IMMIGRATION CONSEQUENCES OF PRETRIAL DIVERSION AND INTERVENTION AGREEMENTS

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Many grounds of removability[1] and bars to relief are triggered by criminal convictions, so practitioners need to fully understand what types of criminal dispositions are considered "convictions" for immigration purposes. Immigration law has its own definition of what constitutes a criminal conviction, and a dismissal under state law can still constitute a conviction under federal immigration laws. In 2017, the Board of Immigration Appeals (BIA) issued a precedential decision in *Matter of Mohamed*, 27 I. & N. 92 (BIA 2017) finding that certain types of pretrial intervention agreements that result in dismissal under state law can still constitute a conviction for immigration purposes. Therefore, practitioners must pay close attention to the structure of such agreements, and the variety of available diversion programs, when evaluating a client's criminal history and advising about the potential immigration consequences of criminal offenses and dispositions.

This advisory discusses when such agreements and programs will constitute a conviction for immigration purposes, and how to avoid such a conviction.

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[1] *See* INA § 212(a)(2); INA § 237(a)(2).

A. Overview: What Constitutes a Conviction Under Immigration Law?

The immigration statute contains its own definition of when a conviction has occurred in state criminal court – regardless of what state law says. The definition at INA § 101(a)(48)(A) provides (emphasis added):

> **(A)** The term "conviction" means, with respect to a [noncitizen], a formal judgment of guilt of the [noncitizen] entered by a court ***or, if adjudication of guilt has been withheld, where***—
>
> i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] 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 [noncitizen's] liberty to be imposed.

The phrase "if adjudication of guilt has been withheld" may apply to a variety of diversion programs that avoid a conviction for state purposes.[2] Depending on the jurisdiction, the programs may be referred to as pretrial diversion, pretrial intervention, deferred adjudication, deferred entry of judgment, or similar terms. The issue most often arises when a noncitizen has successfully completed a diversion program and has no conviction under state law, but immigration authorities nonetheless assert that there is a conviction for immigration purposes. One defense strategy is to show that the disposition did not meet one or both of the INA § 101(a)(48)(A) requirements, because (1) there was no qualifying plea, finding, or admission of guilt, and/or (2) the court did not order a qualifying form of punishment, penalty, or restraint. If either of these requirements was not met, there is no conviction for immigration purposes.

Part B, below, addresses what is required for a qualifying plea, finding, or admission of guilt. Questions often include, what kind of factual admission or judicial finding is sufficient? Is a boilerplate statement of guilt sufficient? What if the statements are contained solely in a private agreement with the prosecution which is not part of the court record?

Part C, below, addresses the requirements for a qualifying punishment, penalty, or restraint. Questions include, what constitutes punishment? Is there any requirement that does not qualify? Is attending classes or counseling a punishment? Are court-ordered fees considered a punishment?

The BIA has made conservative assessments, finding that some diversion programs are in fact convictions according to the § 101(a)(48)(A) criteria. Advocates can appeal such a finding to

[2] *See* ILRC, *Diversion & Immigration Law*, (May 2019), https://www.ilrc.org/diversion-and-immigration-law.

federal courts of appeals, though it may be a challenging task to overcome the BIA's interpretation of this statutory definition.[3]

Advocates may find the most success in pushing for formal or informal arrangements for diversion programs that will not be a conviction for immigration purposes, by passing state laws, convincing prosecutors to implement city- or county-wide "immigration-safe" agreements, or negotiating for specific resolutions in individual cases. See discussion of examples of successful advocacy and tactics at Part D.

Always check to see if there are other bases for finding that a disposition is not a conviction for immigration purposes. For example, a civil delinquency disposition is not a conviction for immigration purposes; an adult, criminal court finding is required for that purpose. The BIA has held that a conviction on direct appeal of right on the merits can lack sufficient finality to be a conviction for immigration purposes, and that some, but not all, state "infractions" or "offenses" lack sufficient constitutional protections to amount to a conviction. See Part E. Finally, a conviction can be eliminated for immigration purposes by qualifying post-conviction relief. See Part F.

B. What is a Qualifying Plea, Finding or Admission of Guilt?

The first prong of INA § 101(a)(48)(A) requires that "(i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt..." In other words, the guilt prong is satisfied if there is a (1) judge or jury finding of guilt, (2) defendant's guilty or nolo contendere ("no contest") plea, or (3) defendant's admission or stipulation to facts or evidence sufficient to warrant a finding of guilt.

Some types of pretrial intervention or diversion agreements that result in dismissal for state court purposes may still constitute a conviction under immigration law. In recent years, the BIA and other courts have found various types of agreements to constitute a conviction, particularly because they include a "stipulation of facts or evidence sufficient to warrant a finding of guilt." Practitioners must be mindful to avoid these types of agreements.

[3] Chevron deference is the doctrine that says that when a statute is ambiguous, federal courts must defer to any reasonable interpretation by the executive agency that administers that statute, even if it is not the best interpretation. This means that federal courts will often defer the BIA's interpretation of the conviction statute.

