

CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION  
 IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES  
 SECTION III – PROPERTY OFFENSES

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
Arson/burning or destroying dwelling house	18.2-77	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(E) <sup>2</sup> and (F)	No	To mitigate risk of offense being considered an aggravated felony, plead in the alternative to 18.2-86, or 18.2-88 and seek sentence under one year.  To create possible defenses to designation of "aggravated felony" in immigration court, structure plea to Section (ii) (aiding, counseling, or procuring burning or destruction) rather than Section (i).
Burning/ Destroying any	18.2-80	Yes	Probably, under 8 U.S.C. §	No	To mitigate risk of offense being considered an aggravated felony, plead in the alternative to 18.2-

<sup>1</sup> 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.

<sup>2</sup> The aggravated felony ground at 8 U.S.C. § 1101(a)(43)(E) refers to numerous sections of the federal code criminalizing arson and other materials offenses. Many of these cross-referenced statutes include an element that involves inter-state commerce or other impact that is federal in scope. In *Torres v. Lynch*, the Supreme Court held that such elements are generally "properly ignored when determining if a state offense counts as an aggravated felony under § 1101(a)(43)." 136 S.Ct. 1619 (2016).

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other building or structure			1101(a)(43)(E) <sup>3</sup> probably under (F) if sentence of one year or more imposed, and possibly under (M) if amount of loss to victim exceeds \$10,000 <sup>4</sup>		86, or 18.2-88 and seek sentence under one year.  Keep sentence under one year.  Keep references to intent (e.g. “malicious” or “intent to defraud”) out of record to preserve defense argument in immigration court.  Create affirmative record that acts did not involve intent to defraud. If impossible, create affirmative record that loss to victim was \$10,000 or less.  Create affirmative record that defendant was not engaged in

<sup>3</sup> See *supra* note 2.

<sup>4</sup> An immigration practitioner would have a strong argument that this statute is overbroad and, therefore, could argue under *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), that a conviction under this statute is not an aggravated felony under either the arson grounds at section 1101(a)(43)(E) or the fraud grounds at section 1101(a)(43)(M). However, an immigration court may find that the statute is “divisible,” and therefore look to the record of conviction to determine under which section of the statute the defendant was convicted. Criminal defenders should therefore review the practice tips and create an affirmative record preserving potential immigration arguments.

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					<p>actual destroying or burning of property at issue but played another role in alleged offense (e.g. “counsel or procure” the burning or destruction of property).</p> <p>If applicable, emphasize in record that no person was injured or was in or near the burned or destroyed property.</p>

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Burning/ Destroying personal property, standing grain, etc.	18.2-81	Yes	Probably, under 8 U.S.C. § 1101 (a)(43)(E) <sup>5</sup> ; probably under (F) if sentence of one year or more imposed, and possibly under (M) if amount of loss to victim exceeds \$10,000 <sup>6</sup>	No	To mitigate risk of offense being considered an aggravated felony, plead in the alternative to 18.2-86, or 18.2-88 and seek sentence under one year.  Keep sentence under one year.  Keep references to intent (e.g. “malicious” or “intent to defraud”) out of record to preserve defense argument in immigration court.  Create affirmative record that acts did not involve intent to defraud. If impossible, create affirmative record that loss to victim was \$10,000 or less.  Create affirmative record that defendant was not engaged in

<sup>5</sup> See *supra* note 2.

<sup>6</sup> See *supra* note 4.

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					<p>actual destroying or burning of property at issue but played another role in alleged offense (e.g. “counsel or procure” the burning or destruction of property).</p> <p>If applicable, emphasize in record that no person was injured or was in or near the burned or destroyed property.</p>

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Threats to bomb or damage buildings or means of transportation; false information as to danger to such buildings, etc.; punishment; venue.	18.2-83	Yes <sup>7</sup>	Yes, under 8 U.S.C. § 1101 (a)(43)(E) <sup>8</sup>		

<sup>7</sup> Generally an offense must involve an element of intent to constitute a CIMT, but the Board of Immigration Appeals has held that, “the intentional transmission of threats is evidence of a vicious motive or a corrupt mind,” sufficient to support a CIMT categorization. See *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).  
<sup>8</sup> See *supra* note 2.

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Setting fire to woods, fences, grass	18.2-86	Possibly <sup>9</sup>	Possibly, under 8 U.S.C. § (a)(43)(F) if sentence imposed of one year or more <sup>10</sup> and (E) <sup>11</sup>	No	Keep sentence under one year to avoid determination that offense is a crime of violence aggravated felony under 8 U.S.C. § 1101 (a)(43)(F).
Carelessly damaging property by fire.	18.2-88	Possibly	No	No	Create affirmative record that offense was committed “carelessly” or “negligently.”
Burglary	18.2-89	Probably <sup>12</sup>	Yes, under 8 U.S.C. §	No	

<sup>9</sup> Although the BIA has held that arson is a CIMT, this offense is more similar to malicious destruction of property, which in some cases has been held not to constitute a CIMT. See, e.g., *Matter of N*, 8 I&N Dec. 466 (BIA 1959); *Matter of M-*, 2 I&N Dec. 686 (BIA 1946); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947); but see *Matter of R-*, 5 I&N Dec. 612, 616 n.1 (BIA 1954); *Matter of M-*, 3 I&N Dec. 272, 273 (BIA 1948); *Da Silva Neto v. Holder*, 680 F.3d 25 (1st Cir. 2012).

