# CHAPTER SIX

## Convictions Under Immigration Law[1]

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As highlighted throughout these materials, most (but not all) crime-related immigration penalties require that there be a conviction in order to trigger consequences. The immigration statute specifically defines what constitutes a conviction under immigration law, and this definition is distinct from Washington State law.

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## 6.1 CONVICTIONS DEFINED UNDER IMMIGRATION LAW

### A. The State's Definition of a Conviction Is Irrelevant for Immigration Purposes.

The Immigration and Nationality Act has had its own, statutory definition of a conviction for immigration purposes since 1997. That definition is as follows:

> 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. [2]

Regardless how Washington law treats the case or defines a conviction, it is this definition that will control in any subsequent immigration proceeding.

### B. Convictions Exist in Perpetuity for Immigration Purposes

Unless vacated for cause, any resolution that meets this definition will be a conviction permanently and in perpetuity for immigration purposes, even where the convicting jurisdiction holds that no conviction exists. A resolution that matches the above definition becomes a conviction for immigration purposes at the time that it is entered and will remain a conviction in perpetuity for immigration purposes regardless of subsequent state court action (unless vacated for cause). For example, a noncitizen defendant enters a plea of guilty for possession of a controlled substance under R.C.W. 69.50.4013 and is granted a 24 month deferred sentence with conditions. This resolution will be a permanent conviction under immigration law even if the defendant complies with conditions and the court subsequently permits a withdrawal and dismissal under state law.[3]

### C. *Nolo Contendre* and *Alford* Pleas Constitute Convictions Under Immigration Law

The statutory definition of conviction for immigration purposes includes a "plea of nolo contendere".[4] Therefore, such a plea does not insulate a defendant from having a conviction for immigration purposes.

Courts have long, and consistently, held that *Alford* pleas are analogous to *nolo contendere* pleas and that they are convictions under state and federal criminal law.[5] They are also clearly

[2] 8 U.S.C. § 1101(a)(48)(A).
[3] *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999) *vacated on other grounds by Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000); *Murrillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001).
[4] 8 U.S.C. § 101(a)948)(A)(i).

convictions under the immigration statute's definition.[6] As outlined in Chapter 5, the factual basis for a defendant's plea is often the critical determining factor as to whether removal grounds are triggered.

## D. Infractions Are Not Convictions Under Immigration Law

Infractions are certain minor offenses handled in non-conventional criminal proceedings that do not require the usual constitutional protections such as access to counsel and right to jury trial.[7] The Board of Immigration Appeals (BIA) has held that this type of disposition will not be considered a conviction for immigration purposes.[8] The BIA held that the phrase "judgment of guilt," appearing in the immigration statute's definition of conviction, is "a judgment in a criminal proceeding, that is, a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication."[9]

## E. No Finality Requirement to Trigger Immigration Consequences

Recently, the Ninth Circuit overturned decades of precedent to eliminate the requirement that a conviction will only be classified as such under immigration law where it is deemed final under state law. In *Planes v. Holder*, a Ninth Circuit panel held that that under the immigration statute's definition the term "conviction" means a formal judgment of guilt against a noncitizen entered by a court, regardless whether appeals have been exhausted or waived. Consequently, the government will now proceed with removal proceedings and deport noncitizens even where a timely appeal of right is pending.[10]

# 6.2 WHAT CONSTITUTES "PUNISHMENT" UNDER THE IMMIGRATION STATUTE'S DEFINITION

In addition to jail time, most criminal court sanctions including probation, imposition of court costs and fines, will all be considered a "punishment, penalty, or restraint" under the immigration statute. As explained in more detail in Chapter Seven, suspended jail sentences are deemed "sentences" under immigration law (regardless of time suspended) and, as such, will constitute punishment regardless of whether any suspended time is ever converted into actual jail time served.

