RIAC2

CRIMINAL LAW FAMILY LAW

IMMIGRATION LAW

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What is a "final conviction" for immigration purposes?

CONTACT US!
Tel. (315)356-5794
Fax (315)356-5795

Sharon Ames, Esq.
sames@ocgov.net
CELL: (315)272-0505

Tina Hartwell, Esq.
thartwel@ocgov.net
CELL: (315)264-9217

The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

WHAT IS A "FINAL CONVICTION" FOR IMMIGRATION PURPOSES?

Sometimes it is impossible to avoid a conviction for your client that makes him or her deportable. In those cases where your client becomes deportable solely because of the conviction in your case, we always advise that a Notice of Appeal be filed because of the longstanding rule that a conviction is not final until a direct appeal has been exhausted or waived.

For immigration purposes, a "conviction" is defined as "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." INA §101(a)(48)(A). In addition, any sentence includes the actual period of incarceration but also any suspension of the sentence. INA §101(a)(48)(B).

We know that an Adjournment in Contemplation of Dismissal (ACD) is not a "conviction" because there is no plea or admission to any offense and that a YO finding is not a "conviction" because the YO statute corresponds to the Federal Juvenile Delinquency Act. *Matter of Devison*, I & N Dec. 3435 (BIA 2001).

On the other hand, we also know that charges dismissed, or pleas withdrawn in Drug Court or after completion of a DV program, still constitute a "conviction" for immigration purposes because (i) the defendant has entered a plea and (ii) the judge has imposed some form of punishment or restraint on your client. Because the dismissal of the charges is granted for "ameliorative" purposes or "in the interest of justice" and **not** on the merits, the allocution of facts that constitute a

crime (admission of guilt), coupled with the restrictive conditions of these programs ("restraint on liberty") are still considered "convictions" for purposes of placing your client into removal proceedings.

What effect does the filing of a direct appeal have on the finality of the conviction? In *Matter of J.M. Acosta*, I&N Dec. 420 (BIA 2018), the Board of Immigration Appeals held that a conviction is not "final" for immigration purposes until the right to direct appeal on the merits has been exhausted or waived. However, in so holding, the BIA stated that once the time period for filing an appeal has expired, a "rebuttable presumption" arises that the conviction is final. The presumption can be rebutted only by proof of filing a Notice of Appeal within 30 days of disposition or the filing of a late notice of appeal ***AND*** *there is proof that the appeal is related to the guilt or innocence of your client or a substantive defect in the criminal proceeding*. In rebutting the presumption, it is this second requirement that has become problematic for immigration defense in a removal proceeding.

Based on *J.M. Acosta*, ICE attorneys and Immigration Judges have begun to question direct appeals especially in cases where they believe the Notice of Appeal was filed to delay any finding that a conviction is "final" for immigration purposes. What this means for defense counsel is that filing of a Notice of Appeal no longer is a guarantee that the finality of your client's conviction will be delayed until the appeal is decided.

The BIA also held that "collateral" attacks that do not delay finality include appeals relating only to the sentence imposed, a reduction of a charge, or ameliorating a conviction for rehabilitation purposes ***or to alleviate immigration hardships***. *Id.*

If your client is removable solely based on a conviction in your client's case, file a Notice of Appeal within the 30 day period following the disposition of the case. The Notice of Appeal can be a standard, generic notice that preserves your client's right to appeal while not limiting the issues and arguments that can be raised in the appeal. However, if it is necessary to file a motion to file *a late notice of appeal*, pursuant to CPL 460.30, our office can assist you in drafting a NOA to rebut the "finality" presumption that will be argued by ICE in your client's removal proceeding. This may be your client's only chance to avoid removal, and the inclusion of legal and constitutional grounds of appeal will help shield the conviction from "finality" under Matter of *J.M Acosta*.

To assist your client's immigration attorney in removal proceedings, you may, as defense or appellate counsel, also be asked to provide an "*Acosta*" letter for filing in the Immigration Court. Such a letter would address the legal and constitutional grounds for the appeal. Again, the RIAC can help you respond to those requests.

As always, contact the RIAC at the earliest possible moment in the case. Time is of the essence if the client is in removal proceedings!

Chief Defenders & Assigned Counsel Administrators:

Contact the RIAC2 to schedule your 2019 training, lunch hour or other session in your office/county. We will provide CLE credit!