Recent Trends in Defining "Conviction"

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Immigration practitioners are familiar with the narrow definition of "conviction" at Immigration and Nationality Act (INA) §101(a)(48)(A).[1] The last two years have seen new case law at both the

[1] INA § 101(a)(48)(A) defines "conviction" as follows:
(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

agency and federal court levels. Themes include analysis of municipal court adjudications and whether the components are there to establish "conviction," and pretrial diversion procedures. Often, cases address minor marijuana offenses where the noncitizen is subject to removal if the disposition qualifies as a "conviction."[2] Other cases involve defining a "misdemeanor" for purposes of temporary protected status, wherein two or more misdemeanors disqualify an applicant for this benefit.[3] As the Board of Immigration Appeals moves towards closing the door further, immigration attorneys assisting criminal defense lawyers will want to be aware of possible pitfalls and devise appropriate strategies in fashioning a plea—as well as arguing the case before the immigration court.

MUNICIPAL COURT PROCEEDINGS: "BEYOND A REASONABLE DOUBT" STANDARD

For the first prong of INA §101(a)(48)(A) to be met, each element of the offense must be established beyond a reasonable doubt; in other words, the standard employed in the *criminal* proceeding resulting in the conviction, in order to qualify it as a "conviction" for immigration purposes, must be the "beyond a reasonable doubt" standard.[4] In *Matter of Eslamizar*,[5] the respondent was found guilty of a "violation" (grand theft third degree)[6] under the lesser preponderance of the evidence standard in Oregon. This particular procedure allows a state prosecutor to elect to proceed in civil proceedings, in exchange for a possible monetary penalty rather than jail time.

The Board of Immigration Appeals (BIA or Board) found that the "violation" under Oregon law did not constitute a "formal judgment of guilt of the alien entered by a court" in a criminal proceeding. In order to qualify as a "conviction," the trial or adjudication process must include constitutional safeguards, and each element of an offense must be established beyond a reasonable doubt. Another important criterion is whether the "violation" may be used as a prior conviction in a subsequent prosecution for another crime. Considering this criterion, the BIA concluded that a "violation" did not meet this standard; hence, it did not qualify as a "conviction."

Jury Trial and Court-Appointed Counsel

In *Matter of Cuellar-Gomez*,[7] the BIA reviewed a municipal court's adjudication of an ordinance violation and found a guilty disposition under the procedure qualifies as a "conviction." The case arose in Wichita and dealt with a Kansas state statute.[8] The respondent in this case argued against a finding of "conviction" because the proceedings did not allow for a jury trial or court-appointed counsel. However, the BIA noted that in misdemeanor prosecutions, there generally is not a right

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

[2] INA §237(a)(2)(B)(i).
[3] 8 CFR §244.1.
[4] *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).
[5] *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).
[6] Or. Rev. Stat. §153.076.
[7] *Matter of Cuellar-Gomez*, 25 I&N Dec. 850, 852–55 (BIA 2012).
[8] Kan. Stat. Ann. §§12-4104(a)(5). The referenced statute has since been repealed.

to a public defender. The BIA noted that if an individual is indigent and faces imprisonment, the court will appoint counsel. The Board further noted that a jury trial is available to the defendant in municipal court if the judge finds him guilty: there is a "second tier" whereby the defendant can seek review by jury trial. Noting that the standard of guilt is still beyond a reasonable doubt for each element of the crime, and the ordinance violation may be considered a prior conviction in subsequent prosecutions, the Board found that the Wichita proceedings did satisfy the requirements of a "conviction."

The Circuits

The U.S. Court of Appeals for the Third Circuit questioned and criticized *Eslamizar* and *Cuellar-Gomez* in *Castillo v. U.S. Att'y Gen.*,[9] wherein the non–American citizen was originally arrested for the criminal offense of shoplifting, but the New Jersey prosecutor elected to proceed in municipal court, terming the offense "disorderly persons." This procedure does not entitle the accused to a trial by jury and does not result in a traditional conviction for any purpose under state law. The court noted that the Board's own precedent is inconsistent in regard to what qualifies as "genuine criminal proceedings" and that a municipal court could not deliver a "conviction" for immigration purposes.[10] The court remanded for the agency to explain and synchronize inconsistent criteria.