<sup>10</sup> An immigration practitioner would have a strong argument that this offense does not constitute a crime of violence aggravated felony under 8 U.S.C. § (a)(43)(F) because use of force is not an element of the offense and there is no substantial risk that physical force will be used against the person or property of another. See 18 U.S.C. § 16.

<sup>11</sup> See *supra* note 2.

<sup>12</sup> The U.S. Court of Appeal for the Fourth Circuit has held that “the act of breaking and entering a dwelling, with the intent to commit *any* crime, necessarily involves conduct that violates an individual’s reasonable expectation that her personal living and sleeping space will remain private and secure” and involves moral turpitude sufficient to be a CIMT. *Uribe v. Sessions*, 855 F.3d 622 (4th Cir. 2017), *pet. for reh’g denied* Jul. 7, 2017; see also *Matter of J-G-D-F-*, 27 I&N

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			1101(a)(43)(F) and (G) if sentence imposed of one year or more <sup>13</sup>		Keep sentence under one year (including time suspended) to avoid aggravated felony.  Seek alternative plea to 18.2-94 to avoid aggravated felony.
	18.2-89 (armed with	Probably (but possibly not) <sup>14</sup>	Yes, under 8 U.S.C. § 1101(a)(43)(F)	Probably (but possibly not) a firearms offense <sup>15</sup>	If impossible to keep sentence under one year, seek alternative plea to 18.2-91 or 18.2-92 and

<sup>12</sup> Dec. 82 (BIA 2017). A person can be convicted under Virginia Code § 18.2-89 for breaking and entering a dwelling with intent to commit a felony or any larceny. See *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989); *Matter of M*, 2 I&N Dec. 721 (BIA 1946). However, a person also can be convicted under the statute for breaking and entering non-dwellings such as a railroad car. See *Uribe*, 855 F.3d at 627. Therefore, an immigration attorney could argue that the statute is overbroad and not a crime involving moral turpitude. Because Virginia Code § 18.2-89 for burglary only references breaking and entering into a “dwelling house” and does not, as it does in Virginia Code § 18.2-90 include ships, vessels, automobiles, etc., an immigration attorney could argue that *U.S. v Stitt*, 139 S.Ct. 399 (2018) does not apply to the Virginia burglary statute. Because the Virginia statute does not have the same ambiguity about what constitutes a “dwelling,” one need not be bound by the argument laid out in *U.S. v Stitt* to determine whether burglary is a violent felony.

<sup>13</sup> Arguments have been made in front of the Arlington court that both “break” and “enter” as defined under this section have been interpreted more broadly than the common law definition of burglary, such that burglary should not qualify as an aggravated felony. Please reach out to CAIR Coalition for more information on this briefing.

<sup>14</sup> See *supra* note 12.

<sup>15</sup> A person is guilty of class 2 felony burglary under Virginia Code § 18.2-89 if he or she is “armed with a deadly weapon” at the time of entry. According to Virginia jury instructions, a deadly weapon is defined as “any object or instrument, not part of the human body, that is likely to cause death or great bodily injury because of the manner and under the circumstances in which it is used.” As a result, it encompasses weapons that are not included in the federal definition of firearm at 18 U.S.C. § 921(a) (which defines “firearm as “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.”). An immigration attorney could therefore argue that the statute is overbroad and categorically not a firearms offense.

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	deadly weapon)		and (G) if sentence imposed of one year or more		see Practice Tips section for those offenses regarding modification to the record (Note: such a plea would not necessarily avoid immigration consequences but would allow for stronger defense arguments against an aggravated felony designation in immigration court).
Breaking and entering with intent to commit murder, rape,	18.2-90	Yes	Probably under 8 U.S.C. § 1101(a)(43)(F) if sentence	No	Keep reference to firearm or any deadly weapon out of the record of conviction.  Keep sentence under one year (including time suspended) to avoid aggravated felony.

