized use of a motor vehicle is not an AF for sentencing purposes because the crime has no essential element of violent or aggressive conduct. See also

United States v. Rodriguez-Rodriguez, 388 F.3d 466 (5th Cir. 2003) (holding the same). But see United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999).

United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999) - Unauthorized use of motor vehicle in Texas is a COV under 18 U.S.C. § 16(b) because there is a substantial risk of harm to person or property (person who doesn't own car more likely to let car be damaged or cause accident). Cited with approval by United States v. Mancia-Perez, 331 F.3d 464 (5th Cir. 2003); De la Paz Sanchez v. Gonzales, 473 F.3d 133 (5th Cir. 2006); Brieva-Perez v. Gonzales, 482 F.3d 356 (5th Cir. 2007); but see United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (limiting Galvan-Rodriguez to its property aspects and §16 cases). Note: United States v. Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009), and United States v. Rodriguez-Rodriguez, 388 F.3d 466 (5th Cir. 2003) do not alter the holding in Galvan-Rodriguez.

United States v. Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007) - A conviction for Unlawful Use of Means of Transportation in violation of ARIZ. REV. STAT. § 13-1803(A)(1) is not a COV under 18 U.S.C. § 16(b) for sentencing purposes because there is a relatively low probability that destructive or violent force will be used in committing the offense.

- ***Unlawful Imprisonment***

Dickson v. Ashcroft, 346 F.3d 44 (2d Cir. 2003) - First degree unlawful imprisonment of competent adult under N.Y. PENAL LAW § 135.10 is a COV under 18 U.S.C. § 16(b) since, whether restraining by force, intimidation, or deception, there is substantial risk force will be used. Note: Unlawful imprisonment of incompetent person or child under 16 years old is not a COV because there is not a substantial risk force will be used.

- ***Unlawful Wounding***

Singh v. Holder, 568 F.3d 525 (5th Cir. 2009) - A conviction under VA. CODE. ANN. § 18.2-51, unlawful wounding, is a COV. Defendant failed to offer the court any hypothetical situation in which a person could violate VA. CODE ANN. § 18.2-51 without using force sufficient to constitute a COV. Due to a lack of a meritorious reason and because the offense was punishable by a term of imprisonment for at least one year, an offence under VA. CODE ANN. § 18.2-51 is an AF.

- ***Vehicular Homicide***

Francis v. Reno, 269 F.3d 162 (3d Cir. 2001) - Pennsylvania misdemeanor conviction for vehicular homicide under 75 PA. CONS. STAT. § 3732 (recklessly or negligently causing death of another by violating a motor vehicle law other than DUI/DWI) is not a COV under 18 U.S.C. § 16(b). Section 16(b) is specifically

limited to felonies. Note: Same violation is now a felony, but still not a COV. Not all violations of traffic/motor vehicle laws pose substantial risk force will be used.

United States v. Gonzalez-Lopez, 335 F.3d 793 (8th Cir. 2003) - Automobile homicide, under UTAH CODE ANN. § 76-5-207(1) (operate motor vehicle in negligent manner causing the death of another while intoxicated) is a COV under 18 U.S.C. § 16(a). Operating motor vehicle equals using force and employing force against another. This case was disagreed with by United States v. Vargas Duran, 356 F.3d 598 (5th Cir. 2004).

Omar v. INS, 298 F.3d 710 (8th Cir. 2002) - Criminal vehicular homicide under MINN. STAT. ANN. § 609.21 subd. 1(4) (drunk driver causes death) is a COV under 18 U.S.C. § 16(b). The inherent nature of crime is such that involves substantial risk that physical force may be used, because it always results in a person's death. Intent not required for 16(b). *Recognized as superseded by* Leocal v. Ashcroft, 543 U.S. 1 (2004) *in* United States v. Torres-Villalobos, 487 F.3d 607 (8th Cir. 2007).

United States v. Gomez-Leon, 545 F.3d 777 (9th Cir. 2008) - A conviction under CAL. PENAL CODE § 192(c)(3), vehicular manslaughter while intoxicated without gross negligence, is not a COV.

- ***Vehicular Manslaughter***

Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005) - Both parties agreed that vehicular manslaughter under N.J. STAT. ANN. § 2C:11-5(b)(1) is not a COV under 18 U.S.C. § 16(a). The court held that the reasoning in Leocal v. Ashcroft, 543 U.S. 1 (2004) suggests that the offense is not a COV under 18 U.S.C. § 16(b) as the offense requires recklessness.

Lara-Cazares v. Gonzales, 408 F.3d 1217 (9th Cir. 2005)–Applying the reasoning from Leocal v. Ashcroft, the court found a conviction under CAL. PENAL CODE § 191.5(a) for gross vehicular manslaughter while intoxicated is not a COV, because the *mens rea* is gross negligence and the intentional use of a vehicle to cause injury is not an element of the offense.

**(G) Theft/Burglary/Receipt of Stolen Property–Term of Imprisonment at least 1 year**

- ***Theft/Receipt of Stolen Property***

Generic Definition of Theft: A theft offense, including the receipt of stolen property, is "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." See

Hernandez-Mancilla v. INS, 246 F.3d 1002 (7th Cir. 2001); adopted in the Ninth Circuit in United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002); adopted in the Tenth Circuit by United States v. Vasquez-Flores, 265 F.3d 1122 (10th Cir. 2001).

Matter of Cardiel-Guerrero, 25 I&N Dec. 12 (BIA 2009) - Receipt of stolen property under CAL. PENAL CODE § 496(a) is categorically an AF. The statute, *inter alia*, prohibits the concealing, selling, or withholding of stolen or extorted property, or aiding in the same, knowing it to have been so stolen or obtained, this falling squarely within the generic and contemporary meaning of receipt of stolen property.

Matter of Garcia-Madruga, 24 I&N Dec. 436 (BIA 2008) - Conviction of welfare fraud under R.I. GEN. LAWS § 40-6-15 of is not a "theft offense" under INA § 101(a)(43)(G) because it does not consist of the taking of, or exercise of control over, property without consent and with criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.

Matter of Song, 23 I&N Dec. 173 (BIA 2001) - If criminal court vacates one-year prison sentence for a theft offense and revises it to under one year then the conviction is not an AF.

Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000) - *Attempted* possession of stolen property under NEV. REV. STAT. §§ 193.330 and 205.275 are attempted theft offenses and AF's under §§ 101(a)(43)(G) and (U). Theft is the knowing receipt, possession, or retention or property from its rightful owner. The Tenth Circuit declined to follow this decision in United States v. Vasquez-Flores, 265 F.3d 1122 (10th Cir. 2001).

Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000) - Unlawful driving and taking of a vehicle in violation of CAL. VEH. CODE § 10851 is a theft offense and therefore an AF. Theft is the taking of property with the criminal intent to deprive owner of the rights and benefits of ownership, even if deprivation is less than total or permanent. But see United States v. Vidal, 504 F.3d 618 (9th Cir. 2007) (holding that a conviction in violation of CAL. VEH. CODE § 10851(a) is not categorically a theft offense).