1. Admissions/Stipulations of Facts

Courts have found that stipulations of fact in pretrial diversion agreements satisfy the guilt prong of the conviction analysis when such stipulation is connected to the charging document and/or a recitation of the elements of the offense. In *Matter of Mohamed*, the BIA held that entry into a pretrial intervention agreement under Texas law constitutes a conviction if "a respondent admits sufficient facts to warrant a finding of guilt at the time of his entry into the agreement," and the penalty prong is satisfied (see discussion of penalty prong in Part C, below).[4] The agreement at issue included the defendant's stipulation sworn under oath to having "committed each and every element alleged and have no defense in law."[5] The agreement provided that if the defendant violated the agreement, he would plead guilty to the offense as charged, permit the admission of the stipulation of evidence, and either accept the punishment offered by the prosecution or allow the judge to set the punishment after a sentencing hearing.[6] Because the pretrial intervention agreement demonstrated that the defendant had read the charging document, admitted to each element of the offense, stipulated to the sufficiency of facts contained in a police report or probable cause affidavit, and agreed that the judge could rely on those documents to determine guilt if the he failed to comply with the agreement, the BIA found that the defendant had admitted to facts sufficient to find guilt and therefore satisfied the first prong of the conviction analysis.[7]

Formal admissions to the court[8] of facts sufficient to support a finding of guilt have been held to fulfill the requirements of the first prong. See, e.g., *Boggola v. Sessions*, 866 F.3d 563 (4th Cir. 2017), where the Fourth Circuit held that a North Carolina deferred prosecution qualified as a "conviction" for immigration purposes. In that case, Mr. Boggola was informed in writing (in the deferred prosecution agreement) of the facts to be used against him, and at the deferred prosecution hearing before the court, he stated that he was stipulating to those facts should prosecution become necessary. The Information included "in factual detail that Boggola had committed conduct that violated each element," so the Fourth Circuit found that Mr. Boggola was

[4] *See Matter of Mohamed*, 27 I. & N. 92 (BIA 2017).

[5] *Id.* at 97.

[6] *Id.* at 93.

[7] *Id.* at 97.

[8] Under *Matter of Mohamed*, one must assume that providing any written or sworn admission of facts *to the prosecution* (though not to the court) may be held to meet the first prong of § 101(a)(48)(A). However, if this type of admission has already occurred, practitioners may investigate contesting that it is sufficient for a conviction on the grounds that § 101(a)(48)(A) must be interpreted to require that the admission be made to the court, or else the statute must be held void for vagueness because it does not state to whom the admission must be made.

aware of the elements of the offense and stipulated to facts satisfying each element, which was sufficient to warrant a finding of guilt under the first prong of the conviction analysis.[9]

Conversely, courts have found if the defendant does not admit facts sufficient for a finding of guilt, and there is no plea or judicial finding of guilt, there is no conviction. In *Iqbal v. Bryson*, a federal district court in Virginia held that the defendant's entry into a pretrial diversion agreement under New York law did not constitute a conviction for immigration purposes because the language of the agreement only stated that he "accepted responsibility for his behavior" but included "no other referral to the facts underlying the charges."[10] The court deemed the "accepted responsibility" statement to be "mere boilerplate language" and therefore could not be considered to "recite sufficient facts to warrant a finding of guilt."[11] *Matter of Mohamed* is distinguishable from *Iqbal v. Bryson* because Mr. Mohamed's admission of guilt was "tethered to the facts and offense elements charged in the indictment, as stated in the stipulation of evidence."[12] In *Matter of Grullon,* the BIA held that Florida's pretrial intervention program does *not* result in a conviction because the pretrial intervention program was available to persons charged with a crime even *before* an information had been filed or an indictment returned.[13] The BIA therefore found that the respondent was not capable of making an admission of guilt or stipulating to facts sufficient for a finding of guilt because the elements of the crime had not yet been set out in an information or indictment.[14]

In a 2018 unpublished decision, the BIA held that pretrial diversion under § 12-23-5 of the Code of Alabama is not a conviction, because the law did not require a finding of guilt, a plea of guilty or nolo contendere, or an admission of sufficient facts to warrant a finding of guilt, and the record did not reflect that the diversion agreement included any stipulation of evidence that would permit a finding of guilt.[15] The court reasoned that the information the defendant had to provide to "conduct an assessment of his treatment needs" did not include a stipulation of facts in the record.[16]

In *Crespo v. Holder*, the Fourth Circuit found that where the defendant pleaded not guilty, a judge's "finding of facts justifying a finding of guilt" under Virginia Code § 18.2-251 was not

[9] *Boggola v. Sessions* at 569.

[10] *See Iqbal v. Bryson*, 604 F. Supp. 2d 822 (E.D. Va. 2009).

[11] *Id*. at 826.

[12] *See Matter of Mohamed* at 97.

[13] *Matter of Grullon*, 20 I. & N. Dec. 12 (BIA 1989).

[14] *Id*.