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robbery, or arson			imposed of one year or longer <sup>16</sup> No, under 8 U.S.C. §1101(a)(43)(G) <sup>17</sup>		Seek alternative plea to 18.2-94 to avoid aggravated felony.  If impossible to keep sentence under one year, to preserve argument that offense is not an aggravated felony, specify in the record if the offense involved entering without breaking, and/or entry into an automobile, ship, or other non-dwelling or building; or alternatively seek to have the record simply reflect the general statutory language, omitting any reference to the
	18.2-90 (armed with deadly weapon)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year	Probably (but possibly not) a firearms offense. Potential defense at note. <sup>21</sup>	

<sup>16</sup> Although this offense may be considered an aggravated felony as a crime of violence, an immigration practitioner would have a strong argument that the offense is overbroad at to that aggravated felony ground. A crime of violence under 8 U.S.C. § 1101(a)(43)(F) must meet the definition under 8 U.S.C. §16 which generally requires the use or attempted use of force in the commission of an offense or a substantial risk that physical force will be used. However, an individual may be convicted under Va. Code 18.2-90 as a result of entering a building without force to commit an offense that does not necessarily require the use of force. Thus, an immigration practitioner could argue that the offense is overbroad and should not constitute a crime of violence aggravated felony. See also *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). See *also* note 10.

<sup>17</sup> *Castendet-Lewis v. Sessions*, 855 F.3d 253 (4th Cir. 2017).  
<sup>21</sup> See *supra* note 10.

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			No, under 8 U.S.C. § 1101 (a)(43)(G) <sup>20</sup>		manner of entry or location of entry. <sup>18</sup>  To preserve a defense against a crime involving moral turpitude charge, plead to 18.2-91 rather than 18.2-90 and do not specify the offense the defendant intended to commit upon entry or specify simple assault and battery as the intended offense. <sup>19</sup>  Keep reference to firearm or any deadly weapon out of the record of conviction.

<sup>20</sup> See *supra* note 17.

<sup>18</sup> For more detailed information regarding the importance of the record of conviction and how to preserve defenses for non-citizens clients in removal proceedings, see CAIR Coalition’s July 6, 2016 Practice Advisory, “*Mathis v. United States* and the Categorical Approach: When the Record Matters,” available online at <http://www.caircoalition.org/wp-content/uploads/2016/07/20160628-Mathis-Practice-Advisory.pdf>.

<sup>19</sup> See *supra* note 18. See also *supra* note 12.

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Statutory burglary	18.2-91	Possibly <sup>22</sup>	Possibly under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year. <sup>23</sup>	No	Keep sentence under one year to avoid aggravated felony.  Seek alternative plea to 18.2-94 to avoid aggravated felony.  If impossible to keep sentence under one year, to preserve argument that offense is not an aggravated felony, specify in the record if the offense involved entering without breaking, and/or entry into an automobile, ship, or other non-dwelling or building; or alternatively seek to have the record simply reflect the
	18.2-91 (armed with	Probably (but possibly not) <sup>27</sup>	No under 8 U.S.C. § 1101(a)(43)(G) <sup>24</sup>	Probably (but possibly not) a firearms offense.	

<sup>22</sup> See *supra* note 12. Please note, local Arlington immigration judges have found this not to be a CIMT; please contact CAIR Coalition for additional briefing on this matter.

<sup>23</sup> See *supra* note 10. See also *supra* note 16. See also unpublished case H-M-F- AXXX XXX 345 (BIA March 29, 2017) reach out to <https://www.irac.net/> for copy of decision.

<sup>24</sup> The U.S. Court of Appeals for the Fourth Circuit has held that Va. Code 18.2-91 is categorically not an aggravated felony theft nor burglary offense. *Castendet-Lewis v. Sessions*, 855 F.3d 253 (4th Cir. 2017). This analysis survives the holding in *US v. Stitt*, 139 S. Ct 399 (2018).

<sup>27</sup> See *supra* note 12. Please note, local Arlington immigration judges have found this not to be a CIMT; please contact CAIR Coalition for additional briefing on this matter.

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	deadly weapon)		<p>sentence imposed is at least one year<sup>28</sup></p> <p>Possibly, under 8 U.S.C. § 1101(a)(43)(G) if sentence is at least one year<sup>29</sup></p>	<p>Potential defense at note.<sup>30</sup></p>	<p>general statutory language, omitting any reference to the manner of entry or location of entry.<sup>25</sup></p> <p>To preserve defense against a crime involving moral turpitude charge, do not specify the offense the defendant intended to commit upon entry or specify simple assault and battery as the intended offense.<sup>26</sup></p> <p>Keep reference to firearm or any deadly weapon out of the record of conviction.</p>

<sup>28</sup> See *supra* note 10. See also *supra* note 16.

<sup>29</sup> See *supra* note 17.

<sup>30</sup> See *supra* note 15.

<sup>25</sup> See *supra* note 18.

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Breaking and entering with intent to commit other misdemeanor	18.2-92	Probably (but possibly not) <sup>31</sup>	Probably, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year <sup>32</sup>	No	Keep sentence under one year (including time suspended) to avoid aggravated felony.  Seek alternative plea to 18.2-94 to avoid aggravated felony.  If applicable, create record showing that structure broken into was not a “dwelling house” to preserve argument that offense is not burglary aggravated felony; alternatively seek to have record simply reflect the general statutory language, omitting any
	18.2-92 (armed with	Probably (but possibly not) <sup>35</sup>	No, under 8 U.S.C. § 1101(a)(43)(G) if sentence imposed is at least one year <sup>33</sup>	Probably (but possibly not) a firearms offense.	

