How Arkansas Convictions are Treated for Immigration Purposes

This March, the Supreme Court issued a potentially ground-breaking case in *Padilla v. Kentucky.* Aside from the potential impact it may have on Sixth Amendment law, it very clearly has a direct impact on how defense attorneys must deal with clients that are not United States citizens. It is now a requirement for a defense attorney to warn a noncitizen when “pending criminal charges may carry a risk of adverse immigration consequences.”

As the Court noted in *Padilla,* there are some cases in which it is obvious that a criminal conviction will affect immigration, such as murder. However, most cases require an in-depth analysis to determine if it falls under a ground of removability or inadmissibility. In many cases, there will be no way to know if the conviction will actually have an immigration consequence until an Immigration Judge makes that determination. However, there are ways to determine if the conviction might have an effect on immigration status. It is in these cases that you must advise your client to seek outside representation for immigration purposes.

This article is intended as an introduction to the cross-over between immigration and criminal law. Part I explores how the INA defines a conviction, Part II synthesizes various conviction relief states in Arkansas and what effect they have in immigration law, and Part III describes how criminal convictions affect a foreign national in the United States. This article should in no way be construed as the final say in any specific case. I hope the main

1. 130 S. Ct. 1473 (2010).
2. *Id.* at 1486.
3. *Id.* at 1483.
4. Criminal convictions can impact a person in three ways: removability, inadmissibility, and eligibility for relief. Each of these categories describes various acts or convictions which make a person either removable from the United States, inadmissible to enter the United States, or ineligible for relief in the form of a waiver. *See infra* Part III.
5. *Padilla* at 1477.
point you take away from this article is that if there is ever any doubt, you should have your client consult an immigration attorney directly.

I. What Is a Conviction?

Although it may seem obvious what a conviction is, the Immigration and Nationality Act (“INA”) has defined what constitutes a conviction for immigration purposes in a very specific manner. The definition is much broader than what most states consider to be a “conviction,” and essentially requires only any finding or admission of guilt and some form of punishment. There are also limited grounds for expunging a conviction once it has been entered.

A. Definition of a Conviction

The INA defines a conviction not only as a formal adjudication of guilt, but also some cases in which a formal adjudication has been withheld. The INA states that a conviction for immigration purposes is:

(A) a formal judgment of guilt of
the alien entered by a court or, if
adjudication of guilt has been
withheld, where:

(i) a judge or jury has found the alien guilty or
the alien has entered a plea of guilty or nolo contendere
or has admitted sufficient facts to warrant a finding
of guilt, AND
(ii) the judge has ordered some form of punishment,
penalty, or restraint on the alien’s liberty to be im-
posed.


As the statute indicates, all formal adjudications of guilt are convictions. But it also includes a disposition without a formal judgment of guilt where two prongs have been met. First, there must be some degree of guilt, either by a finding or plea of guilty or nolo contendere OR admission of sufficient facts to warrant a finding of guilt. Second, there must be some form of punishment, penalty, or restraint of liberty.

In the first prong, both a guilty plea and nolo contendere plea constitute a finding of guilt. It is also sufficient if the defendant admits facts to warrant a finding of guilt. This is true regardless of whether there is a judgment of conviction.

8. The Immigration and Nationality Act can be found within the United States Code as well. This article will cite both to the INA and the U.S.C. throughout this article.
9. However, if the criminal charge requires something less than “beyond a reasonable doubt,” there is no conviction. Matter of Eslamizar, 23 I&N Dec. 684 (BIA 2004) (finding that a criminal violation that required a preponderance of evidence was more akin to a civil violation than a criminal violation).
10. De Vega v. Gonzales, 503 F.3d 45, 48-50 (1st Cir. 2007) (finding that a continuation without a finding (CWOF) required the defendant to admit sufficient facts for a finding of guilt).
11. Bear in mind that the Courts have consistently analyzed both prongs in the context of court orders and sentencing; thus, if there is an informal agreement with the prosecutor that is not mentioned in the final disposition, this may not trigger either prong.
The second prong requires some form of punishment, penalty, or restraint of liberty. This prong includes the obvious forms of punishment, penalty, restraint such as time-served sentences, suspended sentences, and probation, in addition to corrections alternatives such as house arrest, drug education school, community service, or substance abuse programs. It can also include restitution orders and costs/surcharges included in the sentencing context.

### B. Sentencing

As noted above, any sentence, regardless of whether the imposition or execution of the sentence is suspended, is considered a “punishment” in the immigration definition of conviction. In addition, the length of the suspended sentence is the time used in any assessment of length of sentence in immigration court. Unlike convictions in general, however, if a court modifies or reduces the sentence, then the reduced amount is used for analysis.