[15] *H-H-D-*, AXXX XXX 798 (BIA Dec. 21, 2018), available for purchase at www.irac.net/unpublished/index.

[16] *Id*.

sufficient to meet the requirements of INA § 101(a)(48)(A)(i).[17] Based on a plain reading of that section, the court found that the judge's "finding of facts justifying a finding of guilt" was not equivalent to a judicial finding of guilt. Neither was the judge's finding an admission of "sufficient facts to warrant a finding of guilt," because that admission must be made by the defendant, not the judge. Because the defendant had not pled guilty or admitted facts to support guilt, and the judge had not found the defendant guilty, there was not a conviction for immigration purposes.[18]

While there are no published cases, advocates should note that simply waiving rights to criminal defenses is not an admission of guilt, and does not meet the requirement for a conviction. A stipulation with the prosecutor that, if the prosecution goes forward, the defendant will waive rights to object to evidence or to have a jury trial is not an admission of guilt. See discussion in Part D, below.

2. Factors Supporting Conviction Under the Guilt Prong

Based on the case law described above, the following factors in a pretrial diversion agreement generally satisfy the guilt prong of the conviction analysis:

- The existence of a guilty or no contest plea, even if that plea is withheld by the court or later withdrawn[19];
- The defendant's admission or stipulation of facts as described in the charging document (the information, complaint, indictment, etc.) or underlying police report;
- A judicial finding of *guilt* (as opposed to a judicial finding of *facts* where the defendant has not made any admission or stipulation to facts).

3. Strategies to Avoid a Conviction Under the Guilt Prong

Avoid Admissions of Guilt and/or Facts Sufficient to Support a Finding of Guilt. In criminal proceedings, the defendant should seek a disposition where they do not plead guilty *or* admit or stipulate to facts sufficient to find guilt. Many pretrial diversion or intervention agreements include some sort of "confession," statement of guilt, or stipulation to underlying facts. The best way to avoid triggering a conviction for immigration purposes is to ensure that the agreement that your client signs does not contain an admission or statement of guilt, or an admission of facts, including a stipulation to the facts alleged in any court document, such as the complaint, information, indictment, or probable cause affidavit. To be truly "immigration-safe," it is best if the agreement contains language affirmatively stating that "the statements contained in the

[17] *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011).

[18] *Id.*

[19] *See Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998).

agreement are *not* an admission of guilt or a stipulation of any facts alleged, and are not sufficient to warrant a finding of guilt."[20] It may be difficult to convince the prosecution to agree to such language though.[21]

Boilerplate statements about guilt that are not tied to the elements of the offense, charging document, or underlying police report, such as a general statement that the defendant "accepts responsibility for their actions," should not be held sufficient, although it would be best to avoid this where possible. If one has occurred, advocates should argue that such statements do not constitute admissions or stipulations of fact sufficient for a finding of guilt. For strategies to convince the prosecution not to include admissions of guilt or stipulations of fact, see part D, subsection 3 below.

Additional Considerations: Private Agreements between Defendant & Prosecution. If the pretrial diversion agreement is a private agreement between the defendant and prosecution and does not appear in the court record, immigration authorities may not be aware of any admissions of guilt or stipulations of fact contained in the agreement.[22] However, practitioners should not rely on this, as there is no assurance that the Department of Homeland Security (DHS) will not obtain the agreement. Many immigration forms and applications for relief now include questions about pretrial diversion agreements. In some instances, USCIS or immigration judges have refused to grant relief if the applicant will not provide a copy of the pretrial diversion agreement. Furthermore, prosecutors could share the agreement with DHS, even if the agreement is deemed confidential.

In addition, pretrial agreements containing such admissions or stipulations could trigger grounds of removability that require an admission only, such as the crime involving moral turpitude (CIMT) and controlled substance grounds at INA § 212(a)(2)(A)(i).[23] Such an agreement could also be used against your client in a discretionary finding, even if the disposition does not constitute a conviction under immigration law or trigger grounds of removability. Therefore, practitioners

[20] *See* Washington Defender Association, *Deferred Adjudication Agreements under Immigration Law*, at 2 (May 2018), https://defensenet.org/wp-content/uploads/2017/11/WDAIP-Immig-Safe-Defd-Adjudications-memo-FINAL-REVISED-5-26-18.pdf [Hereinafter "WDA Deferred Adjudication Agreements under Immigration Law"].

[21] See discussion of strategies in Part D, below.

[22] Even if the diversion agreement is not part of the court record, the dismissal order often has a reference to the pretrial diversion agreement/program as the reason for dismissal. One way to avoid this is to ask the prosecution or court not to make such a notation, especially if there is no other reference to the diversion agreement in the court record.

[23] Practitioners should argue that such statements or confessions in a pretrial diversion agreement do not constitute an admission triggering removability pursuant to *Matter of K-*, 7 I. & N. Dec. 594 (BIA 1957). Nevertheless, DHS may contend that they do, so it is best to avoid this type of situation.

should strive for an agreement that does not include an admission of guilt, stipulation of facts to support a finding of guilt, or any similar statement, even if vague or ambiguous.