Almeida v. Holder, 588 F.3d 778 (2d Cir. 2009) - Conspiring to commit second-degree larceny in violation of CONN. GEN. STAT. §§ 53a-123 categorically constitutes a "theft offense" under INA § 101(a)(43)(G), as 'theft offense" is more broadly-defined than common-law larceny and the state law is not divisible. The Court distinguished the case from Jaggernauth v. U.S. Attorney Gen., 432 F.3d 1346 (11th Cir. 2005).

Abimbola v. Ashcroft, 378 F.3d 173 (2d Cir. 2004) - A larceny conviction under Connecticut law was found to be an AF theft. The court also disagreed with United States v. Corona-Sanchez, 234 F.3d 449 (9th Cir. 2000) and found that theft of services may be a theft crime.

Ilchuk v. Attorney Gen., 434 F.3d 618 (3d Cir. 2006) - A person who diverted ambulance calls from an ambulance service in order to provide a service of his own committed a theft of services under 18 PA. CONST. STAT. § 3926 (a person is guilty of theft if, having control over the dispositions of services of another to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto) and was guilty of a theft offense under 8 U.S.C. § 1101(a)(43)(G), because the crime required the taking or exercising of control over something of value knowing that the owner had not consented.

Nugent v. Ashcroft, 367 F.3d 162 (3d Cir. 2004) - Theft by deception (intentionally obtains or withholds property of another by deception) under 18 PA. CONS. STAT. § 3922 is not an AF. The court concluded that a theft offense that also involves fraud and deceit must satisfy the elements of both §§ 101(a)(43)(G) and 101(a)(43)(M)(i) to constitute an AF. Theft by deception is a theft offense under § 101(a)(43)(G), however, to be an AF, the loss to the victim must be greater than $10,000 to satisfy § 101(a)(43)(M)(I).

United States v. Graham, 169 F.3d 787 (3d Cir. 1999) - State law misdemeanor is an AF under § 101(a)(43)(G) if it is a theft offense and the actual term of imprisonment is at least one year. New York petit larceny (class A misdemeanor) is a theft offense/AF because term of imprisonment was exactly one year.

Soliman v. Gonzales, 419 F.3d 276 (4th Cir. 2005) - Under Virginia law, a conviction for credit card fraud totaling less than $2,000 was not a theft offense that constituted an AF since the fraud encompassed activities that did not involve the taking of property.

Nolos v. Holder, 611 F.3d 279 (5th Cir. 2010) – A conviction for theft under Nevada law, Nev. Rev. Stat. § 205.0832(1)(b) – alien knowingly, feloniously, and without lawful authority, using services or property entrusted to him or her or placed in his or her possession, with a value of $250 or more – is an AF theft offense.

Martinez v. Mukasey, 519 F.3d 532 (5th Cir. 2008) - Conviction of bank fraud in violation of 18 U.S.C. § 1344 is not an AF under INA § 101(a)(43)(G) because it does not require that property be acquired without consent. Property be obtained by fraud, which occurs with unlawfully obtained consent. Bank Fraud in violation 18 U.S.C. § 1344 is, however, an AF under INA § 101(a)(43)(M)(i) because it "necessarily entails fraud or deceit." Also, please see Martinez v. Mukasey holding that aliens who adjust their status to an LPR after entering the United

States are not barred from seeking a 212(h) waiver of inadmissibility for an aggravated felony conviction. Based on the plain statutory language, an alien must be admitted as an LPR and then commit an aggravated felony in order for the 212(h) waiver bar to apply.

Burke v. Mukasey, 509 F.3d 695 (5th Cir. 2007) - Conviction of criminal possession of stolen property in the third degree under N.Y. PENAL LAW § 165.50 is a theft offense and thus an AF because "the broad terms used in the generic definition of "theft offense" under 8 U.S.C. § 1101(a)(43)(G) easily embrace the New York criminal statute."

United States v. Dabeit, 231 F.3d 979 (5th Cir 2000), *cert. denied*, 531 U.S. 1202 (2001) - Theft is defined as the act of stealing (Black's Law). Conspiring to perpetrate a checking and savings account kite scheme under 18 U.S.C. § 2113(b) involves the taking of another's property and is an AF. Note: Abrogated on other grounds by United States v. Reyna, 358 F.3d 344 (5th Cir. 2004).

Hernandez-Mancilla v. INS, 246 F.3d 1002 (7th Cir. 2001) - Possession of a stolen motor vehicle under Illinois law is an AF. The aline exercised control over another's property without consent. Note: This case created the generic definition of theft.

Sanchez v. Holder, 614 F.3d 760 (8th Cir. 2010) – Because alien had conceded removability based on convictions of (1) 2 or more crimes of moral turpitude and (2) a controlled substance violation, the DHS was not required to prove that alien had committed an AF. Rather, for purposes of showing eligibility for cancellation of removal, the burden of proof was on the alien to show that he had *not* committed an AF.

United States v. Mejia-Barba, 327 F.3d 678 (8th Cir. 2003) - Identity theft (person takes another's identity with intent to fraudulently benefit by obtaining credit/property/services) under IOWA CODE § 715A.8 is an AF.

United States v. Demirbas, 331 F.3d 582 (8th Cir. 2003) - Stealing under Missouri law is an AF even though the alien's four year sentence was suspended (still counts as part of term of imprisonment)

Ramirez-Villalpando v. Holder, 601 F.3d 891 (9th Cir. 2010) – A conviction under CAL. PENAL CODE § 487(a) is not categorically an AF. However, under the modified categorical approach, the court looked to the abstract of judgment and felony complaint to find that the alien's conviction for grand theft pursuant to CAL. PENAL CODE § 487(a) was for theft of personal property, rather than services, and was, therefore, an AF.

Alvarez-Reynaga v. Holder, 596 F.3d 534 (9th Cir. 2010) - Receipt of a stolen vehicle under section 496d(a) of the CAL. PENAL CODE is categorically an AF as a theft offense under INA § 101(a)(43)(G).

Verdugo-Gonzalez v. Holder, 581 F.3d 1059 (9th Cir. 2009) – A conviction for receipt of stolen property under CAL. PENAL CODE § 496(a) is categorically a "theft offense" under INA § 101(a)(43)(G).

Carrillo-Jaime v. Holder, 572 F.3d 747 (9th Cir. 2009) - A conviction under CAL. VEH. CODE § 10801, prohibiting owning and operating a "chop shop," is not categorically an AF. The offense does not necessarily contain the element of "taking and exercising control over property without consent." An individual may obtain a vehicle or a vehicle part by theft, fraud, or conspiracy to defraud and do so with a valid consent of the owner. However, if the Government demonstrates a lack of consent, then removability under INA § 101(a)(43)(G) may be established for this offense under the modified categorical approach.