### C. Post-Conviction Remedies

The general rule regarding expungements is that only those that go to remedy a substantive or procedural defect will be considered for immigration purposes. Expungements for rehabilitative reasons, deferred adjudications, and vacaturs will not erase the conviction in immigration proceedings. The result is that a diversion-type program that requires an admission of guilt with a later dismissal will result in a conviction while a pre-plea diversion program with no plea or admission of facts or guilt will likely not. Although some circuits allow for expungement of state court convictions if they were expunged under a statutory scheme similar to the Federal First Offender’s Act, this is not the case in local circuits.

### II. Arkansas Conviction Relief

The Arkansas code allows for several ways to decrease sentencing, vacate a conviction, or to suspend sentences. However, very few of them have any actual effect on a conviction.
tion for immigration purposes. A good rule of thumb is to remember that “once a conviction, always a conviction.” This means that rehabilitative statutes or expungements will likely have little effect in protecting immigration status.

A. Pre-sentencing remedies

Obviously if there is an actual conviction on record, that conviction will have immigration consequences. But what happens when there is not an official conviction in Arkansas? Remember that the requirements under immigration law are that there must be either a form adjudication of guilt or admission of facts and some form of punishment. Only if both of these requirements are not met, is there no conviction.

So, for instance, under section 16-43-303, a defendant can avoid a conviction in Arkansas for first time offenses if they enter a plea of guilty/nolo contendere and successfully complete probation. Even though there is no official judgment of conviction in Arkansas, there is under immigration law because there has been a plea along with some form of punishment.

This holds true for rehabilitation statutes in Arkansas such as section 5-64-413, which requires a finding of guilt or guilty plea and probation. Despite the lack of a judgment of conviction and a subsequent dismissal of proceedings, use of this section will still result in a conviction for immigration purposes. Section 16-98-201 provides a different type of relief, allowing for the creation of pretrial and post-trial drug treatment programs. Here, there is obviously a form of punishment by participation in the treatment program. If the court requires the defendant to plead guilty or finds the defendant guilty, or they are required to admit specific facts, then regardless of whether Arkansas law requires a conviction, there will be a conviction for immigration consequences.

Taken more broadly, section 16-90-115(b) provides that, in general, a case can be dismissed prior to the entry of a judgment of a conviction and there is no conviction for purposes of Arkansas law. For immigration law, however, it is what happens prior to the dismissal that matters most. If the defendant admits factual allegations related to the elements of the crime and then pays a fine, or must comply with requirements of probation or a suspended sentence, there is a conviction. Put into practice, under section 5-4-311, a defendant is allowed to receive a suspended sentence or probation and, if they successfully complete the requirements, the court will dismiss the case. Under the INA analysis, the suspension/probation constitutes a punishment under the INA; thus, if they admit

facts related to the elements of the crime, then they have a conviction for immigration purposes.\textsuperscript{25}

\textbf{B. Sentencing remedies}

As discussed previously, alternative sentences, suspended sentences, probation, etc., are still considered a form of punishment.\textsuperscript{26} In Arkansas, section 16-93-1004 allows for service under a community work project.\textsuperscript{27} Under this section, a defendant who has either been convicted or enters a plea of guilty or \textit{nolo contendere} can be sentenced to participate in a community work project. Even though sentence is suspended, there is a still a conviction.

\textbf{C. Post-conviction remedies}

The general rule in immigration is that if a conviction is expunged or altered due to a substantive or procedural defect, then that change will be honored for immigration purposes.\textsuperscript{28} The best example in Arkansas law is section 16-90-111, which provides for the correction of an illegal sentence.\textsuperscript{29} However, any expungement or vacatur based on rehabilitation or for immigration purposes, will not be recognized in an immigration analysis.\textsuperscript{30} Thus, section 5-4-1201, which allows a defendant sentenced to a residential drug treatment facility for a felony possession of a controlled substance offense to expunge his or her conviction if he or she successfully complete the program, will not be accepted as a valid expungement for immigration purposes.\textsuperscript{31}

It is also important to note that a pardon only has effect for a few specific types of convictions noted within the removability section of the INA, not for all criminal grounds of removability.\textsuperscript{32} Arkansas’ pardon statute under section 5-4-607 provides for the pardon of various convictions related to murder and felonies.\textsuperscript{33} Unless the defendant meets the specifications in the INA, a pardon under this statute will not be given effect in immigration court.