<sup>31</sup> See *supra* note 12.

<sup>32</sup> See *supra* note 10. See also *supra* note 16.

<sup>33</sup> See *supra* note 17.

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	deadly weapon)		No, under 8 U.S.C. § 1101(a)(43)(G) <sup>36</sup>	Potential defense at note. <sup>37</sup>	reference to the manner of entry or location of entry. <sup>34</sup>  Keep reference to firearm or any deadly weapon out of the record of conviction.
Possession of burglary tools	18.2-94	Probably	No	No	
Grand larceny	18.2-95	Yes	No <sup>38</sup>	No	This would still be considered a conviction for immigration purposes despite deferral of

<sup>36</sup> See *supra* note 17.

<sup>37</sup> See *supra* note 10.

<sup>34</sup> See *supra* note 18.

<sup>38</sup> The Fourth Circuit held in *Omargharib 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 *Omargharib* and its implications can be accessed here: <http://www.caircoalition.org/wp-content/uploads/2015/01/Practice-Advisory-Omargharib-Fourth-Circuit-Grand-Larceny-Decision.pdf>. The Fourth Circuit’s reasoning in *Omargharib* applies with equal weight to the definition of “larceny” for the purposes of a charge under § 18.2-96 for petit larceny.

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CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION  
 IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES  
 SECTION III – PROPERTY OFFENSES

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>41</sup>	COMMENTS AND PRACTICE TIPS
Petit larceny	18.2-96	Yes	No <sup>40</sup>		disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>39</sup> so seek alternate plea to trespass, 18.2-119, to avoid CIMT; if 18.2-119 is impossible seek alternate plea to 18.2-121 unlawful entry of property.  This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>41</sup>

<sup>39</sup> A deferred disposition under VA Code 19.2-303.2 would still likely qualify as a conviction under INA 101(a)(48)(A). Furthermore, the subsequent discharge of the person and dismissal of the proceedings does not eliminate the conviction for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), rev'd on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (Convictions vacated because of post-conviction events, such as rehabilitation or immigration hardships or reasons unrelated to the merits of the underlying criminal proceedings, remain a conviction for immigration purposes.).

<sup>40</sup> See *supra* note 38.

<sup>41</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
Identification of certain personality	18.2-96.1(C)	Probably not <sup>42</sup>	No	No	Seek alternate plea to 18.2-119 trespass to avoid CIMT; if 18.2-119 is impossible seek alternate plea to 18.2-121 unlawful entry of property.  This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>43</sup>  Emphasize the value of property in the record if under \$200 to

<sup>42</sup> In some case the BIA has held that malicious destruction of property is not a CIMT. *Matter of N*, 8 I&N Dec. 466 (BIA 1959); *Matter of M-*, 2 I&N Dec. 686 (BIA 1946); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947); *but see Matter of R-*, 5 I&N Dec. 612, 616 n.1 (BIA 1954); *Matter of M-*, 3 I&N Dec. 272, 273 (BIA 1948); *Da Silva Neto v. Holder*, 680 F.3d 25 (1st Cir. 2012). An immigration attorney could argue that under the statute, the identification of certain personality requires an intent to render the property unidentifiable but not to destroy the property, distinguishing the offense from even malicious destruction of property offenses that the Board has held do not rise to the level of a CIMT.

<sup>43</sup> See *supra* note 39.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
					<p>preserve misdemeanor designation.</p> <p>Ensure that the record does not reflect intent to deprive the owner of the use of the property.</p>
18.2-96.1(D)		Probably <sup>44</sup>	Possibly (but probably not) a theft offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year	No	<p>This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2<sup>45</sup></p> <p>Keep sentence under one year to avoid aggravated felony.</p>

<sup>44</sup> See *supra* note 12.

<sup>45</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>41</sup>	COMMENTS AND PRACTICE TIPS
Larceny of bank notes, checks, etc.	18.2-98	Yes	Possibly, under 8 U.S.C. § 1101 (a)(43)(G) <sup>46</sup>	No	<p>Emphasize the value of property in the record if under \$200.</p> <p>Ensure that the record does not reflect knowing taking or intent to deprive the owner of the use of the property.</p> <p>This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2<sup>47</sup></p> <p>Keep sentence under one year to avoid aggravated felony.</p>

<sup>46</sup> *But see supra* note 24; *see also supra* note 12.