Mandujano-Real v. Mukasey, 526 F.3d 585 (9th Cir. 2008) - A conviction for identity theft under OR. REV. STAT. § 165.800 is not categorically a theft offense under INA § 101(a)(43)(G).

Penuliar v. Mukasey, 528 F.3d 603 (9th Cir. 2008) - Unlawfully taking or driving a vehicle in violation of California Vehicle Code § 10851(a) is not an AF because an alien could be convicted of violating this statute for merely being an accessory after the fact (which would be conduct that falls outside generic definition of theft offense). *Petition for certiorari granted, judgment vacated and case remanded by* Gonzales v. Penuliar, 549 U.S. 1178 (2007).

United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) - Conviction under CAL. VEH. CODE § 10851(a), which criminalizes "theft and unlawful driving or taking of a vehicle" is not categorically a theft offense, and thus not categorically an AF because it applies not only to principals and accomplices but also to accessories after the fact. Under the modified categorical approach the record did not establish that by pleading guilty, Vidal admitted to all the elements of generic theft.

Nevarez-Martinez v. INS, 326 F.3d 1053 (9th Cir. 2003) - Theft of means of transportation under ARIZ. REV. STAT. ANN. § 13-1814 subsections 2, 4, and 5, is not an AF since there is no criminal intent to deprive the owner.

Huerta-Guevara v. Ashcroft, 321 F.3d 883 (9th Cir. 2003) - Possession of a stolen vehicle under ARIZ. REV. STAT. ANN. § 13-1802 requires use of the categorical approach to determine if there is an intent to deprive.

Randhawa v. Ashcroft, 298 F.3d 1148 (9th Cir. 2002) – Using the categorical approach, the court determined that possession of stolen mail obtained in violation of 18 U.S.C. § 1708 is an AF.

United States v. Perez-Corona, 295 F.3d 996 (9th Cir. 2002) - Unlawful use of means of transportation under ARIZ. REV. STAT. ANN. § 13-1803 is not an AF since the statute does not require a showing criminal intent to deprive the owner.

United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) - Petty theft under CAL. PENAL CODE § 484(a) is not an AF. Note: The court adopted the generic definition of theft. Note: Superseded by statute on other grounds.

United States v. Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007) - Conviction for unlawful use of means of transportation under ARIZ. REV. STAT. ANN. § 13-1803(A)(1) is not categorically a COV under 18 U.S.C. § 16(b) and thus not an AF because "knowingly taking unauthorized control over another's means of transportation" encompasses a broad range of conduct that does not involve a substantial risk that physical force against the person or property of another will be used in the course of committing the offense. United States v. Dabeit, 231 F.3d 979 (5th Cir 2000), *cert. denied*, 531 U.S. 1202 (2001) - Theft is defined as the act of stealing (Black's Law). Conspiring to perpetrate a checking and savings account kite scheme under 18 U.S.C. § 2113(b) involves the taking of another's property and is an AF. The case was subsequently abrogated on other grounds by United States v. Reyna, 358 F.3d 344 (5th Cir. 2004).

United States v. Vasquez-Flores, 265 F.3d 1122 (10th Cir. 2001) - Attempting to knowingly receive or transfer a stolen motor vehicle under UTAH STAT. § 41-1a-1316 is an AF because by admitting to knowingly possessing stolen vehicle, alien exercised control over car without consent. Note: Court adopted generic definition of theft.

Jaggernauth v. U.S. Attorney Gen., 432 F.3d 1346 (11th Cir. 2005) – Conviction in violation of FLA. STAT. § 812.014(1) is not categorically a theft offense because a conviction requires either intent to deprive another of property or to appropriate property.

United States v. Christopher, 239 F.3d 1191 (11th Cir. 2001), *cert. denied*, 581 U.S. 877 (2001) - State law misdemeanor can be an AF if it is a theft offense for which the term of imprisonment is at least one year.

- ***Burglary***

Taylor v. United States, 495 U.S. 575 (1990) - Supreme Court defines burglary as unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Matter of Perez, 22 I&N Dec. 1325 (BIA 2000) - Burglary of a vehicle under TEX. PENAL CODE ANN. § 30.04 is not a burglary offense for AF purposes. Board relied on Taylor v. United States, 495 U.S. 575 (1990) (a car is not a building).

United States v. Hidalgo-Macias, 300 F.3d 281 (2d Cir. 2002) - Term of imprisonment is the actual sentence imposed. Serve jail time, get probation, probation revoked and more jail time served, the actual sentence is equal to the total time served in jail.

Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000) - Burglary of a vehicle with intent to commit theft under TEX. PENAL CODE ANN. § 30.04(a) is not a burglary offense. Uses Taylor v. United States, 495 U.S. 575 (1990) definition (a car is not a building).

Solorzano-Patlan v. INS, 207 F.3d 869 (7th Cir. 2000) - Burglary of automobile with intent to commit theft under 720 ILL. COMP. STAT. § 5/19-1(a) is not a burglary offense based on Taylor v. United States, 495 U.S. 575 (1990) because a car is not a building.

Ngaeth v. Mukasey, 545 F.3d 796 (9th Cir. 2008) - A conviction for an *attempted* theft offense of second degree burglary under CAL. PENAL CODE § 459 is an AF under INA §§ 101(a)(43)(G) and (U). The California statute states "[e]very person who enters any . . . vehicle . . . when the doors are locked . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." However, under Ye v. INS, 214 F.3d 1128 (9th Cir. 2000), CAL. PENAL CODE § 459 is not an AF as a burglary offense or a COV. It is an AF as an attempted theft offense.

Nunes v. Ashcroft, 375 F.3d 805 (9th Cir. 2004) - First degree burglary under CAL. PENAL CODE § 459 is an AF.

Ye v. INS, 214 F.3d 1128 (9th Cir. 2000) - Vehicle burglary under CAL. PENAL CODE § 459 is not a burglary for AF purposes since a car is not a building or structure.

**(H) Demand for or Receipt of Ransom (18 U.S.C. §§ 875, 876, 877, or 1202)**

**(I) Child Pornography (18 U.S.C. §§ 2251, 2251A, or 2252)**

Aguilar-Turcios v. Holder, 582 F.3d 1093 (9th Cir. 2009) – A conviction under Article 92 of the Uniform Code of Military Justice (U.C.M.J.) for violating a "lawful general order" is not categorically an AF under INA § 101(a)(43)(I). A modified categorical approach cannot be used because the Article 92 prohibits uses involving "pornography" but not specifically "a visual depiction of a minor engaging in sexually explicit conduct," which is an essential element of the generic crime of child pornography.