In general, a court order to pay costs or surcharges in the context of criminal sentencing constitutes a "punishment" or "penalty" under this definition.[11] However, the Ninth Circuit

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[5] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *U.S. v. Buonocore*, 416 F.3d 1124, 1128 (10th Cir. 2005); *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004); *State v. Heath*, 168 Wn.App. 894, 279 P.3d 458, 459 (2012).
[6] *United States v. Guerro-Velasquez*, 434 F.3d 1193, 1197-98 (9th Cir. 2006).
[7] *See* RCW 7.84.020 and IRLJ 1.1(a).
[8] *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004).
[9] *Id.* at 687.
[10] *Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) *rehearing en banc denied*, 2012 WL 1994862 (9th Cir. 2012); *contra Paredes v. Attorney General of U.S.*, 528 F.3d 196, 198 (3d Cir. 2008).
[11] *Matter of Cabrera*, 24 I&N Dec. 459, 462 (BIA 2008).

recently held that a suspended "nonincarcertatory" sanction is not a punishment under the immigration statute. Consequently, a deferred sentence resolution where the court imposed court costs and/or a fine and then suspended them, *with no additional conditions* would not qualify as a conviction under immigration law.[12] So, for example, a noncitizen defendant facing a first-time offense for the charge of Theft 3rd degree, would not be deemed "convicted" under immigration law where she entered a deferred sentence agreement and the court imposed, and then suspended, $300 in court costs and $150 in fines and imposed no additional conditions.

## 6.3 DEFERRED DISPOSITIONS (E.G., SOC AGREEMENTS, SPECIALTY COURT AGREEMENTS & DEFERRED SENTENCES)

As outlined in §6.1, the immigration statute's definition of a conviction includes dispositions where adjudication of guilt is withheld, usually for a remedial purpose. Thus, deferred adjudication agreements or procedures that do not constitute a conviction under state law, where the defendant complies with conditions and the case is subsequently dismissed, will nonetheless be deemed convictions under immigration law if they comport with the immigration statute's definition.[13]

A deferred disposition will be a permanent conviction for immigration purposes, even where the noncitizen defendant has complied with conditions and the charges are subsequently dismissed, if:

1. the noncitizen entered a plea of guilty; or
2. the noncitizen has admitted sufficient facts to warrant a finding of guilt, and;
3. some form of punishment, penalty or restraint has been ordered.

### A. Stipulated Orders of Continuance, Deferred Disposition and Specialty Court Agreements

Stipulated orders of continuance (SOC), dispositional continuances, and specialty court (e.g., drug or mental health court) agreements will all be deemed permanent convictions for immigration purposes, unless the language of the deferral agreement does not involve a finding or plea of guilty, nor an admission of facts sufficient "to warrant a finding of guilt." Without such language in such agreements, the benefit of these deferred adjudication opportunities are often rendered moot for noncitizen defendants since they will end up with removable convictions, even if they comply with the conditions imposed and the charges are subsequently dismissed.

Many courts throughout the state have revisited these agreements and are now using agreements whose language comports with state law, maintains the integrity of the procedures and is "immigration safe" (i.e., does not require admission of guilt or facts sufficient to warrant a finding of guilt). "Immigration safe" agreements avoid fitting the immigration definition of a

[12] *Retuta v. Holder*, 591 F.3d 1181, 1181-89 (9th Cir. 2010). (Noncitizen plead guilty to a drug offense and the judge deferred entry of judgment, imposed a small fine, and immediately suspended the fine with no conditions attached).
[13] *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999); *Matter of Marroquin*, 23 I&N Dec. 705, 706 (A.G. 2005).

conviction by making clear that the agreement itself is not an admission of sufficient facts or guilt, and that the consideration of evidence is contingent on lack of future compliance. If a court decides to use "immigration-safe" agreements, best practices suggest that they be used in all cases, rather than a separate agreement for noncitizen defendants.

Immigration safe deferred adjudication agreements generally use some version of the following language:

> I understand that I have a right to contest and object to evidence presented against me. I give up the right to contest and object to any evidence presented against me as to my guilt or innocence regarding the underlying charge at any future hearings if I fail to comply with the conditions of this agreement. I also understand that I have the right to present evidence on my own behalf. I give up the right to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge.
>
> 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 read and review that evidence in determining my guilt or innocence. 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.