<sup>47</sup> *See supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>41</sup>	COMMENTS AND PRACTICE TIPS
Unauthorized use of animal, aircraft, vehicle, or boat	18.2-102	No	No <sup>48</sup>		<p>Seek alternate plea to 18.2-119 trespass to avoid CIMT and aggravated felony; if impossible seek alternate plea to 18.2-121 unlawful entry of property.</p> <p>Seek alternate plea to 18.2-102, unauthorized use, to avoid CIMT and aggravated felony.</p>
					<p>This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2<sup>49</sup></p>

<sup>48</sup> On January 14, 2015, the Fourth Circuit decided in *Castillo v. Holder* (Case No. 14-1085) that, under the categorical approach, a conviction under Va. Code 18.2-102 cannot be charged as an aggravated felony theft offense under 8 U.S.C. 1101(a)(43)(G) because Virginia’s unauthorized use statute is categorically overbroad with regard to the theft offense aggravated felony provision.

<sup>49</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>51</sup>	COMMENTS AND PRACTICE TIPS
Concealing or taking possession of merchandise; altering price tags	18.2-103	Probably	Probably, under 8 U.S.C. § 1101 (a)(43)(G) if sentence imposed is at least one year		Create affirmative record that defendant did not intend to deprive owner of rights or privileges of ownership.
			Probably, under 8 U.S.C. § 1101 (a)(43)(M) and (U) if the actual/intended loss to the victim		This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>51</sup>  Keep sentence under one year to avoid theft aggravated felony charge.  If possible, make clear in record of conviction that actual and intended loss to the victim did not

<sup>51</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
Manufacture or sale of devices to shield against electronic	18.2-105.2	Probably	No	exceeds \$10,000 <sup>50</sup>	<p>exceed \$10,000 to avoid fraud aggravated felony charge under 8 U.S.C. § 1101(a)(43)(M), (U).<sup>52</sup></p> <p>To avoid an aggravated felony, consider alternative plea to 18.2-95 grand larceny or 18.2-96 petit larceny (but note that this will not avoid the CIMT grounds of removability).<sup>53</sup></p> <p>This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition,</p>

<sup>50</sup> An actual loss of \$10,000 or more is not necessary for this offense to be charged as a fraud aggravated felony because the language of the offense includes attempts and, therefore, the offense can be charged as an attempted aggravated felony under (U) if the intended loss is greater than \$10,000. *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).

<sup>52</sup> See *supra* note 48.

<sup>53</sup> See *supra* note 12.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
detection of shoplifting					discharge, or dismissal under VA Code 19.2-303.2 <sup>54</sup>
Theft or destruction of public records by others than officers	18.2-107	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(G) and (M) <sup>55</sup>	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>56</sup>  Keep sentence under one year to avoid theft aggravated felony.  Ensure that any references to monetary amount in the record

<sup>54</sup> See *supra* note 39

<sup>55</sup> The statute encompasses both stealing and fraud, which could give rise to the theft and fraud aggravated felony grounds (assuming all other requirements for those provisions are met). However, an immigration practitioner would likely argue that this statute is indivisible and is therefore overbroad for either aggravated felony ground because courts have made clear that fraudulent conduct and theft are distinct means of committing an aggravated felony. *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005); *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014). See *also supra* note 12. However, an immigration court could find that the statute is divisible and therefore look to the record of conviction. As a result, defenders should follow the suggestions in the tips section.

<sup>56</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
Receiving stolen goods	18.2-108	Yes	Subsection (A) Yes Subsection (B) Arguably not <sup>57</sup>	No	are kept under \$10,000 to avoid a fraud aggravated felony under 8 U.S.C. § 1101(a)(43)(M).  Do not create affirmative record as to whether offense occurred by means of fraud or theft.  This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>58</sup>  Keep sentence under one year.

<sup>57</sup> In a 2018 BIA decision, the BIA determined that a Georgia statute with a *mens rea* similar to that of “believes to have been stolen” (as is the requirement in Virginia Statute 18.2-108(B)) was insufficient to meet the aggravated felony definition under USC 101(a)(43)(G). See OEA, A XXX XXX 576 (BIA Oct. 30, 2018). An immigration practitioner could argue this same approach in Virginia.

<sup>58</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
Larceny with intent to sell or distribute	18.2-108.01(A)	Yes	Probably not <sup>59</sup>	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>60</sup>
	18.2-108.01(B)	Yes	Probably not <sup>62</sup>	No	Seek alternate plea to 18.2-119 trespass to avoid CIMT and aggravated felony; if 18.2-119 is impossible seek alternate plea to 18.2-121 unlawful entry of property.  Seek alternate plea to 18.2-102, unauthorized use, to avoid CIMT and aggravated felony.

<sup>59</sup> See *supra* note 24.

<sup>60</sup> See *supra* note 39

<sup>62</sup> See *supra* note 24.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
					Keep sentence under one year (including suspended time) to protect against theft aggravated felony charge. <sup>61</sup>

<sup>61</sup> *But see supra* note 12.