**(J) RICO (18 U.S.C. § 1962) sentence of 1 year or more may be imposed for transmission of wagering info (18 U.S.C. § 1084)–for second or subsequent offenses and sentence of 1 year or more may be imposed or Gambling Offenses (18 U.S.C. § 1955)–sentence of 1 year or more may be imposed**

**(K)(i) Owning, Controlling, Managing, Supervising Prostitution Business**

**(K)(ii) Transportation for Prostitution if Committed for Commercial Advantage (18 U.S.C. §§ 2421, 2422, 2423)**

- ***For Commercial Advantage***

  Matter of Gertsenshteyn, 24 I&N Dec. 111 (BIA 2007) – The categorical approach to determining whether a criminal offense satisfies a particular ground of removal does not apply to the inquiry of whether a violation of 18 U.S.C. § 2422(a) was committed for "commercial advantage". Where, as here, Congress has defined an AF to include a component (e.g., "commercial advantage") that is neither an element of the offense nor a basis for a sentencing enhancement, it would defeat the statute to require application of the categorical or modified categorical approach. But see Gertsenshteyn v. U.S. Dept. of Justice, 544 F.3d 137 (2d Cir. 2008), rev'g Matter of Gertsenshteyn (remanding for improperly rejecting the categorical and modified categorical approaches in determining commercial advantage).

  Gertsenshteyn v. U.S. Dept. of Justice, 544 F.3d 137 (2d Cir. 2008) – The Second Circuit disagreed with the BIA's holding in Matter of Gertsenshteyn, 24 I&N Dec. 111 (BIA 2007) (the categorical approach to determining whether a criminal offense satisfies a particular ground of removal does not apply to the inquiry of whether a violation of 18 U.S.C. § 2422(a) was committed for "commercial advantage"). The court found that the BIA improperly rejected the categorical and modified categorical approaches in determining commercial advantage, so it remanded for the BIA to determine whether either approach should be applied, and then to apply the proper legal framework.

**(K)(iii) Peonage/Slavery/Involuntary Servitude (18 U.S.C. §§ 1581, 1582, 1583, 1584, 1585, 1588)**

**(L)(i) Gathering/Transmitting National Defense Information (18 U.S.C. § 793); Disclosure Classified Info (18 U.S.C. § 798); Sabotage (18 U.S.C. § 2153); or Treason (18 U.S.C. §§ 2381, 2382)**

**(L)(ii) Protecting Identity of Undercover Intelligence Agents (50 U.S.C. § 421)**

**(L)(iii) Protecting Identify of Undercover Agents (Nationality Security Act of 1947 § 601)**

**(M)(i) Offense Involving Fraud or Deceit Causing Loss to Victim Over $10,000**

Nijhawan v. Holder, 129 S. Ct. 2294 (2009) - The $10,000 threshold refers to the particular circumstances in which an offender committed a fraud or deceit crime on a particular occasion rather than to an element of the fraud or deceit crime.

Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007) - When considering whether a conviction for an offense involving fraud or deceit is one "in which the loss to the victim or victims exceeds $10,000" under INA § 101(a)(43)(M)(i), an IJ is not restricted to "record of conviction" evidence but may consider any evidence admissible in removal proceedings bearing on the amount of loss to the victim. The BIA recognized that the ruling represents a "departure from the precepts that have been presumed to apply in immigration hearings involving AF charges arising under section 101(a)(43)(M)(i) of the Act." It left "for another day any questions that may arise with respect to circuit law that may be in tension with this decision, as we ordinarily follow circuit law in cases arising within the particular circuit and the grounds for any departure would need to be developed in the context of specific cases."

Matter of Onyido, 22 I&N Dec. 552 (BIA 1999) - Submitting a false claim with intent to defraud under IND. CODE ANN. § 35-43-5-4-(1) (unsuccessful scheme to obtain money from insurance company) was an attempt to commit a fraud in which the loss exceeds $10,000 and therefore an AF.

De Vega v. Gonzales, 503 F.3d 45 (1st Cir. 2007) - Conviction for false representation to the department of public welfare under MASS. GEN. LAWS ch. 18, § 5B was AF because fraud was a necessary element and record showed loss to the victim of more than $10,000.

Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006) - Conspiracy to commit bank fraud under 18 U.S.C. section 371 was found to be an AF under section 101(a)(43)(M)(i) of the Act.

Ljutica v. Holder, 588 F.3d 119 (2d Cir. 2009) - Attempted bank fraud under 18 U.S.C. § 1344 qualifies as an AF under INA § 101(a)(43)(M) and (U). Only the intended loss, not the actual loss, need be over $10,000. If R was not charged with an AF in deportation proceedings because the Act did not yet apply to him, res judicata does not preclude a finding in naturalization proceedings that R was convicted of an AF.

Pierre v. Holder, 588 F.3d 767 (2d Cir. 2009) - INA § 101(a)(43)(M) requires an actual loss of $10,000 to the victim and subsection (U)(attempt or conspiracy to commit an AF) is not a necessarily included offense of subsection (M).

Dulal-Whiteway v. DHS, 501 F.3d 116 (2d Cir. 2007) - Information in PSR or restitution order could not be relied upon to establish that alien's offense involved

fraud of deceit with loss exceeding $10,000. When applying the modified categorical approach, for convictions following a trial, the BIA may rely only upon facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions. For convictions following a plea, the BIA may rely only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript. Abrogated by Nijhawan v. Holder, 129 S. Ct. 2294 (2009) (holding that the $10,000 threshold refers to particular circumstances rather than an element of the fraud crime).

Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004) - Attempting to evade/defeat tax under 26 U.S.C. § 7201 was found to be an AF. An offense relating to tax evasion is an inclusive phrase, not restrictive. See also Sansone v. United States, 380 U.S. 343 (1965) (holding that § 7201 includes the offense of willfully attempting to evade or defeat the assessment or the payment of any tax).

Kaplun v. Attorney Gen., 602 F.3d 260 (3d Cir. 2010) – Using the information, a guilty plea to that information, the PSR, and the documented lack of objection to the PSR, the court determined that the alien's conviction for securities fraud with a monetary loss in excess of $10,000 was an AF.

Alaka v. Attorney Gen., 456 F.3d 88 (3d Cir. 2006) - A conviction under 18 U.S.C. §1344 for bank fraud is a "fraud offense" within under 8 U.S.C. § 1101(a)(43)(M)(i), but to be an AF, the convicted offense must have resulted in losses greater than $10,000. Only losses stemming from *convicted offenses* may be considered. To determine the amount of loss, the Court looked to the plea agreement, not the indictment or sentence. In this case, alien was not convicted of AF, despite the district court's finding that the intended loss from the fraud was over $47,000; the alien was convicted on only one of three and the actual loss was less than $5,000.