In contrast, the U.S. Court of Appeals for the Ninth Circuit, in an unpublished decision found acceptable the use of municipal court adjudications and infractions as "convictions."[11] In so doing, the court emphasized that the determining factor for a "conviction" in criminal and immigration proceedings is a standard of proof beyond a reasonable doubt. In this case, again unpublished, an applicant for temporary protected status had two misdemeanor dispositions from a Nevada municipal court; the Ninth Circuit affirmed the denial of Temporary Protected Status (TPS) based on these dispositions, where the standard employed was beyond a reasonable doubt.

In 2017, the U.S. Court of Appeals for the Eighth Circuit affirmed the BIA's approach in both *Eslamizar* and *Cuellar-Gomez* in a case involving another municipal judgment arising in Kansas, this time for petty theft. The non–American citizens in *Dominguez-Herrera v. Sessions*,[12] sought cancellation of removal as non–lawful permanent residents (LPRs),[13] and argued that their shoplifting offenses did not qualify as disqualifying "convictions." The petitioners in this case, a married couple, had each been prosecuted in municipal courts in Kansas for violation of state law UPOC §6.1. "UPOC" stands for Uniform Public Offense Code, and each of the municipalities in question—Hutchinson and Great Bend Kansas—had adopted the UPOC, which means each municipality can charge and prosecute violations of state law.

The petitioners argued that because they were adjudicated in municipal court, according to municipal court rules of procedure, they did not have "convictions" under INA §101(a)(48)(A),

[9] *Castillo v. U.S. Att'y Gen.*, 729 F.3d 296 (3d Cir. 2013).
[10] In so doing, the Third Circuit considered the following decisions, which it viewed as in conflict with *Cuellar-Gomez*: *Matter of Eslamizar,* 23 I&N Dec. 684 (BIA 2004), *Matter of Rivera-Valencia,* 24 I&N Dec. 484 (BIA 2008).
[11] *Ramos v. Holder*, 546 Fed.Appx 705 (9th Cir. Dec. 2, 2015); *Ventura Heredia v. Sessions*, No. 15-72580, 770 Fed. Appx 376 (9th Cir. Dec. 28, 2017).
[12] *Dominguez-Herrera v. Sessions*, 850 F.3d 411 (8th Cir. 2017).
[13] INA §240A(b). Conviction for a crime involving moral turpitude is a disqualifying fact for this relief.

but municipal infractions. Noting that the BIA is entitled to deference in interpreting INA §101(a)(48)(A), the appeals court followed the criterion set forth in *Eslamizar* and *Cuellar-Gomez*: the state considers municipal violations to be prior convictions for purposes of subsequent prosecutions and sentence enhancements; the inability to appeal a probation revocation in municipal court is not determinative; and a city prosecutor must establish every element of the crime beyond a reasonable doubt.[14]

In 2018, the U.S. Court of Appeals for the Eighth Circuit issued a decision finding municipal court violations count as misdemeanor convictions for TPS, but a careful reading reflects that the court was non-committal on the substantive issue of "conviction." This case involved municipal ordinance violations in Missouri for leaving the scene of an accident and driving under the influence. Petitioner pointed out that municipal proceedings did not ensure a right to jury trial, are subject to a civil statute of limitations, rules of evidence do not apply, and there is a limited right to appeal.[15] All of these factors sound vitally important to a conviction, but the court of appeals found that the issues were not raised below, and it is important to have uniformity in defining "misdemeanor" in the TPS program. The reader is left wondering, had this case been in removal proceedings, with issues properly reserved for the record, may it have gone another way? Regardless of the result, the analysis is instructive in contesting a final "conviction."

WITHHOLDS OR DEFERRALS OF ADJUDICATION

In considering pretrial diversion and similar rehabilitative procedures, a brief history is helpful. INA § 101(A)(48)(A) actually codified part of the BIA's decision in *Matter of Ozkok.*[16] In *Ozkok*, the individual pled guilty to possession of cocaine in Maryland. The adjudication of guilt was stayed and proceedings deferred while he completed three years of probation and 100 hours of community service. Under the Maryland statute, if the individual did not successfully complete probation, the judge was able to enter final judgment and proceed with a disposition without further proceedings on the issue of guilt or innocence. In this particular case, Ozkok successfully completed probation, and the discharge of probation represented the court's final action in the matter. Under the Maryland statute in effect at that time, "[d]ischarge of a person under this section shall be without judgment of conviction and is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of a crime."[17] In a break from precedent, the BIA held that the Maryland action constituted a conviction for purposes of determining deportability for a controlled substance offense. INA §101(a)(48) was introduced in 1996 as part of IIRAIRA,[18] and incorporates that part of the *Ozkok* decision that deals with withheld or deferred adjudications.