C. What is a Qualifying Punishment, Penalty, or Restraint?

The second prong of INA § 101(a)(48)(A) requires that "(ii) the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen's] liberty to be imposed."

In general, the BIA has held that any imposition of probation, fine, fee, and jail time by a criminal court will satisfy the penalty prong of the definition of conviction.[24] In *Matter of Mohamed*, discussed above, the agreement at issue imposed six terms: (1) community supervision for 24 months; (2) a $60 monthly community supervision fee; (3) 100 hours of community service; (4) $140 of restitution; (5) a $500 pretrial intervention program fee; and (6) no contact with the co-defendant.[25] The community supervision entailed complying with several rules, including submitting to random searches and urine analysis, maintaining contact with a Community Supervision Officer, and obtaining advance permission for a change of address or to leave the county overnight.[26] The BIA found that these conditions constituted a penalty.

1. What is "Punitive?"

In *Matter of Cabrera*, the BIA held that "the imposition of costs and surcharges in the criminal sentencing context constitutes a form of 'punishment' or 'penalty' for purposes of establishing that [a noncitizen] has suffered a 'conviction.'"[27]

Some federal courts have narrowed the BIA's broad definition of penalty. In *Gonzalez v. Sessions*, the Fourth Circuit held that a mandatory assessment of $100 for court costs does not meet the penalty prong of § 101(a)(48)(A).[28] Analyzing the plain language of the statute, the court discussed the ordinary, contemporary meaning of "punishment" and "penalty," and holdings on the definition in different legal contexts. It concluded that "a monetary assessment amounts to a 'punishment' or 'penalty' for purposes of Section 1101(a)(48)(A) if it is principally intended to serve a punitive purpose—that is, if a judge orders the monetary assessment to advance a punitive goal tethered to the defendant's degree of culpability in light of her specific actions…. To properly advance these punitive goals of retribution and deterrence, a particular punishment or penalty must account for the culpability flowing from the actor's underlying conduct. For instance, punitive damage awards generally must be proportionate to the

[24] *Matter of Cabrera,* 24 I. & N. Dec. 459, 460−62 (BIA 2008); *Matter of Mohamed.*

[25] *Matter of Mohamed* at 93.

[26] *Id.* at 93-94.

[27] 24 I. & N. Dec. at 462. The BIA distinguished such fees from *civil* monetary penalties.

[28] *Gonzalez v. Sessions*, 894 F.3d 131 (4th Cir. 2018).

'reprehensibility of the defendant's [specific] conduct.'"[29] The court found that, unlike the more discretionary court costs imposed under Florida law that the BIA had found to be "punishment" in *Matter of Cabrera*,[30] court costs under North Carolina law "cannot be imposed 'on mere equitable or moral grounds,'—i.e., as a discretionary judicial act—but instead are imposed as a ministerial act, pursuant to statute."[31] Thus they are not "punitive in nature."[32]

The reasoning in *Gonzalez v. Sessions* might support an argument that other rehabilitative requirements, such as to attend counseling, classes,[33] or AA meetings, cannot be considered punitive. *Gonzalez* cited to *Retuta v. Holder*, where the Ninth Circuit held that "an unconditional suspended non-incarceratory sanction that has no present effect is not a punishment, penalty, or restraint," where the defendant had been issued a $100 unconditionally stayed fine.[34] However, in a 2012 unpublished decision, the BIA held that Massachusetts continuation without a finding (CWOF), coupled with unsupervised probation before judgment, constitutes a conviction.[35] The BIA stated that although "it is a less heightened form of supervision not usually associated with probation . . . to hold otherwise would make it indistinguishable from 'without probation.'"[36]

2. Court Involvement

Another requirement for a conviction is that the *judge* must order the punishment, penalty or restraint. Critically, the BIA in *Matter of Mohamed* noted that Texas law requires that a judge authorize the conditions of the pretrial intervention agreement, as well as order payment of the pretrial intervention program fees and expenses[37] (in contrast with other types of diversion agreements that local prosecutors may use, which do not require involvement or authorization by the judge). Even though the pretrial intervention agreement was entered into with the prosecution, the BIA found that the criminal court had authorized the obligations associated with

[29] *Id.* at 137, 138.

[30] *See Matter of Cabrera* at 460−62.

[31] *Gonzalez v. Sessions* at 141-142.

[32] *Id.*

[33] The Ninth Circuit has suggested in dicta that a requirement of attending classes is not a punishment or penalty sufficient to create a conviction. *See Retuta v. Holder*, 591 F.3d 1181, 1188, n. 3 (9th Cir. 2010) ("Congress appears not to have been the only body that found attaching removability to minor sanctions troublesome. *See Romero v. Holder,* 568 F.3d 1054, 1058 (9th Cir.2009) (noting that the IJ found that requiring enrollment in a three-month AIDS education program was not a "form of punishment, penalty, or restraint on the alien's liberty")).")

[34] *Retuta v. Holder*, 591 F.3d at 1188-89.