Nugent v. Ashcroft, 367 F.3d 162 (3d Cir. 2004) - Theft by deception (intentionally obtains or withholds property of another by deception) under 18 PA. CONS. STAT. § 3922 is not an AF. The court concluded that a theft offense that also involves fraud and deceit (such as theft by deception) must satisfy the elements of both §§ 101(a)(43)(G) and (M) to be an AF. Theft by deception is a theft offense under (G), however, to be an AF the loss to the victim must be greater than $10,000 to satisfy (M).

Ki Se Lee v. Ashcroft, 368 F.3d 218 (3d Cir. 2004) - Filing false tax returns in violation of 26 U.S.C. § 7206(1) of the IRC is not an AF. This section (M) does not apply to tax offenses.

Munroe v. Ashcroft, 353 F.3d 225 (3d Cir. 2003) -Amount of loss must be over $10,000 to be an AF. Amount of restitution is not controlling to determine

amount of loss (but can be useful to determine amount o floss if conviction record is unclear). Theft by deception under N.J. STAT. ANN. § 2C:20-4 is a crime involving fraud or deceit.

Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002) - Under 18 U.S.C. § 656, embezzlement with specific intent to defraud is an offense involving fraud or deceit (and an AF is loss was over $10,000). Embezzlement with only the specific intent to injure is not an offense involving fraud or deceit. In this case, the court declined to follow Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001).

Martinez v. Mukasey, 519 F.3d 532 (5th Cir. 2008) - Conviction of bank fraud in violation of 18 U.S.C. § 1344 is an AF under INA § 101(a)(43)(M)(i) because it "necessarily entails fraud or deceit." Bank Fraud violation 18 U.S.C. § 1344 is not an AF, however, under INA § 101(a)(43)(G) (theft offense) because it does not require that property be acquired without consent. Also, please see Martinez v. Mukasey holding that aliens who adjust their status to an LPR after entering the United States are not barred from seeking a 212(h) waiver of inadmissibility for an aggravated felony conviction. Based on the plain statutory language, an alien must be admitted as an LPR and then commit an aggravated felony in order for the 212(h) waiver bar to apply.

Arguelles-Olivares v. Mukasey, 526 F.3d 171 (5th Cir. 2008) - A federal tax offense other than tax evasion can be an AF under INA § 101(a)(43)(M); thus, a conviction under 26 U.S.C. § 7206(1) for filing a false federal tax return is an AF under INA § 101(a)(43)(M) if the loss exceeds $10,000.

Patel v. Mukasey, 526 F.3d 800 (5th Cir. 2008) - The offense of misprision of a felony under 18 U.S.C. § 4 involving a loss to the victim that exceeds $10,000 is categorically an AF because the offense necessarily entails the act of intentionally giving a false impression, i.e., the false impression that the earlier felony never occurred. Thus, the crime entails fraud or deceit and is thus an AF.

Martinez v. Mukasey, 508 F.3d 255 (5th Cir. 2007) - Offenses of insurance fraud under TEX. PENAL CODE ANN. §§ 35.02(a) & (b) are convictions that "involve fraud or deceit," since both offenses share the element that the offender act "with intent to defraud or deceive an insurer." The Court applied the modified categorical approach to find that the loss to the victim exceeded $10,000, and thus the crime was an AF. The Court rejected Petitioner's argument that in determining whether the loss to the victim exceeded $10,000 the Court should ignore the total restitution amount and instead equate loss to victim with the restitution amount he actually paid.

James v. Gonzales, 464 F.3d 505 (5th Cir. 2006) - Aiding and abetting bank fraud (18 U.S.C. §§ 2 and 1344) necessarily entails, or has as at least one element, fraud or deceit for the purposes of 8 U.S.C. § 1101(a)(43)(M)(i). The court may look

beyond the conviction and plea agreement to the indictment or restitution amount to determine the amount of actual loss.

Omari v. Gonzales, 419 F.3d 303 (5th Cir. 2005) - A violation of paragraph one of 18 U.S.C. § 2314 is not an AF pursuant to § 101(a)(43(M) or (U) of the Act. The provision does not necessarily entail fraud or deceit, because it can be violated by transporting or transferring goods known to be stolen.

Kellerman v. Holder, 592 F.3d 700 (6th Cir. 2010) – Convictions under 18 U.S.C. §§ 371 (conspiracy to commit an offense or to defraud United States) and 1001 (fraud and false statements or entries) both constitute AFs as defined under INA § 101(a)(43)(M)(i). See Nijhawan v. Holder, 129 S. Ct. 2294 (2009).

Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008) - Alien's conviction for identity theft in violation of ch. 720 ILL. COMP. STAT. § 5/16G-15 is an AF crime involving fraud or deceit in which the loss to the victim[s] exceeds $10,000. Court suggested in dicta that it believed intended loss to the victim could be considered in assessing whether the loss exceeded $10,000.

Tian v. Holder, 576 F.3d 890 (8th Cir. 2009) – Losses attributed to an internal investigation to assess the damage caused by alien's unauthorized access to a computer network are related to alien's fraud, and, thus, are included in determining whether the loss to the victim "exceeds $10,000."

Carlos-Blaza v. Holder, 611 F.3d 583 (9th Cir. 2010) – A conviction under 18 U.S.C. § 656 for misapplication of funds is divisible in that not every conviction involves intent to defraud but may include only intent to injure. However, under a modified categorical approach, the court found that the alien had been convicted of an AF under § 101(a)(43)(M)(i) because in the plea agreement, the alien admitted she knowingly stole, embezzled, or misapplied moneys as a bank employee.

Kawashima v. Holder, 615 F.3d 1043 (9th Cir. 2010) - The court considered, for the third time, the removal orders of the petitioners after the issuance of Nijhawan v. Holder, 129 S. Ct. 2294 (2009), first holding that a federal tax offense other than tax evasion under 26 U.S.C. § 7201, which is specifically referenced in INA § 101(a)(43)(M)(ii), may constitute AF under INA § 101(a)(43)(M)(i). Alien's conviction for subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1), constituted an AF because it necessarily involved "fraud or deceit" and, applying the "circumstance-specific" approach since amount of loss is not an element of the crime under Nijhawan, the Board had followed fundamentally fair procedures in determining that the loss amounted to more than $10,000. A conviction for aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2), necessarily involved "fraud or deceit" but the Court remanded to the Board to determine what type of evidence it may consider to find the total loss suffered by the government.

Kharana v. Gonzales, 487 F.3d 1280 (9th Cir. 2007) - Alien's conviction for obtaining money by false pretenses in violation of CAL. PENAL CODE § 532 is a crime involving fraud or deceit, and as the respondent pled nolo contendere to defrauding four victims of "$11,000, $23,000, $17,000, and $26,250, respectively", the crime caused more than $10,000 in losses making her an aggravated felon. The court rejected the alien's argument that because she repaid the stolen money (after her fraudulent scheme was discovered), the amount of loss was zero.