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Receipt of stolen firearm	18.2-108.1	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(G) if sentence imposed is at least one year  Yes, under 8 U.S.C. § 1101(a)(43)(E) (regardless of sentence)	Probably a firearms offense under grounds of deportability if firearm used matches the federal definition at 18 U.S.C. § 921(a) <sup>63</sup>	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>64</sup>  Keep sentence under one year to avoid theft aggravated felony charge.  Seek alternate plea to 18.2-96 petit larceny with sentence of under one year to avoid aggravated felony and firearms ground of deportability.  Do not specify type of firearm in record to preserve argument that statute is overbroad for the purpose of firearm grounds of deportability.
Receipt or transfer of	18.2-109	Yes	Yes, under 8 U.S.C. §	No	This would still be considered a conviction for immigration

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
possession of stolen vehicle, aircraft or boat			(a)(43)(G) if sentence imposed is at least one year		purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>65</sup>  Keep sentence under one year.
Embezzlement deemed larceny	18.2-111	Yes	Possibly, under 8 U.S.C. 1101(a)(43)(G) if sentence imposed is at least one year <sup>66</sup>	No	If loss to victim is alleged to be \$10,000 or greater, seek alternative plea to 18.2-95 or 18.2-96 grand or petit larceny to avoid fraud aggravated felony

<sup>63</sup> See *supra* note 15.

<sup>64</sup> See *supra* note 39

<sup>65</sup> See *supra* note 39

<sup>66</sup> Immigration practitioners would have a strong argument that this statute is overbroad on the same grounds as Virginia’s larceny statutes. See *supra* note 12. In *Mena v. Lynch*, No. 15-1009 (4th Cir. Apr. 27, 2016), the Fourth Circuit held that a federal embezzlement offense does not constitute a theft aggravated felony as defined at 8 U.S.C. 1101(a)(43)(G) because embezzlement involves the lawful possession of embezzled property, whereas 8 U.S.C. 1101(a)(43)(G) requires the taking of property or receipt of property without consent. With respect to an alternate plea to 18.2-95, Arlington JJ has affirmed *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014), and rejected DHS’s argument with VA grand larceny 18.2-95 could constitute an aggravated felony under the AG’s recent decision in *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020).

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<b>OFFENSE</b>	<b>STATUTE</b>	<b>CRIME INVOLVING MORAL TURPITUDE (CIMT)?</b>	<b>AGGRAVATED FELONY?</b>	<b>OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?<sup>1</sup></b>	<b>COMMENTS AND PRACTICE TIPS</b>
Trespass after having been	18.2-119	No	Yes, under 8 U.S.C. 1101 (a)(43)(M) if loss of victim exceeds \$10,000		<p>Make clear in record of conviction that loss to the victim was less than \$10,000; otherwise, do not emphasize loss amount in record.</p> <p>Keep sentence to less than one year to avoid theft aggravated felony ground.</p> <p>Seek alternate plea to 18.2-119 trespass to avoid CIMT and aggravated felony; if 18.2-119 is impossible seek alternate plea to 18.2-121 unlawful entry of property.</p> <p>Seek alternate plea to 18.2-102, unauthorized use, to avoid CIMT and aggravated felony.</p> <p>This would still be considered a conviction for immigration</p>

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forbidden to do so					purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>67</sup>
Entering property of another for purpose of damaging it	18.2-121	Probably not	Probably not	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>68</sup>
Trespass on posted property (for hunting, fishing or	18.2-134	No	No	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition,

<sup>67</sup> See *supra* note 39

<sup>68</sup> See *supra* note 39

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trapping purposes)					discharge, or dismissal under VA Code 19.2-303.2 <sup>69</sup>
Injuring, etc., any property, monument, etc.	18.2-137(A)	No	No	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>70</sup>
	18.2-137(B)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year <sup>73</sup>		Keep sentence under one year.  Emphasize in record that value of property under \$1,000 to avoid felony conviction and preserve aggravated felony defenses.

<sup>69</sup> See *supra* note 39

<sup>70</sup> See *supra* note 39

<sup>73</sup> See *supra* note 15.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
					If client has no prior felony convictions, seek deferred disposition pursuant to 19.2-303.2; <sup>71</sup> avoid a conviction for immigration purposes by entering a plea of not guilty and do not stipulate or admit to facts sufficient. <sup>72</sup>
Damaging public buildings, etc.	18.2-138 (willful and malicious damage to	Possibly <sup>74</sup>	Possibly, under 8 U.S.C. § 1101(a)(43) (F) if sentence	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge,

<sup>71</sup> See *supra* note 39

<sup>72</sup> See CAIR Coalition Practice Advisory, “Avoiding or Withdrawing a ‘Conviction’ for Immigration Purposes,” for more information on the ways in which a first offender disposition can be structured to avoid a “conviction” for immigration purposes: <http://www.caircoalition.org/wp-content/uploads/2016/04/4.28.16-PA-Avoiding-or-Withdrawing-Conviction.pdf>.