Shortly thereafter, the BIA reaffirmed that state procedures for withholding or deferral of adjudication constitute convictions for immigration purposes even though the state court judge did not formally pronounce guilt.[19] The federal courts have generally approved of this interpretation of

[14] *Dominguez-Herrera v. Sessions*, 850 F.3d 411, at 416–17.
[15] *Rubio v. Sessions*, 891 F.3d 344 (8th Cir. 2018).
[16] *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).
[17] Md. Ann. Code art. 27, §641(c) (1982) (repealed in 2001).
[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.
[19] *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998); *see also Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002). Both of these cases involved deferred adjudications under Texas law.

the statute. For example, in *Uritsky v. Gonzales*,[20] the U.S. Court of Appeals for the Sixth Circuit affirmed a decision of the BIA holding that a non–American citizen was "convicted" for purposes of removal where he had pled guilty to the charge of third-degree sexual conduct and had been designated as a "youthful trainee" under the Michigan Youthful Trainee Act (YTA).[21] Pursuant to the YTA, upon the plea of guilty, the defendant was sentenced to two years' probation, fines, and costs; the disposition included a statement that "no judgment of conviction is entered." Upon successful completion of the probation, proceedings are terminated with no final entry of an adjudication or conviction; however, a judge retains jurisdiction to revoke probation (and youthful trainee status) at any time and to enter an adjudication of guilt.[22] Based on the fact that the defendant must enter a plea of guilty or no contest, and a punishment follows, the Sixth Circuit found the YTA procedure to constitute a "conviction" for immigration purposes.

In *Gradiz v. Gonzales*,[23] the U.S. Court of Appeals for the Fourth Circuit upheld a finding by the BIA that a plea of no contest and deferral of proceedings pending successful completion of probation, with no subsequent adjudication and dismissal of proceedings, qualifies as a "conviction." The court clarified that a state's view that a certain procedure does not result in a "conviction" is not the determinative factor.[24]

However, in *Crespo v. Holder,*[25] Crespo, the defendant/respondent pled not guilty and did not admit to any facts. Although the judge went on to "find sufficient facts" to justify a finding of guilt, the court did not in fact find guilt. The judge then deferred adjudication. Following a year of probation, the case was dismissed. In this scenario, the court of appeals overturned the BIA's determination of a "conviction," stating that a "finding of sufficient facts to justify a finding of guilt" is not the same as finding guilt for §101(a)(48)(A) purposes. Without a plea of guilt or no contest, and with no adjudication of guilt, the disposition did not qualify as a conviction. The same court recently reaffirmed this approach, distinguishing between a judge's finding of sufficient facts with no adjudication of guilt, versus a defendant's factual admissions sufficient to support a finding of guilt.[26]

Court Costs

In February 2008, the BIA changed course and issued a decision in *Matter of Cabrera*[27] that held that the imposition of court costs in the context of a withhold of adjudication is sufficient to constitute "punishment" and qualifies as a conviction.

The circuits have not uniformly deferred to the BIA's analysis that court-related costs meet the punishment or penalty prong of the definition at INA §101(a)(48)(A). The U.S. Court of Appeals for the Ninth Circuit held in *Retuta v. Holder*,[28] that a deferred adjudication with a stayed fine did

[20] *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005).
[21] Mich. Comp. Laws §§762.11–16.
[22] Mich. Comp. Laws §762.12.
[23] *Gradiz v. Gonzales*, 490 F.3d 1206 (10th Cir. 2007).
[24] *Gradiz v. Gonzales*, at 1208.
[25] *Crespo v. Holder*, 631 F.3d 130, 135 (4th Cir. 2011).
[26] *Boggala v. Sessions*, 866 F.3d 563, 567–68 (4th Cir. 2017).
[27] *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).
[28] *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).

not meet the definition at INA §101(a)(48)(A). Specifically, the court of appeals wrote that a deferred judgment with a suspended non-incarceratory sanction does not qualify as a conviction.[29]

In 2018, the U.S. Court of Appeals for the Fourth Circuit determined that a true penalty is commensurate with the wrongdoing; this is not true of a cost assessment.[30] Looking at North Carolina law, the court noted there are three kinds of possible payments post-verdict: restitution, costs, and fines. While restitution and fines are determined based on criminality, costs (per state law) may never be imposed based on moral or punitive grounds.[31] Therefore, an assessment of $100 in costs, with no other payments required, where the judge entered a "verdict of prayer for judgment continued" did not qualify as a "conviction" because the penalty prong was not met.

