

# Immigration Update

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New proposals before Congress would expand the aggravated felony definition and thus expose many more foreign nationals to removal (deportation), denial of naturalization (citizenship), and other immigration consequences. Even the most lenient of the proposals requires criminal defense counsel to consider novel approaches to "sexual abuse of a minor" as well as "accessory after the fact."

Traditional safehavens may not protect your clients from characterization as aggravated felons. Your practice may benefit by thoughtful deliberation of the following article by Karl W. Krooth, which discusses traditional safehavens, such as confining each of multiple counts to a statute of conviction that defines an innocuous mental state, to a sentence of less than 365 days, and to restitution of no more than \$10,000.

## SEXUAL ABUSE OF A MINOR

The law presently limits the documents on which immigration officials may rely to determine whether an offense is an aggravated felony to a relatively small number: the charging documents (complaint/information), abstracts of judgment, as well as plea and restitution agreements. Sexual abuse of a minor depends on the minority of the victim, which is frequently absent from these documents. The most lenient of Congress' proposals would permit a new standard applicable to sexual abuse of a minor, such that immigration officials would have authority to rely on extrinsic evidence in excess of these documents.

Recent jurisprudence from the US Supreme Court and Circuit Court of Appeals may limit this extrinsic evidence, as follows: a condition precedent to admission of police or probation reports is a stipulation to a given report as the factual basis for entry of plea. Thus, barring an inadvertent stipulation to the police or probation report as the factual basis, immigration officials will probably not have the opportunity to consider them.



However, the proposed legislation compels you to become more aggressive in your representation of foreign nationals arrested for sexual abuse of a minor. In cases where you identify the client as a foreign national, this legislation may require you to approach your favorite prosecutor before he or she has charged the client or immediately afterwards. You may have the opportunity to influence the original charging decision or request dismissal of the

original charging document and filing of a new one. As an aside, it's NOT a good idea to amend an original charging document that refers to the minority of the victim because that approach preserves the record. Your negotiations may profit by arguing the foreign national's immigration equities, documenting his relationship with U.S. citizens and lawful permanent residents, explaining whether he pays taxes and owns his own home, and demonstrating that this transgression was an aberration.

Your aggressiveness at the inception of the case may improve the immigration defense of the foreign nationals. In pursuit of that objective, you may impact the record in the following ways: avoid a statute of conviction that mentions the victim's age; omit the age of the victim from the charging document; prevent any reference to age in a stay-away or no-contact order; ensure that the foreign national stipulates to a factual basis by filing an innocuous written statement that omits the victim's age; arrange for any statements by the victim for sentencing to take place in chambers and

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without the presence of the court reporter; move to strike any mention of the victim’s name or age from the court transcript and the reporters transcript; move the trial court for an order to prohibit members of the press from attending hearings; file a motion to suppress any evidence that indicates the victim’s minority; and move to advance the prospective sealing of the probation department report.

ACCESSORY AFTER THE FACT and AIDING AND ABETTING  
“Accessory after the fact” only qualifies as an aggravated felony under present law upon a sentence of 365 days or more. The most lenient of the proposals in Congress recharacterizes the catchall definition in such a way that “accessory after the fact” will probably become an aggravated felony regardless of sentence. Congress proposes this amendment to encompass aiding and abetting in the aggravated felony definition, and has tailored it to the statutory language of aiding and abetting under California Penal Code 31: counseling, advising, and encouraging.

This prospective change may pose an obstacle in the context of controlled substance cases that you would have otherwise pled down to “accessory after the fact.” If your clients are first-time drug offenders and receptive to relocating to the 9<sup>th</sup> Circuit, then you may wish to plead them to simple possession with an express stipulation in the bargain agreement to expungement under state rehabilitative relief upon successful completion of probation.

### CONCLUSION

The likely expansion of the aggravated felony definition demands that you emphasize the immigration equities of foreign nationals to the prosecution. In this process, you will depend on your relationships to curtail state, county, and city prosecutors from notifying immigration officials about potential aggravated felons. These foreign nationals depend on you to carry the torch of freedom by engaging in earnest negotiations and creative dispositions. Equal justice results because your clients who are foreign nationals would gladly plead to multiple immigration-safe charges rather than one aggravated felony, while a US Citizen would certainly prefer the aggravated felony rather than the multiplicity of convictions.