Ferrierra v. Ashcroft, 390 F.3d 1091 (9th Cir. 2004) - California conviction for submitting false statement to obtain welfare involved fraud or deceit and was found to be an AF. The Cal offense requires fraud in an amount greater than $400.00, but court can look to plea agreement to see if restitution is in excess of $10,000, is so then it is an AF.

Chang v. INS, 307 F.3d 1185 (9th Cir. 2002) - Federal bank fraud offense of knowingly cashing a counterfeit check in the amount of $650.30 was not an AF. Court further ruled it is improper to rely on PSR statements that contradict explicit language in plea agreement. Restitution amount does not equal amount of loss.

Hamilton v. Holder, 584 F.3d 1284 (10th Cir. 2009) – In order to determine whether a loss meets the $10,000 requirement, it is proper for the IJ to consider information contained in the PSR. See Nijhawan v. Holder, 129 S. Ct. 2294 (2009).

Khalayleh v. INS, 287 F.3d 978 (10th Cir. 2002) - Bank fraud is a crime involving fraud or deceit. Petitioner pled guilty to a charge that alleged a scheme to defraud. Therefore, amount of loss was measured by the entire scheme, not just one specific check. This amount was over $10,000 and was therefore an AF.

Obasohan v. U.S. Attorney Gen., 479 F.3d 785 (11th Cir. 2007) - Conviction for conspiracy to produce, use and traffic in counterfeit access devices, in violation of 18 U.S.C. § 1029(b)(2) did not involve loss to the victim in excess of $10,000 despite a restitution order of $37,000 because the respondent pled guilty to "no loss", the government conceded there was no proof of loss at the guilty plea hearing, and the proof of the $37,000 loss was based on conduct external to the underlying guilty plea that was alleged only in the Pre-sentence Investigation Report (PSI). Abrogated by Nijhawan v. Holder, 129 S. Ct. 2294 (2009) (holding that the $10,000 threshold refers to particular circumstances rather than an element of the fraud crime).

Balogun v. U.S. Attorney Gen., 425 F.3d 1356 (11th Cir. 2005) - Embezzling more than $10,000 from the United States government was an AF within the

meaning of the exception from waiver of inadmissibility since the federal government did qualify as a "victim" within the definition for AF.

Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001) - Misapplication of bank funds under 18 U.S.C. § 656 necessarily was a fraud/deceit offense and an AF if total amount was over $10,000.

**(M)(ii) Tax Evasion Exceeding $10,000 (IRS Code of 1986 § 7201)**

**(N) Alien Smuggling (8 U.S.C. § 1324; INA § 274(a) (1) (A) or (2))**

Matter of Ruiz-Romero, 22 I&N Dec. 486 (BIA 1999) – The parenthetical "relating to alien smuggling" is merely descriptive and does not limit the types of convictions that may be regarded as an AF under INA § 274(a)(1)(A) or (2). Likewise, the exclusion and deportation grounds in INA §§212(a)(6)(E)(i) and 241(a)(1)(E)(i) do not limit the scope of offenses described in INA § 274(a)(1)(A) or (2). Aff'd by Ruiz-Romero v. Reno, 205 F.3d 837 (5th Cir. 2000); see also United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001); United States v. Galindo-Gallegos, 244 F.3d 728 (9th Cir. 2001).

Matter of Alvarado-Alvino, 22 I&N Dec. 718 (BIA 1999) - Offenses under INA § 275(a) (8 U.S.C. § 1325(a)) (improper entry), are not AF's. Not every offense relating to alien smuggling is an AF, only those described in §§ 274(a)(1)(A) and (2). Aff'd by Rivera-Sanchez v. Reno, 198 F.3d 545 (5th Cir. 1999).

Patel v. Ashcroft, 294 F.3d 465 (3d Cir. 2002) - Harboring an alien under § 274(a)(1)(A)(iii) is an AF relating to alien smuggling and is not limited/restricted to actions aimed at helping an alien obtain unlawful admission or entry. All offenses in § 274(a)(1)(A) relate to alien smuggling. Note: Superseded by statute on other grounds.

Garrido-Morato v. Gonzales, 485 F.3d 319 (5th Cir. 2007) - Amended definition of "AF" contained in IIRIRA rendering alien's pre-IIRIRA alien harboring conviction an AF was not impermissibly retroactive.

Ruiz-Romero v. Reno, 205 F.3d 837 (5th Cir. 2000) - Transporting illegal aliens between two points within the United States in violation of § 274(a)(1)(A)(ii) is an offense relating to alien smuggling (and involves more than just smuggling) and is therefore an AF. Aff'ing Matter of Ruiz-Romero, 22 I&N Dec. 486 (BIA 1999).

Rivera-Sanchez v. Reno, 1998 F.3d 545 (5th Cir. 1999) – Conviction in violation of 8 U.S.C. § 1325(a) "is outside the ambit of § 1101(a)(43)(N), which is explicitly confined to convictions under § 1324(a)." Court agreed with the BIA's analysis in Matter of Alvarado-Alvino, 22 I&N Dec. 718 (BIA 1999).

United States v. Monjaras-Castaneda, 190 F.3d 326 (5th Cir. 1999) - All offenses under 8 U.S.C. § 1324(a) involve the transporting, movement, and hiding of aliens into and within the United States) are offenses relating to alien smuggling and therefore AF's. See also United States v. Solis-Campozano, 312 F.3d 164 (5th Cir. 2002).

Gavilan-Cuate v. Yetter, 276 F.3d 418 (8th Cir. 2002) - Conspiracy to transport and harbor illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(i) and (iii) constitute AF's.

United States v. Guzman-Mata, 579 F.3d 1065 (9th Cir. 2009) – A conviction for bringing in and harboring aliens under 8 U.S.C. § 1324(a)(1)(A) is categorically an alien smuggling offense within U.S.S.G. 2L1.2(b)(1)(A), as defined by INA § 101(a)(43)(N). The family exception is not an element of the generic alien smuggling offense such that the government would be required to prove that the family exception to alien smuggling enhancement did not apply.

United States v. Galindo-Gallegos, 244 F.3d 728 (9th Cir. 2001): Conviction of illegal transportation of aliens in violation of INA § 1324(a)(1)(A)(iii) is an AF for sentencing purposes. The parenthetical "relating to alien smuggling" is descriptive, not limiting. See also Matter of Ruiz-Romero, 22 I&N Dec. 486 (BIA 1999).

Castro-Espinoza v. Ashcroft, 257 F.3d 1130 (9th Cir. 2001) - Harboring illegal aliens and aiding/abetting the harboring of illegal alien's in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) is an AF under § 101(a)(43)(N).

United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001) – Conviction of illegal transportation of aliens in violation of INA § 1324(a)(1)(A)(iii) is an AF for sentencing purposes. The parenthetical "relating to alien smuggling" is descriptive, not limiting. See also Matter of Ruiz-Romero, 22 I&N Dec. 486 (BIA 1999).

