



DEFERRED ADJUDICATION AGREEMENTS UNDER IMMIGRATION LAW

May 2018

This memo addresses the definition of a conviction under immigration law and analyzes how that definition has been interpreted. It also offers language for use in deferred adjudication agreements (e.g. Stipulated Orders of Continuance) that let a noncitizen accept and participate in such an agreement without having it equal a deportable conviction under immigration law.¹

The Definition of “Conviction” Under Immigration Law

The Immigration and Nationality Act (INA) definition of a conviction is:²

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.

Overt admissions of guilt, as such as those required for an RCW 10.05 Deferred Prosecution, or a plea or judgment, or a plea and formal judgment of guilt, as in a Deferred Sentence, will satisfy the immigration statute’s conviction definition, even if defendant complies and the plea is subsequently withdrawn.³ The following are not convictions under this definition:

- A disposition in juvenile delinquency proceedings⁴,
- An infraction,⁵ and
- A conviction that has been vacated due to an underlying legal defect, such as ineffective assistance of counsel (not rehabilitation or hardship).⁶

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

² INA §101(a)(48)(A), 8 USC §1101(a)(48)(A). The statutory definition was created by the IIRIRA, 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).

³ In its 2011 decision in Planes v. Holder, 652 F.3d 991, 995 (9th Cir. 2011) the Ninth Circuit eliminated the decades-old requirement that a conviction on direct appeal of right cannot serve as a basis for deportation.

⁴ Matter of Devison, 22 I&N 1362 (BIA 2000).

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

⁶ See Matter of Pickering, 23 I&N 621 (BIA 2003) (“there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships.” *Id.* at 624); Beltran-Leon v. INS, 134 F.3d 1379, 1380-81 (9th Cir. 1998); Nath v. Gonzales, 467 F.3d 1185 (9th Cir. 2006).

The Scope of What Constitutes a Conviction Under This Immigration Law Definition

Both the Board of Immigration Appeals and the Ninth Circuit Court of Appeals have interpreted the immigration definition broadly, holding that *any* finding or admission of guilt in a criminal proceeding will constitute a conviction *in perpetuity* for immigration purposes.⁷ It is clear that state “rehabilitative relief” (including expungements)⁸ will not be given effect under immigration law and will not eliminate a conviction for immigration purposes. Vacation of a record under RCW 9.96.060 and RCW 9.94A.640 is ineffective for immigration purposes.

Avoid Agreements That Require Admissions Of Guilt and/or Facts Sufficient

Immigration officials (ICE) routinely seek to deport noncitizens based on deferred adjudication agreements they deem to be convictions. This includes cases where the agreement states that the defendant stipulates to the sufficiency of facts contained in a police report or affidavit of PC and agrees that the judge can rely on those documents to determine guilt if the defendant fails to comply with the agreement.⁹

Other types of agreements do not specifically require stipulation to the sufficiency of facts in a police report or PC affidavit, but require such documents to be admitted into evidence and relied upon by the judge as the sole basis for determining guilt or innocence if the defendant fails to comply with the agreement. Some contain an ambiguous “stipulation to facts” in a police report, that could easily be interpreted, or misinterpreted, as an admission of guilt or of sufficiency. Although such agreements are arguably not convictions under state law,¹⁰ they risk being treated as convictions under immigration law. The lack of caselaw interpreting the phrase “admitted sufficient facts to warrant a finding of guilt,” in conjunction with increased efforts to deport noncitizens with criminal history, requires that deferred adjudication agreements used by noncitizen defendants must carefully crafted to avoid inadvertently deportable convictions.¹¹

Thus, regardless of how state criminal law treats the case, successfully completed deferred adjudication agreements (and deferred sentences under RCW 9.95.240) that include a finding or admission of guilt, or admission of facts sufficient, will remain convictions in perpetuity under immigration law. They can serve as a basis for deportation (‘removal’) or denial of important immigration benefits such as citizenship and lawful resident status (a.k.a. green-card).

Alternative “Immigration Safe” Language for Pre-Plea Deferred Adjudications

Attachment A is a sample of an “immigration-safe” agreement that would not be classed as a conviction under immigration law.¹² This language is designed to let noncitizen defendants safely participate in such agreements without risking deportation and, at the same time, preserve practices that let a court efficiently adjudicate a case when a defendant violates the agreement. For questions or additional assistance on this, please contact WDA’s Immigration Project.

⁷ Murillo-Espinoza v. I.N.S., 261 F.3d 771 (9th Cir. 2001); Retuta v. Holder 591 F.3d 1181,1186 (9th Cir. 2010). See also, Matter of Roldan-Santoyo, 22 I&N Dec. 512(BIA 1999); Matter of Punu, 22 I. & N. Dec. 224 (BIA 1998); Matter of Marroquin, 23 I&N Dec. 705 (A.G. 2005).

⁸ State rehabilitative relief, meaning a conviction eliminated based upon successful completion of probation.

⁹ See Matter of Ali Mohamed 27 I&N Dec. 92(BIA 2017)(Texas pre-trial intervention agreement with a stipulation to evidence a conviction.)

¹⁰ See State v. Drum, 168 Wash.2d 23, 39 (2010).

¹¹ Non-citizens will typically be unrepresented, and the DHS adjudicator a non-attorney.

¹² Presumably such agreements will also acknowledge and waive jury trial and speedy trial rights.

ATTACHMENT A – SAMPLE AGREEMENT LANGUAGE¹³

STIPULATIONS BY DEFENDANT

I am the defendant in this case. I understand that I have been charged with the following crime(s):
_____. I understand that I have a constitutional right to a jury trial in this matter to contest evidence presented against me, the right to hear and question witnesses against me, the right to present witnesses and evidence on my own behalf at no expense to me, the right to testify or not testify on my own behalf, the right to be presumed innocent, and the right to require the prosecution to prove the charge(s) beyond a reasonable doubt.

I understand that by entering into this Agreement, I am giving up my constitutional right to a jury trial in this matter to contest evidence presented against me, the right to hear and question witnesses against me, the right to present witnesses and evidence on my own behalf at no expense to me, the right to testify or not testify on my own behalf, and to object to the admissibility of evidence against me.

I understand that if I fail to comply with the conditions of this Agreement, a hearing will be held in the future at which evidence will be presented against me which the judge will review to determine whether I am guilty or not guilty beyond a reasonable doubt of the charge(s) specified above. I give up the right at any future hearing to contest the admissibility of any evidence presented against me and to present evidence 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 in this agreement are not an admission of guilt, and are not sufficient by themselves to warrant a finding of guilt.

DEFENDANT’S SIGNATURE

DATE

CASE NO. : _____

¹³ Underlined section is the critical language to be included in any deferred adjudication agreement that will make it “immigration safe.” See other samples of immigration-safe SOC’s at: <https://defensenet.org/resource-category/deferred-adjudication-agreements-e-g-socs-and-other-deferred-dispositions/>