

# Washington Defender Association's Immigration Project

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## **DEFERRED ADJUDICATION AGREEMENTS & IMMIGRATION LAW**

This memo addresses the definition of what constitutes a conviction under immigration law and provides analysis regarding how that definition has been interpreted. It also offers deferred adjudication agreement<sup>1</sup> language that can permit noncitizens to accept and participate in such agreements without having these agreements become deportable convictions under immigration law.

**Context: The Definition of “conviction” under immigration law.** In 1996, Congress amended the Immigration and Nationality Act (INA) to contain a statutory definition of what constitutes a conviction under immigration law.<sup>2</sup> That provision, contained at 8 U.S.C. 1101(a)(48)(A), states:

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--

- (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.

Additionally, basic legal principles applied in federal case law also govern what is considered to be a conviction for immigration purposes. As such, the following are not convictions under this definition:

- A disposition in juvenile delinquency proceedings<sup>3</sup>,
- a conviction on direct appeal of right<sup>4</sup>,
- an infraction,<sup>5</sup> and

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<sup>1</sup> The term “deferred adjudication agreement” is used here to refer to *pre-plea* agreements which are called various names in different courts (such as such as a “stipulated orders of continuance” or a “dispositional continuance”).

<sup>2</sup> INA §101(a)(48)(A), 8 USC §1101(a)(48)(A). The statutory definition of conviction and sentence applies to “convictions and sentences entered before, on, or after the date of enactment of the 1996 IIRIRA.” See IIRIRA §§ 322(c), 304(a)(3). IIRIRA is the Illegal Immigration Reform and Immigrant Responsibility Act, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

<sup>3</sup> Matter of Devison, 22 I&N 1362 (BIA 2000).

<sup>4</sup> Pino v. Landon, 349 U.S. 901, 75 S.Ct. 576 (1955).

<sup>5</sup> Matter of Eslamizar, 23 I. & N. Dec. 684, 687-88 (BIA 2004).

- a conviction that has been vacated due to an underlying legal defect (not rehabilitation or hardship).<sup>6</sup>

**The scope of what constitutes a conviction under this immigration law definition.**

Subsequent caselaw from the Board of Immigration Appeals (BIA) and the Ninth Circuit have delineated aspects of the scope of this definition. In the case Matter of Roldan<sup>7</sup>, the BIA interpreted the statutory language extremely broadly holding that any finding or admission of guilt in a criminal proceeding will constitute a conviction *in perpetuity* for immigration purposes. In Murio-Espinoza v. I.N.S.<sup>8</sup>, Ninth Circuit upheld this interpretation.

In these decisions, the BIA and the Ninth Circuit held that the new statutory definition required them to overturn decades of rulings to find that state “rehabilitative relief” (including expungements) no longer has any effect to eliminate a conviction for immigration purposes<sup>9</sup>. State rehabilitative relief was loosely defined to include any procedure where a plea was withdrawn or conviction otherwise eliminated based on completion of probation or other requirement, as opposed to based on legal error.

Importantly, this means that any subsequent criminal proceeding that is considered “rehabilitative” will have no legal effect for immigration purposes. Thus, regardless of how state criminal law treats the case, the original finding or admission of guilt will remain a conviction under immigration law and, as such, can serve as a basis for deportation (now known as ‘removal’) or denial of important immigration benefits such as citizenship and lawful resident status (a.k.a. greencard). Thus, successfully completed deferred prosecutions under RCW 10.05 and deferred sentences under RCW 9.95.240 will have no effect. Both will constitute convictions in perpetuity under immigration law.

**Avoiding deferred adjudication agreements becoming convictions under immigration law.** There has been no BIA or Ninth Circuit caselaw to date interpreting the provision of 8 U.S.C. 1101(a)(48)(A) that states that a noncitizen will also be deemed to have a conviction under immigration law where s/he “has admitted sufficient facts to warrant a finding of guilt”.

Consequently, it is imperative to exercise caution when crafting pre-plea deferred adjudication agreements for noncitizens to ensure that the agreement does not fall within the scope of this provision and, thus, result in a conviction for the noncitizen (even if successfully completed).

It is clear from the actions of the Immigration and Customs Enforcement Division of the Department of Homeland Security (formerly INS, now ICE) that they will treat any deferred

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<sup>6</sup> See Matter of Pickering, 23 I&N 621 (BIA 2003); Beltran-Leon v. INS, 134 F.3d 1379, 1380-81 (9th Cir. 1998); cf. United States v. Bravo-Diaz, 312 F.3d 995 (9th Cir. 2002).

<sup>7</sup> Int. Dec. 3377 (BIA 1999). See also Matter of Punu, 22 I. & N. Dec. 224 (BIA 1998); Matter of Marroquin, 23 I&N Dec. 705 (A.G. 2005).

<sup>8</sup> 261 F.3d 771 (9<sup>th</sup> Cir. 2001).

<sup>9</sup> The exception is that rehabilitative relief such as a successfully completed deferred sentence or an expungement will eliminate a first conviction for certain minor drug offenses in immigration proceedings held in the Ninth Circuit states. See Lujan-Armendariz v. INS, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), Cardenas-Urriarte v. INS, 227 1132 (9<sup>th</sup> Cir. 2000). Chavez-Perez v. Ashcroft, 386 F.3d 1284 (9<sup>th</sup> Cir. 2004). However, . The conviction will continue to exist and the defendant will remain vulnerable to deportation until all of the requirements for rehabilitative relief have been met and the conviction has been eliminated under state law.

adjudication agreement as a conviction where the agreement specifically states that the defendant stipulates to the sufficiency of the facts contained in the police report or affidavit of probable cause and agrees that the judge can rely on those documents as the basis for a subsequent determination of guilt if the defendant fails to comply with the agreement.

Other types of deferred adjudication agreements contain language that does not specifically require stipulation to the sufficiency of the facts contained in a police report or affidavit of probable cause but rather have language that agrees that those documents will be admitted into evidence and relied upon by the judge if the defendant fails to comply with the agreement. In light of the lack of clear definition concerning the meaning of the phrase “has admitted sufficient facts to warrant a finding of guilt”, combined with the posture of ICE to aggressively seek deportation of noncitizens with criminal history, deferred adjudication agreements containing this type of language are very dangerous for noncitizen defendants. In short, until the courts provide guidance to the contrary, such language must be deemed to render these types of deferred adjudication agreements convictions under immigration law.

### **Alternative Language For Pre-Plea Deferred Adjudications For Noncitizen Defendants**

The following language would ensure that a noncitizen defendant could accept a deferred adjudication agreement without risking obtaining a deportable conviction:<sup>10</sup>

**I am the defendant in this case. I understand that I have been charge with the following crime: \_\_\_\_\_ . I understand that if I do not comply with the conditions of this agreement, evidence will be presented against me at a future hearing and I understand that the judge will review that evidence in determining my guilt or innocence.**

**I understand that I have a constitutional right to contest evidence presented against me, to present evidence on my own behalf, . If I fail to comply with the terms of this agreement, I give up the right to contest any evidence presented against me and to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge at any future hearings.**

**I understand that by agreeing to this process I am giving up my constitutional rights to a jury trial, the right to hear and question witnesses, the right to present witnesses on my own behalf and the right to testify or not testify on my own behalf.**

**I understand that the police report in this case has been marked as an exhibit for administrative efficiency, but has not yet been admitted into evidence. I understand that this agreement and the statements contained herein are not an admission of guilt, and are not sufficient by themselves to warrant a finding of guilt.**

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<sup>10</sup> Presumably such agreements will also contain an acknowledgement and waiver of defendant’s right to a jury trial and speedy trial rights.