

Aggravated Felonies

Detailed Table of Contents

Acknowledgments.....i
Preface..... iii
Table of Abbreviations..... v
Summary Table of Contents..... vii
Detailed Table of Contents.....ix

Chapter One:

Introduction.....1

§ 1.1 I. Importance of the Topic..... 1
 § 1.2 II. What is an Aggravated Felony?.....4
 § 1.3 A. Initial Definition4
 § 1.4 B. History of Expansion of the Term.....5
 § 1.5 III. What is the Definition Used for?8
 § 1.6 A. Ground of Deportation8
 § 1.7 B. Disqualification from Relief in Immigration Court ...9
 § 1.8 C. Restriction of Procedural Rights in Removal
 Proceedings.....14
 § 1.9 D. Enhanced Sentences for Illegal Re-entry15
 § 1.10 IV. Favorable Rules for Defining Aggravated Felonies.....16
 § 1.11 V. Outline of the Book19

Chapter Two:

Immigration Consequences21

§ 2.1 I. Introduction.....22
 § 2.2 II. Adjustment of Status.....24
 § 2.3 III. Cancellation of Removal27
 § 2.4 A. For Lawful Permanent Residents28
 § 2.5 B. For Non-Lawful Permanent Residents30
 § 2.6 C. Continuous Presence and the Stop-Time Rule.....31

§ 2.7	IV. Consular Processing.....	35
§ 2.8	V. Convention Against Torture	36
§ 2.9	VI. Deferred Action Status (Prosecutorial Discretion)	37
§ 2.10	VII. Deportation Grounds.....	39
§ 2.11	VIII. Detention	39
§ 2.12	IX. Expedited Removal and Special Removal Proceedings for Noncitizens in Prison.....	52
§ 2.13	X. Family Unity	54
§ 2.14	XI. Good Moral Character Ineligibility	55
§ 2.15	XII. Illegal Re-entry.....	56
§ 2.16	XIII. Inadmissibility.....	60
§ 2.17	A. In General.....	61
§ 2.18	B. After Deportation.....	65
§ 2.19	XIV. Judicial Review Limitations	66
§ 2.20	XV. Legalization.....	76
§ 2.21	A. Amnesty Program	77
§ 2.22	B. Special Agricultural Workers	78
§ 2.23	XVI. NACARA Relief.....	79
§ 2.24	XVII. Naturalization and Citizenship.....	80
§ 2.25	XVIII. Non-Immigrant Visas.....	84
§ 2.26	A. “S” Visa – Temporary and Permanent Status for Witnesses and Informants.....	85
§ 2.27	B. “T” Visa – Temporary and Permanent Status for Victims of Trafficking	87
§ 2.28	C. “U” Visa – Temporary and Permanent Status for Crime Victims and Witnesses.....	88
§ 2.29	XIX. Parole.....	91
§ 2.30	XX. Political Asylum.....	91
§ 2.31	A. In General.....	92
§ 2.32	B. <i>American Baptist Church</i> (ABC) Settlement	94
§ 2.33	XXI. Private Bill in Congress	95
§ 2.34	XXII. Registry	95
§ 2.35	XXIII. Reinstatement of Removal or Deportation Order	96
§ 2.36	XXIV. Suspension of Deportation.....	98
§ 2.37	XXV. Temporary Protected Status (TPS)	100
§ 2.38	XXVI. Violence Against Women Act (VAWA)	101
§ 2.39	XXVII. Voluntary Departure	104
§ 2.40	A. Before Removal Proceedings Begin.....	105

§ 2.41	B.	During Removal Proceedings.....	105
§ 2.42	C.	At End of Removal Proceedings	106
§ 2.43	D.	After Removal Proceedings.....	107
§ 2.44	XXVIII.	Waiver Under Former INA § 212(c)	109
§ 2.45	XXIX.	Waiver of Inadmissibility Under INA § 212(h)	130
§ 2.46	XXX.	Waivers – Other Waivers.....	134
§ 2.47	XXXI.	Withholding of Removal	136

Chapter Three:

Elements of the Deportation Ground141

§ 3.1	I.	Introduction.....	143
§ 3.2	II.	Elements of the Aggravated Felony Deportation Ground	144
§ 3.3	A.	Alienage.....	144
§ 3.4	1.	United States Citizens	145
§ 3.5	2.	Nationals of the United States.....	148
§ 3.6	3.	American Indians Born in Canada	151
§ 3.7	B.	Conviction	152
§ 3.8	C.	Conviction Must be for a Crime.....	153
§ 3.9	D.	After the Effective Date	156
§ 3.10	E.	After Admission	164
§ 3.11	1.	Statutory Definition of “Admission”	165
§ 3.12	2.	Any Admission.....	165
§ 3.13	3.	Adjustment as Admission	166
§ 3.14	4.	Returning LPRs Seeking Admission.....	167
§ 3.15	F.	Of Attempt, Conspiracy, or Commission of a Substantive Criminal Offense	169
§ 3.16	1.	Attempt.....	169
§ 3.17	2.	Conspiracy.....	169
§ 3.18	3.	Substantive Offenses	169
§ 3.19	G.	That Falls Within a Generic Aggravated Felony Category	170
§ 3.20	H.	Violation of the Law of a Listed Jurisdiction.....	172
§ 3.21	1.	Listed Jurisdictions.....	172
§ 3.22	a.	Federal Convictions	172
§ 3.23	b.	State Convictions	173

§ 3.24	c.	Foreign Convictions	176
§ 3.25	i.	Foreign Conviction Date Limitation.....	176
§ 3.26	ii.	Special Rules for Foreign Convictions	177
§ 3.27	2.	Unlisted Jurisdictions	184
§ 3.28	a.	Violations of Local Law.....	185
§ 3.29	b.	Violations of Indian Tribal Law.....	185
§ 3.30	c.	Convictions Under Military Law	186
§ 3.31	III.	The Nature of a Conviction.....	188
§ 3.32	A.	Statutory Definition of “Conviction”	189
§ 3.33	B.	Dispositions That Do Not Constitute Convictions	198
§ 3.34	1.	Deferred Prosecution	200
§ 3.35	2.	Deferred Verdict.....	201
§ 3.36	3.	Deferred Sentence.....	203
§ 3.37	4.	Defective Convictions	204
§ 3.38	C.	Acquittal.....	204
§ 3.39	D.	Dismissal Without Plea or Admission.....	205
§ 3.40	E.	Conviction by Court of Competent Jurisdiction....	206
§ 3.41	F.	Juvenile Adjudications.....	206
§ 3.42	G.	Convictions <i>in Absentia</i>	214
§ 3.43	H.	Finality of Conviction.....	215
§ 3.44	1.	Direct Appeal.....	219
§ 3.45	2.	Slow Plea Dispositions	220
§ 3.46	3.	Late Appeal.....	221
§ 3.47	I.	Post-Conviction Relief from Conviction.....	222
§ 3.48	IV.	Unlisted Non-Substantive Offenses	224
§ 3.49	A.	Accessory After the Fact	226
§ 3.50	B.	Aiding and Abetting	230
§ 3.51	C.	Facilitation	235
§ 3.52	D.	Misprision of a Felony.....	236
§ 3.53	E.	Solicitation	239
§ 3.54	F.	Other Non-Substantive Offenses	246
§ 3.55	V.	Aggravated Felony Sentences.....	247
§ 3.56	A.	Classification of Aggravated Felonies Based on Sentence	247
§ 3.57	B.	Aggravated Felonies Based on Felony Level of Offense	248

§ 3.58	1.	Aggravated Misdemeanors.....	256
§ 3.59	2.	Felony Requirement for Crimes of Violence Under 18 U.S.C. § 16(b).....	259
§ 3.60	3.	Felony Requirement for Drug Trafficking Aggravated Felonies.....	259
§ 3.61	C.	Offenses that are Aggravated Felonies Only if One Year Sentence is Imposed.....	259
§ 3.62	1.	Definition of Sentence Imposed.....	261
§ 3.63	2.	Techniques for Avoiding a One-Year Sentence	272
§ 3.64	D.	Aggravated Felonies Regardless of Sentence	275
§ 3.65	E.	Aggravated Felonies Defined in Terms of Potential Sentence	276
§ 3.66	F.	Post-Conviction Relief from Sentence.....	277

Chapter Four:

Analysis of an Aggravated Felony.....283

§ 4.1	I.	Basic Analysis of Whether a Conviction Constitutes an Aggravated Felony.....	284
§ 4.2	II.	Categorical Analysis	285
§ 4.3	A.	Essential Elements of the Offense.....	288
§ 4.4	1.	Statutory Elements	289
§ 4.5	2.	Elements As Defined by Judicial Decisions ..	291
§ 4.6	3.	Resisting Exceptions to Categorical Analysis.....	292
§ 4.7	B.	Minimum Conduct Necessary to Violate the Statute	303
§ 4.8	III.	Divisible Statutes	305
§ 4.9	A.	Divisibility Analysis – When Does It Apply?.....	309
§ 4.10	1.	Discrete Subsections	310
§ 4.11	2.	Disjunctive Statutes.....	311
§ 4.12	3.	Target Offenses	315
§ 4.13	B.	Divisibility Analysis – When It Does <i>Not</i> Apply...317	
§ 4.14	IV.	Record of Conviction.....	319
§ 4.15	A.	Existence vs. Nature of Conviction.....	320
§ 4.16	B.	Limitation to Record of Conviction	321

§ 4.17	C. Elements vs. Facts.....	325
§ 4.18	1. Rationale for Ignoring the Facts	328
§ 4.19	2. Application	330
§ 4.20	3. Foreign Offenses	333
§ 4.21	D. Documents Included	334
§ 4.22	1. Charging Papers.....	335
§ 4.23	2. Factual Basis and Admissions	338
§ 4.24	3. Judgment.....	340
§ 4.25	4. Jury Verdict	340
§ 4.26	5. Plea and Plea Agreement.....	342
§ 4.27	6. Other Documents Included.....	343
§ 4.28	E. Documents Excluded	344
§ 4.29	1. Dismissed Counts	344
§ 4.30	2. Police Reports.....	347
§ 4.31	3. Probation and Presentence Reports	349
§ 4.32	4. Other Documents Excluded.....	350
§ 4.33	V. General Considerations	356
§ 4.34	A. Definition Under Federal or Common Law	356
§ 4.35	1. Definition Under Federal Statutes	356
§ 4.36	2. General or Common Law Definitions	358
§ 4.37	B. “Related to” Language.....	365
§ 4.38	C. Parentheticals	368
§ 4.39	D. Effects of State Law	371
§ 4.40	E. Immigration vs. Sentencing Contexts.....	374
§ 4.41	F. All Reasonable Doubts Favor the Noncitizen	381

Chapter Five:

Aggravated Felony Categories..... 385

§ 5.1	Definitions of Specific Aggravated Felony Offenses	387
§ 5.2	Accessory After the Fact.....	387
§ 5.3	Aiding and Abetting.....	388
§ 5.4	Alien Harboring	388
§ 5.5	Alien Smuggling	389
§ 5.6	Alien Transporting	391
§ 5.7	Attempt.....	392
§ 5.8	Bribery — Commercial.....	394

§ 5.9	Bribery of Witness	396
§ 5.10	Burglary	396
§ 5.11	Child Pornography	402
§ 5.12	Conspiracy	406
§ 5.13	Counterfeiting	407
§ 5.14	Crimes of Violence	408
§ 5.15	1. Statutory Definition of Both Prongs	408
§ 5.16	2. Sentence Imposed Requirement	409
§ 5.17	3. 18 U.S.C. § 16(a)	410
§ 5.18	a. Element of Force	410
§ 5.19	b. Use, Threat, or Attempt	411
§ 5.20	c. Violent Physical Force	414
§ 5.21	d. Against Person or Property of Another	418
§ 5.22	e. Intent Element	418
§ 5.23	4. 18 U.S.C. § 16(b)	424
§ 5.24	a. Felony Conviction	425
§ 5.25	b. By its Nature	426
§ 5.26	c. Involves a Substantial Risk	426
§ 5.27	d. Violent Physical Force	427
§ 5.28	e. Against Person or Property of Another	427
§ 5.29	f. In Commission of the Offense	427
§ 5.30	g. Use of Force	428
§ 5.31	h. Intent Element	430
§ 5.32	5. Political Offense Exception	430
§ 5.33	6. Specific Crimes	432
§ 5.34	Deceit	436
§ 5.35	Destructive Device Trafficking	437
§ 5.36	Document Fraud	438
§ 5.37	Drug Trafficking	440
§ 5.38	1. Elements of Both Prongs	441
§ 5.39	2. Felony Requirement	443
§ 5.40	a. Simple Possession	447
§ 5.41	b. Other Cases	454
§ 5.42	3. Listed Controlled Substance	458
§ 5.43	4. Commercial Element	464
§ 5.44	5. Federal Analogue	466