\textsuperscript{25} This is true regardless of the type of punishment required. \textit{See supra} Part I, Section A. For instance, \textsc{Ark. Code Ann.} § 16-93-1206 allows for placement in a community correction program as a sentencing alternative. However, this would still constitute “punishment” for purposes of immigration law. This will also hold true if the only form of punishment is a fine, which would be considered a civil penalty in Arkansas. \textsc{Ark. Code Ann.} § 16-90-115. Matter of Cabrera, 24 I\&N Dec. 459 (BIA 2008)(finding costs and surcharges in criminal sentencing context is a form of punishment or penalty).

\textsuperscript{26} \textit{See supra} Part I, Section B.

\textsuperscript{27} \textsc{Ark. Code Ann.} § 16-93-1004.

\textsuperscript{28} Matter of Rodriguez-Ruiz, 22 I\&N Dec. 1378 (BIA 2000).

\textsuperscript{29} \textsc{Ark. Code Ann.} § 16-90-111. \textit{See Matter of Cota-Vargas, 23 I\&N Dec. 849 (BIA 2005)(discussing that any court nunc pro tunc modification or reduction of a sentence is given full and faith and credit by the immigration system without regard to the reasons for such modification).}

\textsuperscript{30} \textit{See supra}, Part I, Section C.

\textsuperscript{31} \textsc{Ark. Code Ann.} § 16-90-1201.

\textsuperscript{32} INA § 237(a)(2)(A)(vi).

\textsuperscript{33} \textsc{Ark. Code Ann.} § 5-4-607. This same analysis applies to \textsc{Ark. Code Ann.} § 16-90-601, which provides for pardons of individuals who were convicted of a felony under the age of sixteen.
III. Immigration Consequences of Criminal Convictions

The INA provides that any alien with a conviction for specific criminal offenses will be deemed removable. They are placed in Removal Proceedings, a civil administrative court, which will determine if they do, indeed, meet the definition of removable, and if they are eligible for any relief. Depending on the foreign national’s status, they will be charged with either deportability or inadmissibility. Although the two designations contain similar restrictions, inadmissibility generally contains more restrictions and has fewer waivers.

A. Deportability

Deportability applies if one is here as either a nonimmigrant (a temporary immigrant such as a student, tourist, or worker) or an immigrant (such as someone who is a Lawful Permanent Resident (LPR) – or in other words has their “green card”). This section is the most lenient as it allows for certain waivers not available in other situations and includes grounds related to immigration violations, document fraud, security and terrorism-related grounds, as well as multiple criminal grounds.

B. Inadmissibility

Inadmissibility is stricter than removability. This category applies to anyone outside the United States, or to anyone within the country that wishes to adjust status. Inadmissibility will also apply to anyone in the country that is undocumented, both while present in the United States and if they later have any reason for staying permanently in the United States. This is because anyone that is here without documentation must physically leave the United States and re-enter.

These grounds can also apply to individuals here on non-permanent visas, such as students. There is an exhaustive list of grounds of inadmissibility, including those for criminal grounds, found in INA Section 212(a)(2). See Appendix A. This list includes: crimes involving moral turpitude, controlled substance violations, multiple criminal convictions,

34. INA §§ 212(a)(2), 237(a)(2).
35. The grounds for removability can be found in INA § 237(a), 8 U.S.C. § 1227. See Appendix B.
36. The grounds for inadmissibility can be found in INA § 212(a).
37. For example, a woman who comes to the United States and marries a United States citizen does not automatically become a citizen. If she is in the United States on a nonimmigrant visa she must request to adjust her status to become a permanent resident.
38. It is a common misconception that if an individual enters the country without documentation, he or she can “become legal” by marrying someone or having a child. In most instances, an individual must be eligible to adjust status in order to gain status. This means they must leave the United States and re-enter with documents. However, for most people, a ten-year bar will automatically attach to them as soon as they leave the country.
39. This includes a violation of any state, federal, or foreign law related to a controlled substance as defined in 21 U.S.C. § 802. Note that if the specific drug is not listed, it may not satisfy the requirements of a controlled substance violation in immigration proceedings. However, because the burden is on the foreign national in an inadmissibility hearing, this argument is not strong.
40. This applies if the foreign national has multiple criminal convictions for which the aggregate imposed sentences add up to five years or more (this is in addition to any grounds that otherwise might render them ineligible for immigration benefits).
controlled substance trafficking,\textsuperscript{41} prostitution,\textsuperscript{42} significant trafficking in persons,\textsuperscript{43} and money laundering.\textsuperscript{44} Most of these are fairly self-explanatory, but it is important to note that each one is defined very specifically.