In numerous agreements, evidence, such as police reports, is entered into the record at the time of the agreement with caveats on the record that it is being entered for administrative purposes only.

**See APPENDIX J for a sample Immigration-Safe SOC Agreement.**

**See APPENDIX K for a sample Immigration-Safe Drug Court Agreement.**

## B. Deferred Sentence Resolutions

Washington State law permits courts to defer imposition of a sentence where a defendant has been "convicted," which in most cases means that the defendant has entered a plea of guilty.[14] Because a finding of guilt has been entered, these agreements will be classified as convictions in perpetuity under immigration law from the time that they are entered, regardless of any subsequent compliance, withdrawal, or dismissal. However, as explained in §6.2 above, a deferred sentence resolution where the court imposed court costs and/or a fine and then suspended them, with no additional conditions would not qualify as a conviction under immigration law because such a resolution does not establish the required punishment to constitute a conviction under immigration law.[15]

[14] *See* RCW 3.50.320 (municipal courts); RCW 3.66.067 (district courts) and RCW 35.20.255 (municipal courts in cities over four hundred thousand).

[15] *Retuta v. Holder*, 591 F.3d 1181, 1181-89 (9th Cir. 2010) (Noncitizen plead guilty to a drug offense and the judge deferred entry of judgment, imposed a small fine, and immediately suspended the fine with no conditions attached).

## C. Deferred Prosecution Under R.C.W. 10.05

A deferred prosecution under RCW 10.05 is a permanent conviction for immigration purposes at the time it is entered because RCW 10.05.020(3)(c), and 020(3)(i) require stipulation to the admissibility and sufficiency of facts in the written police report and that the person not believe that he or she is innocent. Note, however, that a conviction for DUI under RCW 46.61.502 involving alcohol[16] is not a removable offense under immigration law; it can have other immigration consequences, but it does not trigger crime-related statutory grounds of deportability or inadmissibility. [17]

# 6.4 POST-CONVICTION RELIEF, EXPUNGEMENTS AND PARDONS

## A. Vacation of the Conviction Pursuant to Post Conviction Relief

In order to eliminate a disposition that constitutes a conviction under immigration law, a noncitizen must obtain post-conviction relief that vacates the conviction for cause, not for rehabilitation or hardship considerations. The Board of Immigration Appeals has held that a conviction is *not eliminated* for immigration purposes if the court vacated it for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."[18]

Immigration authorities will not question the validity under state law of the vacation of judgment, but will give "full faith and credit" to the state court. Thus, just as the respondent cannot attack the validity of a criminal conviction in removal proceedings, neither can the government attack the validity of a facially valid vacation for cause.[19] The Ninth Circuit has held that the government bears the burden of proof to establish by clear and convincing evidence that an order vacating a conviction is ineffective to eliminate the conviction for immigration purposes.[20]

## B. Post-Conviction Sentence Modifications

Some of the grounds of deportation are only triggered where a specific sentence is imposed. For example, theft offenses (whether misdemeanors or felonies) will be classified as aggravated felonies under immigration law only where a sentence of one year or more is imposed (regardless of time suspended).[21]

Unlike post-conviction vacations of a conviction, sentence modifications or reductions for any reason (including avoiding immigration consequences) will be recognized by immigration

[16] Convictions for DUI offenses involving drugs will be deemed offenses relating to a controlled substance and, thus, trigger the drug-related deportation and inadmissibility grounds.
[17] *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (DUI offense not a crime of violence aggravated felony); *Matter of Torres-Varela*, 23 I&N Dec. 78, 90 (BIA 2007) (DUI not a crime involving moral turpitude).
[18] *Matter of Pickering*, 23 I&N Dec. 621, 621 (BIA 2003).
[19] *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1380 (BIA 2000).
[20] *Nath v. Gonzalez*, 467 F.3d 1185, 1188-90 (9th Cir. 2006).
[21] 8 U.S.C. § 1101(a)(43)(G).