[35] *See Patricia Esmeralda Valladares Bardales*, A094 098 339 (BIA Jan. 20, 2012), available for purchase at www.irac.net/unpublished/index.

[36] *Id.*

[37] *Matter of Mohamed* at 98.

participation in the program, satisfying the penalty prong of the conviction analysis.

Notably, USCIS has taken *Matter of Mohamed* even further, finding that a judge authorizes an agreement—and therefore the penalty prong of the conviction analysis is satisfied—when the judge grants a "conditional dismissal motion," whereby the prosecution moves to dismiss charge(s) based on the defendant's promise to fulfill obligations within a certain timeframe[38] (as opposed to agreements where the defendant must fulfill obligations prior to dismissal). If the defendant does not follow through, the prosecution may re-file the charge(s). Some state laws allow the judge or prosecutor's office to collect a supervision reimbursement fee,[39] which could also be deemed a court-ordered penalty.

In addition, the BIA has issued conflicting unpublished decisions about whether a plea under Texas Penal Code section 12.45 constitutes a conviction, where the defendant has multiple charges, admits guilt to an unadjudicated offense (thereby barring any future prosecution of that offense), and the court may take that admission into account in sentencing on the primary offense.[40]

[38] *See* MATTER OF J-R-L- APPEAL OF VERMONT SERVICE CENTER DECISION APPLICATION: FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS, 2018 WL 3609337, at *2; *see also* MATTER OF J-B- APPEAL OF VERMONT SERVICE CENTER DECISION FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT, 2019 WL 3386195, at *5 ("The judge's dismissal of the charge pursuant to the agreement is an indication that the judge was involved in the Petitioner's punishment"); MATTER OF J-S-C-M- APPEAL OF VERMONT SERVICE CENTER DECISION APPLICATION: FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS, 2018 WL 3019694, at *3 ("under the Texas pretrial diversion rules, only a judge can authorize entry in the program, and a judge orders payment of program fees and expenses."). *See also* MATTER OF J-P-C- MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION APPLICATION: FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS, 2018 WL 2717392, at *4 ("Texas statutes confirm judge involvement, as Texas Government Code section 76.002(a)(1) provides that criminal court judges establish community supervision departments, which administer pretrial diversion programs, and Article 102.012 of the Texas Code of Criminal Procedure requires the courts to order payment of pretrial intervention program fees and expenses.").

[39] *See* Tex. Code of Crim. Pro. Art. 102.012 & 102.0121.

[40] Under Texas Penal Code section 12.45, a sentencing judge may take the defendant's admission of guilt to an *un*adjudicated offense into consideration when determining a sentence to another offense for which the defendant was convicted. The BIA, in an unpublished decision, held this does not constitute a conviction for immigration purposes because it does not require that the judge order some form of punishment based on the consideration, and the court record had no indication that the judge ordered any heightened form of punishment as a result of the admission to the unadjudicated offense. *See J-A-G-G-,* A XXX 611 (BIA March 3, 2017), available for purchase at www.irac.net/unpublished/index. *But see H-C-G-*, A XXX 868 (BIA Feb. 21, 2019) (finding that a 12.45 plea does constitute a conviction for immigration purposes).

3. Factors Supporting Conviction Under the Penalty Prong

Based on the case law described above, immigration authorities will likely find that the following factors in a pretrial diversion agreement generally satisfy the penalty prong of the conviction analysis:

- Court-ordered fines[41], jail time, probation/community supervision or other conditions;
- Court-*authorized* fines, jail time, probation/community supervision or other conditions;
- Court-assessed fees in the criminal context.[42]

4. Strategies to Avoid a Conviction Under the Penalty Prong

Avoid "Punitive" Punishment or Penalty. If there is no formal judgement of guilt entered by the court, in order to constitute a conviction, both the guilt and penalty prongs must be satisfied. If a pretrial diversion agreement does not include any punishment or penalty, then it is not a conviction. However, most, if not all, diversion agreements are structured so that the defendant must complete some requirements, so seeking a pretrial agreement without penalty or punishment may not be a viable strategy. In addition, courts have found almost all types of agreement requirements, including just the payment of fees, to constitute a penalty or restraint on liberty.[43] However, some courts have held that court fees that are solely administrative and not punitive in nature do not constitute a penalty.[44]

Avoid Authorization of Penalties by the Judge/Court. In order to constitute a qualifying penalty, the criminal court must order it. Pretrial agreements that include conditions that have no court involvement should not constitute a conviction because no judge or court is ordering a punishment, penalty, or restraint on liberty.

D. Advocating for "Immigration-Safe" Diversion Agreements

Perhaps the best way to ensure that a pretrial diversion agreement in your state does not trigger a conviction is to advocate for a state law prohibiting agreements containing problematic admissions of guilt or stipulations of fact. Advocacy can also be done on the local level with prosecutors to modify language in county- or city-wide diversion agreements, as well as on an individual basis for noncitizen defendants in criminal proceedings.