§ 5.45	6. Non-Substantive Offenses	471
§ 5.46	7. Effect of Rehabilitative Relief.....	471
§ 5.47	Failure To Appear in Court.....	472
§ 5.48	1. To Face Charges	472
§ 5.49	2. To Serve Sentence	474
§ 5.50	Firearms Offenses	475
§ 5.51	1. Firearms Trafficking.....	475
§ 5.52	2. Other Firearms Offenses.....	479
§ 5.53	Forgery	484
§ 5.54	Fraud	485
§ 5.55	1. Nature of the Offense	485
§ 5.56	2. Loss to the Victim(s)	490
§ 5.57	Illegal Re-Entry After Deportation	500
§ 5.58	Kidnapping/Extortion.....	503
§ 5.59	Misprision of a Felony	503
§ 5.60	Money Laundering.....	503
§ 5.61	Murder.....	505
§ 5.62	National Security Offenses	505
§ 5.63	Obstruction of Justice.....	505
§ 5.64	Perjury	506
§ 5.65	Prostitution	508
§ 5.66	Rape.....	509
§ 5.67	Receiving Stolen Property	511
§ 5.68	Revealing Undercover Agent's Identity	512
§ 5.69	RICO Offenses	513
§ 5.70	Sexual Abuse of a Minor	514
§ 5.71	1. Sexual Element.....	523
§ 5.72	2. Abuse Element.....	525
§ 5.73	3. Proof of Age	529
§ 5.74	4. As a Crime of Violence	531
§ 5.75	Solicitation	534
§ 5.76	Statutory Rape.....	534
§ 5.77	Tax Evasion.....	543
§ 5.78	Theft.....	545
§ 5.79	Vehicles With ID Numbers Removed — Trafficking...	551

Chapter Six:

Post-Conviction Relief.....553

§ 6.1 I. Introduction.....554

§ 6.2 II. Elimination of a Conviction557

§ 6.3 A. Vacating the Conviction as Legally Invalid.....558

§ 6.4 1. A Conviction Vacated as Legally Invalid
Causes No Immigration Damage559

§ 6.5 2. New Definition of Conviction.....565

§ 6.6 3. *Matter of Pickering*572

§ 6.7 4. Full Faith and Credit576

§ 6.8 5. Analyzing Convictions Vacated on
Immigration-Related Grounds579

§ 6.9 6. Jurisdiction to Vacate587

§ 6.10 7. Grounds for Vacating a Plea589

§ 6.11 B. State and Federal Rehabilitative Relief597

§ 6.12 1. General Rule.....597

§ 6.13 2. Federal First Offender Act Exception601

§ 6.14 3. Ninth Circuit Exception602

§ 6.15 C. Judicial Recommendation Against Deportation....607

§ 6.16 D. Pardon.....610

§ 6.17 1. Determination of Whether a Pardon Exists ...613

§ 6.18 2. Foreign Pardons.614

§ 6.19 III. Reduction of Felony to Misdemeanor616

§ 6.20 A. Felony Aggravated Felonies.....616

§ 6.21 1. Drug Trafficking Convictions616

§ 6.22 2. Crimes of Violence Under
18 U.S.C. § 16(b)618

§ 6.23 B. Effect of Reduction to Misdemeanor620

§ 6.24 IV. Vacating or Modifying Sentence620

§ 6.25 A. Most Recent Sentence Governs.....621

§ 6.26 B. New Definition of “Conviction”622

§ 6.27 C. Reducing Sentence.626

§ 6.28 D. Grounds to Vacate Sentence.....627

§ 6.29 V. Reopening Proceedings After Post-Conviction Relief ...631

§ 6.30 A. Removal Proceedings631

§ 6.31 B. Criminal Proceedings632

APPENDICES:

Appendix A: Category Case Index	635
Appendix B: Crime Case Index	739
Appendix C: Aggravated Felony Checklist	857
Appendix D: Evolution of the Aggravated Felony Statute	859
Appendix E: Checklist of Federal Drug Offenses	865
Appendix F: Non-Substantive Offenses	869

Table of Authorities	871
Subject Matter Index	931

OTHER RESOURCES:

[Www.CriminalAndImmigrationLaw.com](http://www.CriminalAndImmigrationLaw.com) Website Description
 Law Offices of Norton Tooby Publications Order Form
 Law Offices of Norton Tooby Seminar Description
 Immigrant Legal Resource Center (ILRC) CALIFORNIA CRIMINAL LAW
 AND IMMIGRATION Order Form
 ILRC Consultation Services Description
 National Lawyers Guild IMMIGRATION LAW AND CRIMES Order Form

About the Author