<sup>74</sup> The BIA has mixed case law on whether or not malicious destruction of property offenses are CIMTs. *Matter of N*, 8 I&N Dec. 466 (BIA 1959); *Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of C*-, 2 I&N Dec. 716 (BIA 1947). The BIA, in some unpublished recent decisions, and a circuit court have held that malicious destruction of property statutes are CIMTs. See *Matter of R*-, 5 I&N Dec. 612, 616 n.1 (BIA 1954); *Matter of M*-, 3 I&N Dec. 272, 273 (BIA 1948); *Da Silvio Neto v. Holder*, 680 F.3d 25 (1st Cir. 2012). An immigration attorney could argue that under the statute, the identification of certain personality requires an intent to render the property unidentifiable but not to destroy the property, distinguishing the offense from even malicious destruction of property offenses that the Board has held do not rise to the level of a CIMT.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>71</sup>	COMMENTS AND PRACTICE TIPS
	public buildings or written materials)		imposed is one year or more <sup>75</sup>		or dismissal under VA Code 19.2-303.2 <sup>76</sup>  Seek alternate plea to 18.2-119 trespass to avoid CIMT and aggravated felony; if 18.2-119 is impossible seek alternate plea to 18.2-121 unlawful entry of property.  Keep sentence under one year.
Tampering with vehicle	18.2-146	Likely Not <sup>77</sup>	Probably not	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>78</sup>

<sup>75</sup> See *supra* note 10.

<sup>76</sup> See *supra* note 39

<sup>77</sup> Not found to be CIMT by local Immigration Judge.

<sup>78</sup> See *supra* note 39

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? <sup>1</sup>	COMMENTS AND PRACTICE TIPS
Entering or setting a vehicle in motion	18.2-147	Arguably not <sup>79</sup>	No	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>80</sup>  Create affirmative record that intended crime was one not involving moral turpitude (such as simple trespass).

<sup>79</sup> A person can be convicted under Virginia Code § 18.2-147 for entering a vehicle with the intent to commit any crime. Conduct criminalized by this statute would only constitute a CIMT if the intended crime is a crime involving moral turpitude. See *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989); *Matter of M*, 2 I&N Dec. 721 (BIA 1946). As the statute criminalizes conduct that is not a crime involving moral turpitude, an immigration attorney could argue that the statute is overbroad and not a crime involving moral turpitude.

<sup>80</sup> See *supra* note 39

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Breaking and entering railroad cars, etc.	18.2-147.1	Arguably not <sup>81</sup>	Probably, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is one year or more <sup>82</sup>  Possibly (but probably not) under 8 U.S.C. § 1101(a)(43)(G) if sentence	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>84</sup>  Keep sentence under one year to avoid aggravated felony charge.

<sup>81</sup> Virginia Code § 18.2-147.1 punishes the acts of breaking the seal or lock of any railroad car, etc. or breaking and entering any such vehicle with the intent to commit larceny or any felony therein. Simple breaking is not a crime involving moral turpitude. Breaking and entering is not a crime involving moral turpitude unless the person breaks and enters with the intent to commit a crime involving moral turpitude. See *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989); *Matter of M*, 2 I&N Dec. 721 (BIA 1946). As the statute is overbroad, an immigration attorney could argue that a conviction under this statute is overbroad and not a crime involving moral turpitude.

<sup>82</sup> See *supra* note 10.

<sup>84</sup> See *supra* note 39

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	18.2-147.1 (armed with firearm)	Arguably not <sup>85</sup>	imposed is one year or more <sup>83</sup> Probably, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed of one year or more <sup>86</sup> Possibly (but probably not) under 8 U.S.C. § 1101(a)(43)(G) if sentence	Probably a firearms offense under grounds of deportability if firearm used matches the federal definition at 18 U.S.C. § 921(a) <sup>88</sup>	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>89</sup>  Do not specify type of firearm in record to preserve argument that statute is overbroad for the purposes of 8 U.S.C. § 1101(a)(43)(E).

<sup>83</sup> To constitute a burglary aggravated felony, the elements of this statute would need to meet the elements set forth for burglary in *Taylor v. United States*, 495 U.S. 575 (1990). The elements of burglary under *Taylor* require an unlawful entry into a “building or structure.” An immigration practitioner would have a strong argument that 18.2-147.1 allows conviction for unlawful entry into vehicles that do not constitute “buildings or structures” and therefore could show that the statute is categorically overbroad.

<sup>85</sup> See *supra* note 79.

<sup>86</sup> See *supra* note 10.

<sup>88</sup> See *supra* note 15.

<sup>89</sup> See *supra* note 39

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Stealing from or tampering with parking meter, vending machine, pay telephone, etc.	18.2-152	Probably <sup>90</sup>	Probably not	No	This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>91</sup>  Keep sentence under one year to avoid potential determination that this offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) or (G).

<sup>87</sup> See *supra* note 81.