[41] *But see Retuta v. Holder* (finding that suspended, non-incarceratory fines do not constitute a penalty).

[42] *But see Gonzalez v. Sessions* (finding that fees must be punitive in nature).

[43] *See Matter of Cabrera*.

[44] *See Gonzalez v. Sessions, Retuta v. Holder*.

To change policy or pass legislation, it is critical to work with allies, particularly local and regional community groups. Other local or national groups that work on immigrant rights, criminal justice reform, or civil rights, are key allies – especially for state legislation, as they may have knowledge or even paid lobbyists working on these issues.

1. State Laws

There are a variety of state "diversion" laws. For immigration purposes, the important divide is between programs that require a plea or admission of guilt before the person is diverted (which are almost sure to be held a "conviction" for immigration purposes), versus those that do not (which are not a conviction for immigration purposes). Other distinctions include the type of defendant (e.g. "first offenders," persons with disabilities), the type of offense (e.g. misdemeanors, drug crimes, domestic violence), and whether the prosecutor controls access.

California has diversion statutes that illustrate these characteristics. Because California is in the process of enacting criminal law reforms, it has been possible to add new programs or strengthen existing ones – to some extent.

- Regarding persons with disabilities, California pretrial diversion (with a not-guilty plea) is available to some people diagnosed with developmental disabilities who face misdemeanor and, as of 2021, most felony charges,[45] as well as people diagnosed with mental health disorders facing misdemeanor and most felony charges.[46]

- Regarding the role of the prosecutor, for years California law provided for a pretrial diversion program for most misdemeanor charges, but because this was solely at the prosecution's discretion, only two of the 56 counties in the state used the program. Under a new law, as of January 1, 2021, a court has the option of granting misdemeanor diversion, over the objection of the prosecution.[47] To date, defenders report that many judges are offering pretrial diversion.

California and Oregon advocates have been able to successfully push for enactment of new pretrial diversion statutes by agreeing to include a waiver of constitutional rights in the event the case is prosecuted. This provides some certainty to the prosecution that if the defendant is not successful in the diversion program and the case returns to regular criminal proceedings, it will not be difficult to obtain a conviction. Advocates must work closely with criminal defense organizations, who understandably may be opposed to any agreement that compromises

[45] California Penal Code § 1001.20

[46] California Penal Code § 1001.36.

[47] Compare California Penal Code § 1001.95 (2021), which permits judges to offer pretrial diversion, to § 1001.2, controlled by the prosecutor.

constitutional rights. Advocates, including community advocates, must carefully explain what is at stake to all parties.

- In 2015 the California legislature voted to change a drug diversion statute from a "deferred entry of judgment" (requiring a guilty plea) to pretrial diversion (permitting a plea of not guilty). However, the Governor vetoed the legislation due to prosecutor objections that without a guilty plea, there was no "hammer" to ensure compliance with diversion requirements. After consultation with the Governor's office, defenders, prosecutors, and advocates proposed a new bill that included a requirement that the diversion participant would waive the right to a jury trial, in the event diversion failed and the person returned to face the charges. In 2017, the governor signed the bill.[48]

- Oregon advocates had to offer more waivers of rights in order to pass a pretrial diversion bill, including the right to jury trial, to present or object to witnesses, to cross-examine witnesses, and certain appellate rights. Oregon law now prohibits pre-trial diversion agreements (known as "conditional discharge agreements") from requiring any admission of guilt or facts that establish guilt, as well as the admission of police reports and other evidence generally associated with supporting the criminal charges, thereby preventing Oregon conditional discharge agreements from constituting convictions under immigration law.[49]

2. City or County-Wide Diversion Policies

On a local level, practitioners may advocate with the District Attorney (DA) or other appropriate prosecutor office to eliminate statements of guilt or stipulations of facts from all pretrial diversion agreements used by the prosecution in the city or county. This type of local advocacy has been successful in several localities, including Travis County and Harris County, Texas, and multiple cities and counties in Washington state[50], among others. In pushing for these changes with local prosecutors, it is important that immigration attorneys and criminal defenders partner with community-based advocates and directly impacted community members to demonstrate the real, disproportionate impact that this harmful language has on noncitizen defendants, and why it

[48] *See* California Penal Code § 1000 et seq., amended effective Jan. 1, 2018 by AB 208 (Eggman). For further information see ILRC, *Practice Advisory: New California Pretrial Diversion* (Jan. 2018), https://www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges.

[49] *See* Oregon Revised Statute § 475.245. *See also* Oregon State Bar, 2019 Oregon Legislation Highlights at 6-12, https://www.osbar.org/_docs/lawimprove/2019LegislationHighlights.pdf.

[50] The Washington Defender Association suggests model language for Washington's "stipulated orders of continuance" and provides examples on their website of "immigration-safe language" adopted by multiple cities and counties in the state. *See* WDA Deferred Adjudication Agreements under Immigration Law; WDA Resources, *DEFERRED ADJUDICATION AGREEMENTS (E.G. SOCS AND OTHER DEFERRED DISPOSITIONS),* available at https://defensenet.org/resource-category/deferred-adjudication-agreements/.

must be changed. In Travis, Harris, and Spokane[51] Counties, attorneys and community-based organizations fought together for changes to the pretrial diversion agreements.