PRETRIAL INTERVENTION OR DIVERSION

In comparison to the withholding or deferral of adjudication procedure, a pretrial intervention or diversion procedure that does not require a plea to the court does not result in a conviction for immigration purposes. Across the country, every county may employ distinct rules of procedure. For a pretrial diversion or intervention scheme to avoid a "conviction," a defendant will not enter a plea, but is placed under some form of probation-type program—such as classes and/or reporting—while the criminal charges are held in abeyance. Upon successful completion of the program, the charges are dismissed.[32] As long as the defendant makes no formal admission of guilt on the record, the first prong of INA §101(a)(48)(A) is not met. Moreover, if the defendant in some fashion violates the program, he or she remains able to contest the charges (*i.e.*, go to trial).

Because diversionary programs vary, fresh analysis in every case is recommended. Diversion should not be confused with deferred adjudication—the latter allows for an automatic entry of guilty upon violation of the program and/or conditions. Furthermore, diversion programs normally involve the agreement and interaction of the prosecutor's office and the defendant—and "bypass" the court. In comparison, deferrals of adjudication require the direct participation of the state court judge.

Admissions to the Prosecutor

Many local prosecutors' offices will require, as a *quid pro quo* of diversion, that the defendant sign a statement admitting guilt. Assuming diversion or intervention is successfully satisfied, this statement may or may not be placed in the court file. This sort of written admission, if made between the parties outside the courtroom, does *not* qualify as an "admission" for purposes of INA §101(a)(48). It is not a part of the "record of conviction"; the record of conviction includes the indictment or information (*i.e.*, charges), the plea, and the final judgment and sentence.[33] This should be well-settled law, embodied in the INA, the regulations, and administrative and federal-

[29] *Retuta v. Holder*, 591 F.3d 1181, at 188.
[30] *Santos Guzman Gonzalez v. Sessions*, 894 F.3d 131 (4th Cir. 2018).
[31] *Santos Guzman Gonzalez v. Sessions*, *id.*, at 141.
[32] *See Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994); *White v. INS*, 17 F.3d 475 (1st Cir. 1994); *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989). Although these cases precede the introduction of INA §101(a)(48), as well as BIA cases decided thereafter, they remain good law today.
[33] *See* 8 CFR §1003.41; *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979). These are also referred to as the "Shepard" documents, in reference to *Shepard v. U.S.*, 544 U.S. 13, 25 (2005).

court case law. However, in *Matter of Mohamed* the BIA held that if the pretrial agreement contains an admission of facts comprising guilt, a waiver of the right to trial if violated, and is filed with the court, it may cross the line and qualify as a "conviction."[34]

The point is, an ancillary document in the prosecutor's file does not suffice to meet the definition of "conviction" and should not be admissible in immigration court to establish a "conviction." However, once presented to a criminal court judge, depending on whether there is an admission of guilty facts, the document may qualify. Also, such an admission may be relevant in the context of an arriving alien charged with admission to the essential elements of a crime at a port of entry—*if* U.S. Customs and Border Protection (CBP) were to locate the document, which is unlikely.

POST-CONVICTION RELIEF: SENTENCE MODIFICATION

In a significant change to precedent, the Attorney General issued a decision on October 25, 2019, determining that a post-conviction motion in criminal court to modify the sentence imposed must be based on legal error or defect, or a constitutional violation, in order to be valid for immigration law purposes.[35] For 15 years the law has been that a vacatur of a plea and conviction had to be based on legal or constitutional error in order to be honored in immigration court.[36] In comparison, prior to this new decision, modification of a sentence in criminal court (*i.e.*, the period of imprisonment imposed, the amount of loss) could be based on immigration hardship or equities and would be applied in the immigration law context. [37] Based on *Thomas and Thompson*, the *Pickering* standard applies to post conviction modification of sentence. Practitioners will want to carefully draft their motions and court orders to highlight legal error and defect when moving to modify the sentence. Of note, the AG specifically declines to address which party has the burden of proving (or disproving) the viability of a post-conviction action.

[34] 27 I&N Dec. 92 (BIA 2017).
[35] *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019).
[36] *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd, Pickering v. Gonzales,* 465 F.3d 263 (6th Cir. 2003).
[37] *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).