<sup>90</sup> The Board of Immigration Appeals has held that in order for a theft offense to constitute a crime involving moral turpitude it must require intent to permanently deprive *or* intent to deprive the owner of his property rights under circumstances where these rights are *substantially* eroded. See *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016); *Matter of Diaz-Lizagarra*, 26 I&N Dec. 847 (BIA 2016).

<sup>91</sup> See *supra* note 39

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Computer fraud	18.2-152.3	Yes	Possibly, under 8 U.S.C. § 1101 (a)(43) (G) if sentence imposed is at least one year <sup>92</sup>  Probably, under 8 U.S.C. § 1101 (a)(43)(M) if loss to the victim exceeds \$10,000 <sup>93</sup>	No	Deferred disposition under 19.2-303.2 is not available for computer fraud crimes.  Keep sentence under one year to avoid theft aggravated felony charge.  Make clear in record of conviction that loss to the victim was less than \$10,000 to avoid fraud aggravated felony charge; otherwise, do not emphasize loss amount in record.  It is likely that an immigration court would view this as a divisible statute and would therefore review the record of conviction. Thus, in order to

<sup>92</sup> The same type of overbreadth arguments relevant to Virginia’s larceny offenses (*see supra* note 38) are also potentially applicable to Va. Code 18.2-152.3.

<sup>93</sup> An immigration practitioner could argue that this statute is overbroad for the fraud aggravated felony ground under 8 U.S.C. § 1101(a)(43)(M) because the language of the statute appears to encompass both fraud and theft offenses. *See supra* note 12. *See supra* note 66.

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<b>OFFENSE</b>	<b>STATUTE</b>	<b>CRIME INVOLVING MORAL TURPITUDE (CIMT)?</b>	<b>AGGRAVATED FELONY?</b>	<b>OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?<sup>1</sup></b>	<b>COMMENTS AND PRACTICE TIPS</b>
Computer trespass	18.2-152.4	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(G) if sentence		<p>preserve the strongest argument against an aggravated felony designation, defenders should not create an affirmative record as to the section under which the defendant is convicted and the means of commission of the offense. If this is impossible, defenders should plead to subsection 2 (embezzlement or larceny) and do not create affirmative record as to the means of the larceny or embezzlement.</p> <p>Keep sentence under one year to avoid theft aggravated felony charge.</p> <p>Make clear in record of conviction that loss to the victim was less than \$10,000 to avoid fraud</p>

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Theft of computer services	18.2-152.6	Yes	imposed is at least one year <sup>94</sup> Possibly, under 8 U.S.C. § 1101(a)(43)(M) if loss to the victim exceeds \$10,000 <sup>95</sup> Possibly, under 8 U.S.C. § 1101(a)(43)(G) if sentence imposed is at least one year <sup>96</sup>	No	aggravated felony charge; otherwise, do not emphasize loss amount in record.  Keep sentence under one year to avoid theft aggravated felony charge.  Make clear in record of conviction that loss to the victim was less than \$10,000 to avoid fraud

<sup>94</sup> An immigration practitioner would likely argue that this statute is not divisible and is overbroad because it punishes both theft and fraud offenses. See *supra* note 66.

<sup>95</sup> An immigration practitioner could argue that this statute is overbroad for the fraud aggravated felony ground under 8 U.S.C. § 1101(a)(43)(M) because the language of the statute appears to encompass both fraud and theft offenses. See *supra* note 66.

<sup>96</sup> An immigration practitioner would likely argue that this statute is not divisible and is overbroad because it punishes both theft and fraud offenses. See *also supra* note 24. See *supra* note 66.

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Unlawful use of, or injury to, telephone and telegraph lines; copying or obstructing	18.2-164	Yes	Possibly, under 8 U.S.C. § 1101(a)(43) (M) if loss to the victim exceeds \$10,000		aggravated felony charge; otherwise, do include a loss amount in record, if possible.  Do not specify in the record whether offense committed by means of theft or fraud (e.g. whether or not consent from alleged victim was obtained).
			Possibly, under 8 U.S.C. § 1101(a)(43) (F) if sentence imposed is at least one year <sup>97</sup>		This would still be considered a conviction for immigration purposes despite possibility of deferral of disposition, discharge, or dismissal under VA Code 19.2-303.2 <sup>98</sup>

<sup>97</sup> Va. Code § 18.2-164 may be charged as an aggravated felony crime of violence property offense. However, an immigration practitioner would have a strong argument available that Va. Code § 18.2-164 is not an aggravated felony “crime of violence” under 8 U.S.C. § 1101(a)(43)(F) as defined at 18 U.S.C. § 16(a) or (b) because it has no element of force. *See also supra* note 16. *See also supra* note 10.

<sup>98</sup> *See supra* note 39

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messages; penalty					<p>Seek alternate plea to trespass, 18.2-119, to avoid CIMT; if 18.2-119 is impossible seek alternate plea to 18.2-121 unlawful entry of property.</p> <p>Keep sentence under one year to avoid aggravated felony charge.</p>

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