3. Individual Cases

As stated above, often the prosecution seeks an admission of guilt because they want some assurance the defendant will be easily convicted if they violate the terms of the diversion agreement, and the case goes back to a regular criminal proceeding. Below are some strategies for negotiating around this issue in individual cases.

If the defendant is not detained, advocate with the prosecution to delay the plea hearing in order to give the defendant time to voluntarily complete certain requirements, e.g., to pay restitution or attend classes. If the defendant complies, the prosecutor may agree to pretrial diversion with no admission of facts (or, alternatively, to a plea to an immigration-neutral offense, or to dropping the charges).

Another strategy is to negotiate for other types of waiver of rights in lieu of an admission of guilt. Rather than admitting to facts, the defendant can waive their right to various criminal defenses, such as the right to a speedy trial (which appears in almost all pretrial diversion agreements), the right to a jury trial,[52] etc. See discussion of these waivers in subsection 1, above. The noncitizen defendant may decide that the opportunity for an effective diversion program and avoiding deportation is well worth the loss of rights in a potential criminal case – or at least wish to have the choice. As always, advocates, community members and criminal defenders must work together to reach some understanding based on the defendant's needs and priorities.

Warning: Whether to Seek Diversion. Before advocating for diversion, and especially before trading away key constitutional rights to obtain it, defenders must evaluate whether the particular defendant is likely to successfully complete the program. Many people who ultimately overcome their addiction fail at least a few times first. If the client is deep into their addiction, or into a pattern of recidivist domestic violence or drunk driving, or otherwise appears unable to complete the program, the best course may be to focus on fighting for the best possible immigration plea now, while defenders have all their tools available.

[51] The Spokesman-Review, "Shawn Vestal: Groups Say Prosecutor's Policy Punishes Refugees, Legal Immigrants," Feb. 23, 2018, available at https://www.spokesman.com/stories/2018/feb/23/shawn-vestal-groups-say-prosecutors-policy-punishe/.

[52] The court and/or prosecution may particularly value an offer to waive the right to jury trial. From their perspective, this will avoid a lengthy proceeding if the case comes back to court. From the defendant's perspective, they at least still have a right to a trial by the judge.

E. Other Bases for Finding a Disposition is Not a Conviction for Immigration Purposes

Some state "infractions" or "offenses" are not convictions. The BIA has held that certain offenses that are less than a misdemeanor – sometimes called infractions or offenses – do not qualify as criminal convictions.[53] This is because they are handled in non-conventional criminal proceedings that do not provide the usual constitutional protections of a criminal trial, and/or the disposition does not have effect as a prior conviction in subsequent prosecutions.[54] Carefully analyze your state's procedure as it compares to the BIA's criteria, and see if there are published or unpublished opinions indicating DHS' position on the procedure. For example, while a California infraction arguably should not be held a conviction under these criteria, there are multiple reports of immigration authorities treating a California infraction as a conviction.[55]

Juvenile delinquency dispositions are not convictions. Adjudication in juvenile delinquency proceedings does not constitute a conviction for almost any immigration purpose, regardless of the nature of the offense.[56] If the record of proceedings indicates that proceedings were in juvenile court, there was no conviction. In addition, formally admitting conduct that one committed while a juvenile does not make a person inadmissible for admitting to a moral turpitude or controlled substance offense. This is because the person is admitting to having

[53] *Matter of Eslamizar*, 23 I. & N. Dec. 684, 687-88 (BIA 2004).

[54] *Matter of Cuellar*, 25 I.& N. Dec. 850 (BIA 2012), clarifying *Matter of Eslamizar*. *See also* a summary of the criteria in ILRC, *Arguing that a California Infraction is Not a Conviction* (2012) at https://www.ilrc.org/arguing-california-infraction-not-conviction-test-non-misdemeanor-offenses.

[55] *See Heredia v. Sessions*, No. 15-72580, 720 F. App'x 376, 379 (9th Cir. Dec. 28, 2017) (holding that California infractions are convictions for immigration purposes because they entail fines as punishment, a defendant may elect to proceed with the charge as a misdemeanor, the California penal code classifies an infraction as a crime, and the burden of proof in California infraction proceedings is beyond a reasonable doubt). Counsel should assume conservatively that a California infraction might be held a conviction, prepare to litigate the matter (contact ILRC), and seek an additional defense where possible. The best practice may be to vacate a California infraction with California Penal Code § 1473.7. This may be especially true if the person was found guilty of an infraction without representation by criminal defense counsel. *See also* ILRC, *Arguing that a California Infraction is Not a Conviction*, above.

