

4.1 Conviction for Immigration Purposes

- A. Conviction Defined
 - B. Conviction without Formal Judgment
 - C. Finality of Conviction
-

4.1 Conviction for Immigration Purposes

A. Conviction Defined

In 1996, Congress adopted a statutory definition of conviction for immigration purposes. The definition of conviction was made deliberately broad in scope. It is set out in INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), 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.

Under this definition, a disposition may constitute a conviction with or without the entry of a formal judgment.

B. Conviction without Formal Judgment

Generally. A state court disposition without a formal judgment will constitute a conviction if there has been both a finding, plea, or admission of guilt *and* the court has ordered some form of “punishment, penalty, or restraint on liberty.”

Under this prong of the definition, certain court proceedings in which a defendant enters a guilty plea or makes an admission of sufficient facts to warrant a finding of guilt and is ordered by the court to complete probation or some other condition will likely be treated as a conviction for immigration law purposes even if the plea is later vacated or charges dismissed. In contrast, a pre-plea diversion arrangement, in which no plea is entered or admission made but some form of pretrial probation or community service is ordered, should not be considered a conviction for immigration purposes. The application of this definition to different North Carolina dispositions is discussed *infra* in § 4.2, Effect of North Carolina Dispositions.

Plea of Guilty. The term “plea” includes a no contest plea as well as a guilty plea. The definition has also been interpreted as including an *Alford* plea even though the defendant does not admit guilt with that type of plea. (In an *Alford* plea, the defendant asserts his or her innocence but admits that sufficient evidence exists with which the prosecution could

likely convince a judge or jury to find the defendant guilty.) *See Abimbola v. Ashcroft*, 378 F.3d 173, 180–81 (2d Cir. 2004).

Punishment or Restraint on Liberty. In addition to incarceration, the term “punishment” or “restraint on liberty” includes a variety of community corrections alternatives, such as probation, treatment alternatives to street crime (TASC), drug education school (DES), house arrest with electronic monitoring, community service, and anger management and substance abuse programs. It also includes other restraints, such as restitution and a fine. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

The punishment or restraint must be imposed by the court for the disposition to qualify as a conviction for immigration purposes. An agreement with a prosecutor to attend a drug treatment program or anger management program, for example, should not qualify as a restraint on liberty if not ordered by the court.

C. Finality of Conviction

Traditionally, a conviction was deemed effective for immigration purposes only when the judgment of conviction was final. *See Pino v. Landon*, 349 U.S. 901 (1955). A conviction is final for immigration purposes when the direct appeal has been exhausted or waived. A pending state or federal post-conviction challenge, however, does not affect the finality of the conviction.

The Ninth Circuit has found that Congress, in adopting a statutory definition of conviction, eliminated the requirement of finality. *Planes v. Holder*, 652 F.3d 991, 996 (2011), *reh’g denied*, 686 F.3d 1033 (9th Cir. 2012). In contrast, the Third Circuit has held that the finality rule survives, at least with regard to a “formal judgment of guilt”—that is, the conviction is not considered final until direct appeal has been exhausted or waived. *Orabi v. Att’y Gen. of U.S.*, 738 F.3d 535 (3d Cir. 2014). Although the law is in flux, the traditional requirement of finality appears to continue to apply in the Fourth and Eleventh Circuits, which review cases arising from the North Carolina and Georgia immigration courts involving North Carolina defendants.