

CRIMINAL-IMMIGRATION LAW PRIMER SERIES

CAIR Coalition Virginia Justice Program
www.caircoalition.org/vjp
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THE DEFINITION OF “AGGRAVATED FELONY”

What is an “aggravated felony” for immigration purposes?

The term “aggravated felony” encompasses an enumerated list of generic offenses set forth in federal immigration law at 8 U.S.C. § 1101(a)(43)(A)-(U). The definition of aggravated felony is very broad and incorporates offenses that are neither felonies nor “aggravated” in nature.¹

Generally, 8 U.S.C. § 1101(a)(43) includes four categories of offenses, and a state conviction that falls within any of these categories will therefore likely be deemed an aggravated felony by the Department of Homeland Security:

1. Offenses defined solely by the nature of the crime, including **murder, rape, sexual abuse of a minor, drug trafficking, firearm trafficking, and prostitution business offenses**;
2. Offenses that require a sentence of one year or more, meaning 365 days or 12 months, including **crimes of violence, theft, burglary, bribery, forgery, obstruction of justice, and perjury**;²
3. Offenses that involve **fraud or deceit with loss to the victim of more than \$10,000**;³
4. **Attempts or conspiracy** to commit an aggravated felony.⁴

Why do “aggravated felonies” matter?

A state conviction that is considered an aggravated felony will trigger the most severe immigration consequences that can arise from a criminal proceeding, including (but not limited to): deportation;⁵ mandatory detention by ICE during removal proceedings, with no possibility of release on bond;⁶ ineligibility for defenses to deportation like asylum;⁷ and ineligibility for naturalization.⁸ Aggravated felonies also make noncitizens permanently unable to return to the U.S. after removal and subject to an enhanced prison sentence of up to 20 years for illegal reentry. Moreover, an aggravated felony results in a noncitizen being an enforcement priority for removal,⁹ meaning that U.S. Immigration and Customs Enforcement will aggressively pursue deportation against any immigrant who has an aggravated felony.

Does a sentence under one year always avoid an aggravated felony?

No. Although certain aggravated felony grounds, including crimes of violence and theft offenses, require a sentence of at least one year, many apply regardless of the length of the sentence.

If I avoid an aggravated felony conviction for my client, does that mean there are no immigration consequences?

No. Whether or not a conviction constitutes an aggravated felony, it may still trigger a variety of separate grounds of removal. Most notably, many convictions lead to deportation because they are characterized as “crimes involving moral turpitude” (CIMT), controlled substance offenses, crimes of domestic violence, firearm offenses, and more. For example, even if a theft or a fraud offense is not considered an aggravated felony, it will almost certainly be a CIMT.

VIRGINIA PRACTICE TIPS – AGGRAVATED FELONIES

- ✓ In many instances, avoiding an aggravated felony will be the primary goal of the representation; thus, take all steps necessary to avoid an aggravated felony conviction. Notably, this may include accepting more actual jail time imposed if the sentence overall is shortened to less than one year.
- ✓ Obtain a sentence of less than one year (364 days or less) for offenses that involve crimes of violence, theft, burglary, bribery, forgery, or obstruction of justice and perjury.
- ✓ When an offense involves fraud or deceit, create an affirmative record that the alleged and actual loss to the victim is \$10,000 or less.
- ✓ Because the Fourth Circuit has found Virginia grand larceny not to constitute a theft aggravated felony, a plea to Virginia Code § 18.2-95 (and potentially petit larceny under Virginia Code § 18.2-96) is unlikely to be charged as a theft aggravated felony within the Fourth Circuit. *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014).
- ✓ If the offense involves violence or injury and therefore could be considered an aggravated felony crime of violence, avoid any mention in the record of the attempted, threatened, or actual use of physical force.

¹ Indeed, the Department of Homeland Security frequently charges Virginia class 1 misdemeanors as aggravated felonies, usually depending on the sentence associated with the conviction.

² 8 U.S.C. §§ 1101(a)(43)(F) (crimes of violence); (G) (theft or burglary); (R) (bribery and forgery); (S) (obstruction of justice and perjury).

³ 8 U.S.C. §§ 1101(a)(43)(M).

⁴ 8 U.S.C. § 1101(a)(43)(U).

⁵ 8 U.S.C. § 1227(a)(2)(A)(iii).

⁶ 8 U.S.C. § 1226(c)(1)(B).

⁷ All aggravated felonies are considered “particularly serious crimes,” which bar asylum. 8 U.S.C. § 1158(b)(2)(B)(i).

⁸ A conviction of an aggravated felony after November 29, 1990 is a permanent bar to establishing good moral character, which is required for naturalization.

⁹ See [CAIR Coalition Immigration Executive Action practice advisory](#) for more information.