\section*{C. Combined Grounds}

The last category is ineligibility for relief that is the most strict because it encompasses grounds in both removability and inadmissibility. This usually applies to someone who is seeking a waiver for inadmissibility that is not based on a criminal conviction. For instance, a noncitizen may seek a waiver that allows him or her to stay in the country despite having entered without documentation. In this case, the noncitizen must demonstrate that he or she has not committed offenses that fall under either the removability or inadmissibility grounds.

\section*{Conclusion}

The Immigration and Nationality Act contains a much broader definition of what a conviction is for immigration purposes. Although Arkansas contains several statutes allowing for dismissals, discharges, or expungements of conviction for state purposes, few of these will apply when a foreign national is in Immigration Court. If deemed convicted of certain criminal statutes, an alien may be deemed removable and, in some instances, will not be allowed re-entry to the United States. With the Supreme Court’s ruling in \textit{Padilla}, it is important to notify your client at every stage of the proceedings, even prior to an entry of a judgment of conviction, that there may be immigration consequences to any finding regarding her criminal activity.

\textsuperscript{41} This applies to anyone the government “knows or has reason to believe” is a controlled substance trafficker and can be proven by any number of convictions or even none at all depending on the circumstances.

\textsuperscript{42} Prostitution includes directly or indirectly procuring or attempting to procure, or receiving in whole or in part the proceeds of prostitution.

\textsuperscript{43} The government must show they know or have reason to believe the individual is aiding, abetting, assisting, conspiring or colluding to traffic in persons.

\textsuperscript{44} This includes offenses, or aiding, abetting, assisting, conspiring, or colluding to commit offenses in title 18, section 1956 or 1957.
Appendix A

Sec. 212. Excludable Aliens

(a) Classes of Aliens Ineligible for Visas or Admission. – Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) Criminal and related grounds. –

(A) Conviction of certain crimes. –

i. In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

I. a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

II. a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

ii. Exception. – Clause (i)(I) shall not apply to an alien who committed only one crime if –

I. the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

II. the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions. – Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) CONTROLLED SUBSTANCE TRAFFICKERS – Any alien who the consular officer or the Attorney General knows or has reason to believe –

i. (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

ii. (ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.
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(D) Prostitution and commercialized vice. – Any alien who –

i. is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

ii. directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

iii. is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. – Any alien –

i. who has committed in the United States at any time a serious criminal offense (as defined in section 101(h) ),

ii. for whom immunity from criminal jurisdiction was exercised with respect to that offense,

iii. who as a consequence of the offense and exercise of immunity has departed from the United States, and

iv. who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized. – For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM – Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is inadmissible.

(H) SIGNIFICANT TRAFFICKERS IN PERSONS –

i. IN GENERAL – Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act, is inadmissible.

ii. BENEFICIARIES OF TRAFFICKING – Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

iii. EXCEPTION FOR CERTAIN SONS AND DAUGHTERS – Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) MONEY LAUNDERING – Any alien –

i. who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense
which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

ii. who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section; is inadmissible.
Appendix B

Sec. 237 [8 U.S.C. 1227]
(a) Classes of Deportable Aliens. – Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses. –

(A) General crimes. –

i. Crimes of moral turpitude. – Any alien who –

   I. is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and

   II. is convicted of a crime for which a sentence of one year or longer may be imposed.

   is deportable

   ii. (ii) Multiple criminal convictions. – Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

   iii. Aggravated felony. – Any alien who is convicted of an aggravated felony at any time after admission is deportable.

   iv. High Speed Flight. – Any alien who is convicted of a violation of section 758 of title 18, United States Code, (relating to high speed flight from an immigration checkpoint) is deportable.

   v. FAILURE TO REGISTER AS A SEX OFFENDER – Any alien who is convicted under section 2250 of title 18, United States Code, is deportable.

   vi. Waiver authorized. – Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances. –

i. Conviction. – Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.

ii. Drug abusers and addicts. – Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses. – Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.
(D) Miscellaneous crimes. – Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate –

i. any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of five or more years may be imposed;

ii. any offense under section 871 or 960 of title 18, United States Code;

iii. a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

iv. a violation of section 215 or 278 of this Act, is deportable.

(E) Crimes of Domestic violence, stalking, or violation of protection order, crimes against children and.

i. Domestic violence, stalking, and child abuse. – Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

ii. Violators of protection orders. – Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) TRAFFICKING – Any alien described in section 212(a)(2)(H) is deportable.