[56] *Matter of Devison*, 22 I. & N. Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (BIA 1981). The exceptions are that certain delinquency dispositions may form a bar to applying for Family Unity (see *Defending Immigrants in the Ninth Circuit*, Chapter 11, § 11.24) or to petitioning for a relative under the Adam Walsh Act (see *§ N.13. Adam Walsh Act* at www.ilrc.org/chart.)

committed civil delinquency conduct[57], not a "crime." Juvenile court proceedings still can create problems for juvenile immigrants, however.[58]

Convictions on direct appeal should not constitute convictions. The BIA has held that a conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review of the merits of the conviction has expired or been waived.[59] It held that if the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes.[60] "To rebut that presumption, a respondent must come forward with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court. They must also present evidence that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings." [61] The BIA asserted that federal courts should defer to this ruling, and it distinguished the holdings of some federal courts that had come to a contrary conclusion, including the Ninth Circuit in *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011), on the grounds that the decisions did not address a direct appeal of right on the merits of a conviction.[62]

[57] *Matter of M-U-*, 2 I. & N. Dec. 92 (BIA 1944). *See* INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) for the inadmissibility ground.

[58] A juvenile delinquency disposition will cause problems if it establishes that the youth has engaged in prostitution, is or has been a drug addict or abuser, has been or helped a drug trafficker, or benefitted from an inadmissible parent or spouse's trafficking within the last five years. Undocumented juvenile defendants might be eligible to apply for lawful immigration status.

[59] *Matter of J. M. Acosta*, 27 I.& N. Dec. 420 (BIA 2018).

[60] *Id*.

[61] *Id.* at 432.

[62] *Id.* Note that as of this writing, the Ninth Circuit has not yet responded to the BIA's ruling in *Acosta*. Despite this uncertainty, it is worthwhile to file direct appeals or "slow pleas" in appropriate cases, because (a) according to the BIA, a pending direct appeal means that a conviction is not final for the purposes of removal or disqualification from relief, and (b) the conviction may be overturned on appeal. But, when possible, defense counsel should have an additional back-up strategy in case the Ninth Circuit does not accept this ruling. Earlier the BIA had held that in some circumstances the fact that a case is on direct appeal of right supports the grant of continuance pending resolution of the appeal. *Matter of Montreal*, 26 I. & N. Dec. 555 (BIA 2015).

F. Post-Conviction Relief to Eliminate a Conviction

In general, a conviction is not eliminated for immigration purposes by mere "rehabilitative relief" – meaning, where a state permits withdrawal of a plea or dismissal of charges because the defendant completed probation or other requirements, rather than because of some legal error.[63] Immigration authorities will not accept rehabilitative relief to eliminate a conviction even if state law provides that absolutely no conviction or even arrest record remains. The two exceptions to this are that an 'expungement" will eliminate a conviction as an absolute bar to DACA, and, in the Ninth Circuit only, it will eliminate certain minor drug offenses that occurred on or before July 14, 2011.[64]

Instead, the conviction must be vacated for cause, meaning on the basis of a legal or procedural defect in the underlying proceeding.[65] When a court vacates a judgement of conviction for cause, the conviction no longer exists for immigration purposes. Ineffective assistance of counsel based on a failure to adequately advise the defendant regarding immigration consequences constitutes a legal defect.[66]

Some judges may be reluctant when the "conviction" to be vacated is a resolved diversion case that is not deemed a conviction under state law, but is nonetheless a conviction under immigration law – for example, a diversion program where the person pled guilty and completed all diversion requirements, so the charges were dismissed. They may find that they cannot vacate the conviction because there is nothing to vacate. Advocates should assert that a disposition continues to cause collateral consequences and the wronged party cannot be barred from correcting an error on the grounds that it does not exist.[67]

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[63] *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001). However, there are two exceptions to the general rule that rehabilitative relief does not eliminate convictions. *See* ILRC, *What Qualifies as a Conviction for Immigration Purposes?,* at 3-4.

[64] *See* information on DACA at www.ilrc.org/daca, and *see* ILRC, *Practice Advisory: Lujan and Nunez, July 14, 2011* (2011) at https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011.

[65] *See, e.g., Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).

[66] *See, e.g., Padilla v. Kentucky*, 129 S.Ct. 1317 (2009).

[67] *See, e.g., People v. Delong,* 101 Cal.App.4th 482, 484 (Cal. Ct. App. 2002) (upholding the appeal of a disposition under California Proposition 36 despite the fact that plea had been withdrawn and charges dismissed based on completion of probation, due to remaining adverse consequences); *Meyer v. Superior Court*, 247 Cal.App.2d 133 (Cal. Ct. App. 1966); *People v. Tidwell,* 246 Cal.App.4th 212 (Cal. Ct. App. 2016).

G. Conclusion

To properly advise clients, it is imperative for practitioners to understand what types of criminal dispositions constitute or could constitute a conviction under federal immigration laws. The BIA's decision in *Matter of Mohamed*, as well as other court decisions, have demonstrated that not all types of diversion agreements are "immigration-safe," even when there is no guilty plea or overt admission of guilt. By analyzing all the components of a diversion or intervention agreement, practitioners can ensure that it will not trigger a conviction for immigration purposes.

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