

PRE-PLEA DIVERSION: CRAFTING IMMIGRATION-SAFE AGREEMENTS

This advisory is intended to serve as a quick-reference guide for defenders representing noncitizens and is not a substitute for individualized analysis. [Consult with the WDA Immigration Project](#) for case-specific assistance.

DIVERSION AGREEMENTS AND NONCITIZENS

Courts may offer diversion agreements under different names,¹ and with different requirements. For the typical defendant, the key point of such an agreement is that their criminal charges will be dismissed upon successful completion of the agreement's terms, and the case will be treated as a non-conviction.

For noncitizen defendants, however, not all diversion agreements are created equal.

A successfully completed diversion may remain a conviction for a noncitizen given the definition of "conviction" under immigration law. A noncitizen defendant who admits guilt—or facts sufficient to warrant a finding of guilt—as part of a deferral or diversion agreement will have a permanent conviction *for immigration purposes*, even if they comply with the criminal court's conditions and their charges are dismissed.

DEFINING A "CONVICTION" UNDER IMMIGRATION LAW

The Immigration and Nationality Act defines "conviction" as follows:²

The term "conviction" means, with respect to [a noncitizen]³ 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 Board of Immigration Appeals and the Ninth Circuit have interpreted this definition broadly, holding that *any* finding or admission of guilt (or "sufficient facts" to warrant such a finding) in a criminal proceeding is a permanent conviction for immigration purposes.⁴

¹ "Diversion agreement" is used here to refer to *pre-plea* agreements, which may go by different names in different courts (e.g., deferred adjudication, stipulated order of continuance, dispositional continuance).

² INA § 101(a)(48)(A); 8 USC § 1101(a)(48)(A).

³ This advisory uses the term "noncitizen" in place of "alien."

⁴ *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771 (9th Cir. 2001) (theft conviction vacated under Arizona rehabilitative statute still a conviction); *see also Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 522 (BIA 1999) (concluding that Congress did not intend for state rehabilitative measures to be considered in determining whether a conviction exists for purposes of immigration law); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (deferred adjudication constituted a conviction where statute required a plea of guilty or *nolo contendere*, a finding that the evidence substantiated guilt, and imposition of probation conditions); *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 717 (A.G. 2005) ("formal judgment of guilt" still encompasses vacated convictions); *but see Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010) (suspended fine not a "punishment, penalty, or restraint on [. . .] liberty.").

The following do *not* constitute convictions under immigration law:

- Dispositions in juvenile delinquency proceedings,⁵
- Infractions,⁶ and
- Convictions vacated due to an underlying legal defect, such as ineffective assistance of counsel.⁷

Note: “rehabilitative” dismissal or vacatur will not eliminate a conviction under immigration law.⁸

IMMIGRATION-SAFE LANGUAGE FOR PRE-PLEA DIVERSION AGREEMENTS

Immigration officials (e.g., ICE) routinely seek to deport noncitizens based on diversion agreements they deem to be convictions. Because immigration case law interpreting the phrase “admitted sufficient facts to warrant a finding of guilt” is lacking, diversion agreements for noncitizen defendants must be crafted carefully to avoid inadvertently creating “convictions.”⁹ Immigration-safe language allows a noncitizen to gain the benefit of a diversion agreement while also preserving practices that let a court to efficiently adjudicate a case if a defendant violates the agreement.

An “immigration-safe” diversion agreement should avoid language in which the defendant:

- Admits guilt or admits having committed the elements of an offense;¹⁰
- Affirms, acknowledges, or stipulates that the contents of certain documents (e.g., a police report or probable cause affidavit) are sufficient to establish guilt; or
- Agrees to a general “stipulation of facts” in such a document (which risks being interpreted as an admission of guilt or sufficiency).

Even an agreement that requires a police report to be admitted into evidence as the sole basis on which a judge may rely to determine guilt if the defendant fails to comply with the agreement (without any stipulation to the *sufficiency* of the facts therein) risks being treated as a conviction under immigration law, although it is arguably not a conviction under state law.¹¹ To minimize this risk, include a statement that exhibits have been marked for administrative efficiency but are not yet admitted, and that defendant understands the agreement is not an admission of guilt. (See Attachment A for sample immigration-safe diversion agreement language.)

⁵ *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

⁶ *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004) (holding that an Oregon “violation” did not constitute a “conviction” for immigration purposes, where proceeding lacked constitutional safeguards usually attendant on a criminal proceeding, including that guilt was found by preponderance of the evidence—a lower standard than beyond a reasonable doubt).

⁷ *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (“significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings” and vacatur based on “rehabilitation or immigration hardships”); *Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006) (where government bears burden of proving deportability, unclear record regarding basis of vacatur insufficient); *but see Pereira v. Wilkinson*, 592 U.S. 224 (2021) (where applicant bears burden of proving no disqualifying conviction, unclear record insufficient).

⁸ See *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998) (conviction set aside to prevent deportation, and not due to legal defect, still a conviction for immigration purposes); *Prado v. Barr*, 949 F.3d 438 (9th Cir. 2020) (state convictions retain their immigration consequences even when modified or expunged for reasons of state public policy). This includes, e.g., dismissals under RCW 9.94A.640 (vacation of record of conviction), 9.95.240 (dismissal after probation completed), 9.96.060 (vacation of misdemeanor and GM), and 10.05 (deferred prosecution).

⁹ Noncitizens are typically unrepresented in immigration court (and/or may face non-attorney adjudicators in affirmative immigration applications), making it critical to reach clear criminal court resolutions that do not require complex explanation.

¹⁰ See *Matter of Ali Mohamed*, 27 I&N Dec. 92 (BIA 2017) (Texas pre-trial agreement constituted a conviction where stipulation of evidence included sworn admission to having committed “each and every element alleged,” and an agreement that any violation would “automatically result in a conviction based on the admission of guilt in the stipulation of evidence”).

¹¹ See *State v. Drum*, 168 Wash.2d 23, 39 (2010) (en banc) (drug court contract stipulation not binding, trial court must make independent determination of guilt).

A diversion agreement that includes a finding or admission of guilt, or admission of “facts sufficient,” will be a conviction under immigration law—regardless of its treatment by state law—and may be the basis for deportation or denial of an immigration benefit such as a visa, lawful permanent residence, or citizenship.

CONSULT WITH WDAIP

For help with a specific case, including reviewing proposed language for a stipulated order of continuance to assess whether it is immigration safe, please fill out WDAIP’s intake form here: <https://defensenet.org/case-support/wda-immigration-project/wdaip-case-assistance/>.

ATTACHMENT A – SAMPLE IMMIGRATION-SAFE AGREEMENT LANGUAGE¹²

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. : _____

¹² Underlined section is the critical language; additional samples at: <https://defensenet.org/resource-category/deferred-adjudication-agreements/>.