**(O) Improper Entry/Reentry By Alien Previously Deported for a § 101(a)(43) Offense (8 U.S.C. §§ 1325(a) or 1326; INA §§ 275(a) or 276)**

Note: IIRAIRA changes apply under § 276(b) only to violations of § 276(a) (reentry after deportation) occurring on or after date of enactment (9/30/96). Section 321(c) of IIRAIRA).

Matter of Alvarado-Alvino, 22 I&N Dec. 718 (BIA 1999) - Offense under INA § 275(a) (improper entry) is an AF, but only if alien was previously deported for AF. See Rivera-Sanchez v. Reno, 198 F.3d 545 (5th Cir. 1999) (upholding BIA's decision).

**(P) Falsely Making/Forging/Counterfeiting/Mutilating/Altering Passport or Instrument (18 U.S.C. § 1543) or Document Fraud-term of imprisonment is at least 12 months (18 U.S.C. § 1546(a))**

**(Q) Failure to Appear for Service of Sentence When Underlying Offense Punishable by Five Years or More**

**(R) Commercial Bribery, Counterfeiting, Forgery or Trafficking in Vehicles the ID Numbers of Which Have Been Altered–term of imprisonment at least 1 year**

- ***Commercial Bribery***

  Matter of Chrysanth George Gruenangerl, 25 I&N Dec. 351 (BIA 2010) – Conviction of Bribery of a Public Official in violation of 18 U.S.C. § 201(b)(1)(A) is not an offense relating to commercial bribery because "[i]t is immaterial whether the act is expected to result in pecuniary gain or loss." Applying the modified categorical approach, the offense is not one relating to commercial bribery because "the statute, on its face, does not define an offense that is sufficiently related to commercial bribery," and "the respondent's particular purpose does not render the offense one 'relating to' commercial bribery of a private sector individual." The Court declined to read the phrase "relating to" broadly so as to cover a violation of 18 U.S.C. § 201(b)(1)(A).

- ***Counterfeiting***

  Magasouba v. Mukasey, 543 F.3d 13 (1st Cir. 2008) - A Rhode Island conviction for trafficking in trademark counterfeits (selling pirated copies of DVDs and CDs) is an AF under INA § 101(a)(43)(R) as an offense relating to commercial bribery, counterfeiting, or forgery. Sub-§ (a)(43)(R) subsumes all the elements of the respondent's conviction, and thus the fact of conviction alone establishes he is an aggravated felon. Note: Respondent argued that the DHS was obligated to pursue his removal under INA § 101(a)(43)(M), which relates to a crime of fraud or deceit in which the loss to the victim exceeds $10,000. The court disagreed and found that DHS has discretion to choose which section to charge.

  Kamagate v. Ashcroft, 385 F.3d 144 (2d Cir. 2004) - A conviction for conspiracy to utter and possess counterfeit securities in violation of 18 U.S.C. §§ 271 and 513(a) was found to be a crime relating to counterfeiting because the crime involved counterfeiting and the intent to deceive.

  Park v. Attorney Gen., 472 F.3d 66 (3d Cir. 2006) - A conviction for trafficking in counterfeit goods or services in violation of the Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320 is a conviction for an offense relating to counterfeiting. The offense prohibits the knowing use of a counterfeit mark and given the "broad meaning" of "relating to," the offense clearly relates to counterfeiting.

Nwagbo v. Holder, 571 F.3d 508 (6th Cir. 2009) - Conspiracy to possess, and aiding and abetting in the possession of, counterfeited obligations or other securities of the United States with intent to defraud in violation of 18 U.S.C. §§ 2, 371, and 472 is an AF.

Albillo-Figueroa v. INS, 221 F.3d 1070 (9th Cir. 2000) - Possessing counterfeit obligations of the United States under 18 U.S.C. § 472, where a prison term is at least one year, is an AF. The offense requires that the alien know the bill is counterfeit and either possess or pass the phony bill with the intent to defraud and is therefore an offense relating to counterfeiting.

- ***Forgery***

Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999) - Second degree forgery under N.Y. PENAL LAW § 170.10(2) (falsely make/alter written instrument with intent to defraud/deceive) is an AF under (R) if prison term is at least one year.

United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001) - Forgery under Colorado law is an AF.

Richards v. Ashcroft, 400 F.3d 125 (2d Cir. 2005) - Possessing forged instruments was found to be a crime related to forgery.

Drakes v. Zimski, 240 F.3d 246 (3d Cir. 2001) - Second degree forgery under DEL. CODE ANN. § 861, where a prison term is at least one year, is an AF. The offense relating to forgery includes intent to defraud and intent to deceive.

United States v. Chavarria-Brito, 526 F.3d 1184 (8th Cir. 2008) - A conviction for possession of forged documents required to legally enter, remain, or work in this country, either with the intent to defraud or with the knowledge that the person is facilitating a fraud under sections 715A.2(1)(d) and (2)(a)(4) of the Iowa Code is categorically an offense relating to forgery.

Vizcarra-Ayala v. Mukasey, 514 F.3d 870 (9th Cir. 2008) -Forgery conviction under CAL. PENAL CODE § 475(c) is not categorically an offense relating to forgery because the statute punishes the possession of *real* document[s] in order to defraud, and a key element of generic forgery is the *falsification* of a document itself.

Morales-Alegria v. Gonzales, 449 F.3d 1051 (9th Cir. 2006) - Forgery conviction under CAL. PENAL CODE § 476 was found to be an AF.

- ***Trafficking in Vehicles with Altered ID Numbers***

United States v. Maung, 320 F.3d 1305 (11th Cir. 2003) - Conspiring to violate 18 U.S.C. § 2321(a) (knowingly receiving/possessing cars with altered ID numbers

with the intent to sell)) is an offense relating to trafficking in vehicles with altered ID numbers and an AF under (R) if prison term is at least one year (court cannot reduce sentencing solely to avoid immigration consequences).

**(S) Obstruction of Justice/Perjury or Subornation of Perjury/Bribery of Witness– term of imprisonment at least one year**

- ***Obstruction of Justice***

Matter of Martinez-Recinos, 23 I&N Dec. 175 (BIA 2001) - A perjury conviction under CAL. PENAL CODE § 118(a) was found to be an AF.

Matter of Espinoza-Gonzales, 22 I&N Dec. 889 (BIA 1999) - Misprision of a felony (knowing person committed a crime and took affirmative stip to conceal crime) under 18 U.S.C. § 4 is not an offense relating to obstruction of justice or an AF under (S). Obstruction of justice offenses are listed in 18 U.S.C. §§ 1501-1518 and have as an element interference with the proceedings of a tribunal or require an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate in the proceeding. See also Salazar-Luviano v. Mukasey, 551 F.3d 857 (9th Cir. 2008).

Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997) - Accessory after the fact to a drug trafficking crime under 18 U.S.C. § 3 is an offense relating to obstruction of justice (offense requires knowingly preventing/hindering another's apprehension/trial or punishment) and therefore an AF under (S) if sentence (regardless of any suspension or of execution of that sentence) is at least 1 year. This case was distinguished by Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (flight from cop to evade own arrest not obstruction of justice).

United States v. Gamboa-Garcia, 620 F.3d 546 (5th Cir. 2010) – For sentencing purposes, accessory to murder under the second section of 18-205 of the Idaho criminal code was an AF under 8 U.S.C. § 1101(a)(43)(S) as its elements were essentially the same as 18 U.S.C. § 3 (accessory after the fact) – both statutes required that the defendant have knowledge that the offense had been committed, take actions to assist the offender, and actively interfered in obstructing justice.

Alwan v. Ashcroft, 388 F.3d 507 (5th Cir. 2004) - Contempt of court conviction under 18 U.S.C. § 401(3) (disobedience of a court order) would be punishable as obstruction of justice under 18 U.S.C. § 1503(a) and is therefore an AF. Intent to interfere with the administration of justice found despite alien's refusal to testify, after grant of immunity, because he feared he would be harmed.

Salazar-Luviano v. Mukasey, 551 F.3d 857 (9th Cir. 2008) - Aiding and abetting an *attempted* escape from custody, in violation of 18 U.S.C. § 751, is not an AF under § 101(a)(43)(S) of the Act (offense relating to obstruction of justice). The court deferred to Matter of Espinoza-Gonzalez, 22 I&N Dec.889 (BIA 1999),

which determined that whether a specific offense is an (S) crime depends on whether the elements of that offense constitute the crime of obstruction of justice as that term is defined in 18 U.S.C. § 1501 *et al.* The court acknowledged that escape from custody of one who is arrested, charged with a crime, or held for the purposes of expulsion, etc, most probably impedes prospective judicial or tribunal process. However, this did not make *attempted* escape from custody fall within the narrow categorical confines of the (S) ground as set forth in Espinoza-Gonzalez.

Renteria-Morales v. Mukasey, 551 F.3d 1076 (9th Cir. 2008) - A conviction in violation of 18 U.S.C. § 3146, failure to appear in court, does constitute an AF under INA § 101(a)(43)(S), but it is not an AF under INA § 101(a)(43)(T). Note: Renteria-Morales v. Mukasey, 532 F.3d 949 (9th Cir. 2008) is withdrawn and superseded.

- ***Perjury***

Matter of Martinez-Recinos, 23 I&N Dec. 175 (BIA 2001) - Perjury under CAL. PENAL CODE § 118(a) has essentially the same elements as perjury under 18 U.S.C. § 1621 and is therefore an AF under (S).

**(T) Failure to Appear After Court Order to Answer Felony Charge–for which term of 2 years or more may be imposed**

Renteria-Morales v. Mukasey, 551 F.3d 1076 (9th Cir. 2008) - A conviction in violation of 18 U.S.C. § 3146, failure to appear in court, does not constitute AF under INA § 101(a)(43)(T) but does constitute an AF under INA § 101(a)(43)(S). Note: Renteria-Morales v. Mukasey, 532 F.3d 949 (9th Cir. 2008) is withdrawn and superseded.

**(U) Attempt or Conspiracy to Commit Any of the Above Offenses**

Matter of Richardson, 25 I&N Dec. 226 (BIA 2010) – A conviction of conspiracy can constitute an AF under § 101(a)(43)(U) even if the state statute does not have an overt act requirement – that is, the statute does not require the commission of an overt act by one of the conspirators in furtherance of the conspiracy. The alien's conviction for conspiracy under New Jersey law was, thus, an AF.

Matter of S-I-K-, 24 I&N Dec. 324 (BIA 2007) - Federal conviction for conspiracy under 18 U.S.C. § 371, which in this case applied to the making of false statements relating to a health care benefit program in violation of 18 U.S.C. § 1035, mail fraud in violation of 18 U.S.C. § 1341, and health insurance fraud in violation of 18 U.S.C. § 1347, is categorically a conspiracy conviction under INA § 101(a)(43)(U) because the conspiracy involved fraud or deceit in which the loss to the victim exceeds $10,000 under INA § 101(a)(43)(M). The conviction record showed that the potential loss associated with the offense was more than $10,000.

Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000) - *Attempted* possession of stolen property (including receipt of stolen property) under NEV. REV. STAT. §§ 13.330 and 205.275 are attempted theft offenses and AF's under (U).

Matter of Onyido, 22 I&N Dec. 552 (BIA 1999) - Submitting false claim with intent to defraud arising from an unsuccessful scheme to obtain $15,000 from an insurance company is an "attempt" to commit fraud in which the loss to the victim exceeded $10,000 and is therefore an AF under (U).

Pierre v. Holder, 588 F.3d 767 (2d Cir. 2009) - INA § 101(a)(43)(U) is not a necessarily included offense of subsection (M). A finding of removability on a ground not charged in the NTA (here, INA § 101(a)(43)(U)) is a violation of due process rights.

Sui v. INS, 250 F.3d 105 (2d Cir. 2001) - Possession of counterfeit securities with intent to deceive under 18 U.S.C. § 513(a) is not attempted fraud or deceit, nor an AF. Attempt requires the intent to commit a crime plus a substantial step to commit a crime. In this case, a substantial step to pass securities and cause a loss not shown.

Omari v. Gonzales, 419 F.3d 303 (5th Cir. 2005) - A violation of paragraph one of 18 U.S.C. § 2314 is not an AF pursuant to § 101(a)(43)(M) or (U) of the Act. The provision does not necessarily entail fraud or deceit, because it can be violated by transporting or transferring goods know to be stolen.

Iysheh v. Gonzales, 437 F.3d 613 (7th Cir. 2006) - Alien's conviction for conspiracy to sell stolen cars was found to be an AF as a conspiracy to commit an offense involving fraud or deceit causing a loss of more than $10,000 under 101(a)(43)(M)(i) and (U).

United States v. Martinez-Garcia, 268 F.3d 460 (7th Cir. 2001) - Entering a motor vehicle with the intent to commit a theft under 705 ILL. COMP. STAT. ANN. § 405/5-120 is an attempted theft offense and an AF. Unlawfully entering a vehicle is a substantial step to commit a theft offense. The court applied Sui's definition of attempt. (Sui v. INS, 250 F.3d 105 (2d Cir. 2001)).Ngaeth v. Mukasey, 545 F.3d 796 (9th Cir. 2008) - A conviction for an *attempted* theft offense of second degree burglary under CAL. PENAL CODE § 459 is an AF under INA §§ 101(a)(43)(G) and (U). The California statute states "[e]very person who enters any . . . vehicle . . . when the doors are locked . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." Under Ye v. INS, 214 F.3d 1128 (9th Cir. 2000), Cal. Penal Code § 459 is not an AF as a burglary offense or a COV. It is an AF as an attempted theft offense.