

CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION
 IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES
 SECTION I - INCHOATE OFFENSES

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMIT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? ¹	COMMENTS AND PRACTICE TIPS
Conspiracy to commit felony	18.2-22	Probably, if underlying offense is a CIMIT	Yes, under 8 U.S.C. § 1101(a)(43)(U), if underlying offense is an aggravated felony ²	Yes, if underlying offense triggers other grounds; see cover memo	Plead to a conspiracy to commit a crime that doesn't trigger immigration consequences Create affirmative record that no over act occurred in furtherance of conspiracy

¹ Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

² In *Etienne v. Lynch*, the Fourth Circuit analyzed a Maryland conspiracy statute and held “that a state-law conspiracy conviction need not require an overt act as an element for the conviction to qualify as an “aggravated felony.” 813 F.3d 135, 142 (4th Cir. 2015), There may be a potential argument that Virginia’s conspiracy statute is not a categorical match to the federal generic definition of “conspiracy” because it does not require an overt act, however, in *Etienne*, the Fourth Circuit held that even a federal generic common-law definition of conspiracy does not require an overact because if it if, it would be contrary to Congressional intent. This analysis is different from *United States v. Garcia*, No. 12-10471 (9th Cir. Feb. 20, 2014), where the Ninth Circuit held that the generic definition of “conspiracy” under 8 U.S.C. § 1101(a)(43)(U) includes proof that the defendant committed an overt act in furtherance of the conspiracy and therefore that a conspiracy conviction in a state that does not impose such a requirement cannot qualify as an aggravated felony. Virginia’s conspiracy statute does not require an overt act. *See, e.g., Gray v. Commonwealth*, 537 S.E.2d 862, 865 (Va. 2000). However, since Fourth Circuit has already ruled that an “overact” is not required for a generic federal definition and a state statute without an overact would still qualify as an aggravated felony, this argument is unlikely to prevail for immigration purposes. Regardless, defense attorneys should seek to demonstrate on the record when possible that no overt act occurred in furtherance of the conspiracy to preserve the argument that the crime does not constitute an aggravated felony. “Any state-law conspiracy to commit one of the substantive offenses listed in the INA therefore qualifies as an “aggravated felony” under the categorical approach.” *Etienne v. Lynch*, 813 F.3d 135, 145 (4th Cir. 2015).

**This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.*

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Conspiring to trespass or commit larceny	18.2-23(A) (conspiring to trespass)	No	No	No	[FN 2] See the practice tips relating to the substantive offenses of trespass and larceny
	18.2-23(B) (conspiring to commit larceny)	Probably	Probably, under 8 U.S.C. § 1101(a)(43)(U) (FN 2) and (G) ³	No	
Attempt to commit Class 1 Felony Offenses	18.2-25	Probably, if underlying offense is a CIMT	Yes, under 8 U.S.C. § 1101(a)(43)(U) if the underlying	Yes, if underlying offense triggers other grounds; see cover memo	

³ The Fourth Circuit held in *Omarharib v. Holder*, 775 F.d 192 (4th Cir 2014), that a conviction for grand larceny under Va. Code § 18.2-95 is categorically overbroad with regard to the aggravated felony theft offense at 8 U.S.C. 1101(a)(43)(G). Accordingly, a conviction for Virginia grand larceny cannot serve as the basis for a theft aggravated felony charge, although it can still be charged as a CIMT. A practice alert addressing *Omarharib* and its implications can be accessed here: <http://www.caircoalition.org/wp-content/uploads/2015/01/Practice-Advisory-Omarharib-Fourth-Circuit-Grand-Larceny-Decision.pdf>. The Fourth Circuit's reasoning in *Omarharib* applies with equal weight to the definition of "larceny" for the purposes of a charge under § 18.2-96 for petit larceny. Thus, because the underlying offense for larceny (grand or petit) does not count as an aggravated felony, Conspiring to commit larceny also should not count as an aggravated felony.

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Attempt to commit felonies other than Class 1 felony offenses	18.2-26	Probably, if underlying offense is a CIMT	offense is an aggravated felony Yes, under 8 U.S.C. § 1101(a)(43)(U) if underlying offense is an aggravated felony	Yes, if underlying offense triggers other grounds; see cover memo	Plead to a conspiracy to commit a crime that doesn't trigger immigration consequences
Attempt to commit misdemeanors	18.2-27	Probably, if underlying offense is a CIMT	Yes, under 8 U.S.C. § 1101(a)(43)(U) if underlying offense is an aggravated felony	Yes, if underlying offense triggers other grounds; see cover memo	Plead to a conspiracy to commit a crime that doesn't trigger immigration consequences
Criminal solicitation	18.2-29 (commands, etc. another	Probably, if underlying offense is a CIMT	Probably, if underlying offense is an	Probably, if underlying offense triggers other	Plead to solicitation to commit a crime that doesn't trigger immigration

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	person to commit a felony other than murder)		aggravated felony ⁴	grounds; see cover memo	consequences
	18.2-29 (person 18 or old who commands, etc. a person under 18 to commit a felony other than murder)	Probably	Probably, if underlying felony is an aggravated felony (FN 4)	Probably, if underlying offense triggers other grounds; see cover memo	
	18.2-29	Probably	Probably, under 8	No	

⁴ In *Matter of Beltran*, the Board of Immigration Appeals (“BIA”) held that solicitation to possess drugs is a crime relating to a controlled substance. The Board reasoned that solicitation was similar to attempt or conspiracy. See 20 I&N Dec. 521 (BIA 1992). Therefore, solicitation to commit an underlying aggravated felony will probably be considered an aggravated felony under (U) and the corresponding aggravated felony ground.

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	(commands, etc. to commit murder)		U.S.C. § 1101(a)(43)(A) (FN 4)		

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