courts. In *Matter of Cota-Vargas*[22] the Board of Immigration Appeals held that when a judge modifies a sentence, this will control for immigration purposes even if the basis for the motion is not legal error but merely a need to avoid immigration consequences. In that case, a San Diego judge granted a motion to reduce a sentence to 364 days, in response to counsel's argument that this would prevent the conviction from being an aggravated felony and allow the defendant, a lawful permanent resident, to qualify to ask the immigration judge for cancellation of removal. *Matter of Cota-Vargas* reaffirmed the long-standing rule that where a court reduces a sentence under any legal procedure, or the sentence is commuted by appropriate authorities, only the reduced sentence is the sentence imposed for immigration purposes, even if the noncitizen has actually served a longer time period.[23] For more information on sentencing issues see Chapter Seven.

## C. Expungements

Vacation of the record of conviction under R.C.W. 9.60.060 (misdemeanors) or 9.94A.640 (felonies) will not eliminate a conviction for immigration purposes.[24] In short, obtaining an expungement under one of these statutes has no effect on the immigration consequences of the conviction.

## D. Pardons

The immigration statute provides that a "full and unconditional pardon" by the President or a Governor of a state will prevent a conviction from triggering the grounds of deportation relating to crimes involving moral turpitude and aggravated felonies.[25] It will not eliminate deportability based on other grounds, for example the domestic violence or firearms grounds, even if the conviction also is a crime involving moral turpitude or aggravated felony.[26]

# 6.5 JUVENILE DISPOSITIONS

A juvenile adjudication is not considered a conviction for immigration purposes.[27] However a juvenile convicted as an adult will have a conviction for immigration purposes.[28] Like adult convictions, juvenile dispositions can be used to establish deportability or inadmissibility under certain conduct-based grounds such as "engaged in prostitution" or being a "drug addict or drug

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[22] 23 I&N Dec. 849, 849 (BIA 2005).
[23] *See Matter of Song*, 23 I&N Dec. 173, 173 (BIA 2001) (revised sentence); *Matter of Martin*, 18 I&N Dec. 226, 226 (BIA 1982) (correction of illegal sentence); *Matter of H-*, 9 I&N Dec. 380 (BIA 1961) (new trial and sentence); *Matter of J-*, 6 I&N Dec. 562 (A.G. 1956) (commutation by Board of Pardons and Paroles).
[24] *See Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999).
[25] 8 U.S.C. § 1227(a)(2)(A)(vi).
[26] *Matter of Suh*, 23 I&N Dec. 626, 626 (BIA 2003).
[27] *Matter of Devison*, 22 I&N Dec. 1362, 1362 (BIA 2000) (resentencing of New York youthful offender following probation violation does not convert juvenile adjudication into a judgment of conviction); *Matter of De La Nues*, 18 I&N Dec. 140, 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 135 (BIA 1981); *Matter of F-*, 4 I&N Dec. 726, 726 (BIA 1952); *Matter of A-*, 3 I&N Dec. 368, 368 (BIA 1948); *Matter of O'N-*, 2 I&N Dec. 319, 319 (A.G. 1945).
[28] *Matter of De La Nues*, 18 I. & N. Dec. 140, 140 (BIA 1981); *Matter of C-M-*, 9 I. & N. Dec. 487, 487 (BIA 1961); *Matter of P-*, 8 I. & N. Dec. 517, 517 (BIA 1960); *Matter of N-*, 3 I. & N. Dec. 723, 723 (BIA 1949); *Matter of F-*, 2 I. & N. Dec. 517, 517 (BIA 1946).

abuser," or where they could give the government "reason to believe" the person ever has been a drug trafficker. See Chapter Eight for more on noncitizen juveniles.

## 6.6 NOT GUILTY BY REASON OF INSANITY RESOLUTIONS

A finding of Not Guilty by Reason of Insanity under R.C.W. 10.77 has never been found to constitute a conviction for immigration purposes. However, depending on the defendant's immigration status and the underlying conduct this type of resolution can trigger serious non-conviction, conduct-based immigration consequences. It will also trigger the mental health-related ground of inadmissibility.[29]

[29] 8 U.S.C. § 1182(a)(1)(A)(iv) (physical or mental disorder and associated harmful behavior).