ASISTA NEWSLETTER

JUNE 2012

IN THE NEWS

- **US House of Representatives passes VAWA reauthorization bill. Bill now heads to Conference Committee.**

Our purpose is to centralize assistance for advocates and attorneys facing complex legal problems in advocating for immigrant survivors of domestic violence and sexual assault.

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A Practice Guide for Representing Self-Petitioning Applicants With Criminal Convictions or Criminal History (Part 1 of 3)

A Practice Guide for Representing Self-Petitioning Applicants With Criminal Convictions or Criminal History

By Ann Benson & Jonathan Moore[1]

Editor's Note: Due to the length of this article, it has been divided into three parts. This is the first of these parts. The second installment will be published in the next ASISTA Newsletter. The forthcoming portions of this practice advisory will further discuss criminal convictions as a bar to GMC as well as exceptions to GMC under the INA. The entire Advisory is also available on our website at www.asistahelp.org.

I. Introduction & Overview

Congress made numerous options for overcoming the impact of criminal conduct available to VAWA self-petitioners. Advocates should not decline to represent an otherwise eligible self-petitioning client without first determining that her criminal conviction or conduct does, in fact, make her ineligible to apply. While understanding the immigration consequences of criminal convictions can be challenging, there are many resources available to support you in doing so. Many self-petition cases involve clients whose criminal acts or convictions do not necessarily bar approval of their petition, either because of the nature of the act(s), or because they were acting in self-defense, or under the influence of their abusive US citizen or legal permanent resident spouse or parent. Thus, understanding how criminal acts and convictions affect self-petition cases can make an immense difference for immigrants, whose only other options may be deportation, even for minor criminal offenses, or living with the uncertainty of the lack of immigration status.

Generally, criminal convictions or criminal conduct can impact the self-petitioning process in two primary ways

(1) Criminal convictions/conduct may make one ineligible for lawful status in the long term because they may trigger statutory bars to establishing "good moral character" (GMC), as required under Immigration and Nationality Act, or INA, § 101(f). Unlike applicants for adjustment of status (or other types of immigrant and non-immigrant visas), self-petitioners are not deemed to be seeking a lawful "admission". As such, INA §212(a)'s grounds of inadmissibility do not directly apply to self-petitioners.[2] However, the crime-related grounds of inadmissibility at INA § 212(a)(2) indirectly apply to a self-petitioner because they are incorporated into the statutory bars to GMC at INA § 101(f)(3).

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[2] Note that INA § 212(a)'s grounds of inadmissibility will apply to an approved self-petitioner at the time she applies to adjust her status to become a lawful permanent resident.

(2) Since the granting of a self-petition is a discretionary determination, applicants with criminal convictions/conduct will need to overcome its negative discretionary impact.

This practice advisory will provide a step-by-step framework for approaching representation of self-petitioners with criminal histories. It describes criminal conduct and convictions that create statutory bars to GMC, when a statutory exception may be available for such conduct, and if so, how to apply for one.

II. Step One: Get The Criminal Records

To identify possible grounds of inadmissibility a client faces, you will need full information regarding the client's criminal proceedings and history.[3]

> The importance of full disclosure of your client's criminal history cannot be over-emphasized.

If your client has ever been arrested or convicted, you need to get complete, accurate information about each incident before filing the self-petition (or any application).

The two most important sources of information will be your client and the court file (assuming charges were brought against your client). While your client is a critical source of information, it is also really important that you obtain any official records available regarding the incident. Self-reporting is notoriously inaccurate. Frequently, you cannot rely on a client's self-report about whether an arrest resulted in a conviction or not. People commonly fail to remember or understand when a conviction actually exists. You must get any official records available regarding the arrest or incident.

In addition to being essential to analyzing whether a conviction or

[3] In addition to any criminal history, advocates should also routinely file Freedom of Information Act (FOIA) requests to DHS for every client. When possible FOIA requests should be done prior to submitting applications for relief. FOIA is an important way to obtain official information about a client's general immigration status. DHS maintains files on all noncitizens that have filed applications or been subject to some type of enforcement action (e.g., deportation or voluntary departure). These records often reveal and clarify important details about the client's immigration history. The best way to get current information about FOIA procedures and access current FOIA forms is through the internet at the following addresses (note: so-called "A-files" are at CIS).

For USCIS: http://www.U.S.C.is.gov/portal/site/U.S.C.is/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=34139c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=34139c7755cb9010VgnVCM10000045f3d6a1RCRD

For Customs & Border Patrol FOIA Reference Guide: http://www.cbp.gov/xp/cgov/admin/fl/foia/reference_guide.xml

For Immigration & Customs Enforcement (ICE) FOIA instructions: http://www.ice.gov/foia/submitting_request.htm

For EOIR (Immigration Court) FOIAs: http://www.justice.gov/eoir/mainfoia.html

Regulations governing FOIA requests are found at 8 CFR § 103.10. You do not need to (and generally should not) reveal the client's address; the information can be sent to your office. To avoid delay, the letter and envelope should be clearly marked "FREEDOM OF INFORMATION ACT REQUEST" circled in red. Provide the client's name, date of birth and "A" number (eight-digit number beginning with "A", found on INS documents), if the client has one. If the client does *not* have an "A" number, it is unwise and unnecessary to identify your client as an alien.

incident bars eligibility for the self-petition, it is also necessary to know what court records, police reports and rap sheets (criminal history compilations) say in order to work with the client so that his or her credibility is not undermined by contradictory information in your client's declaration. If no records are available, for example, because misdemeanor records were shredded, you want to verify that fact with a letter from the court clerk stating that no other records are available.

Court clerks often respond to criminal record requests by printing out a computerized summary, or docket, listing events in the case, which may contain useful information. **Unless that is all that is actually exists, this is not enough**. You need copies of the actual documents from the court file: the criminal complaint, the judgment, the plea statement or diversion agreement signed by the defendant, and anything else like a pre-sentence report by probation, or a certificate of probable cause. This is more work for a clerk but you need to insist. Criminal court records, barring some specific exception, are public records, and you should not need to justify getting them. A release from the client will also help you get files from previous defense counsel, which may contain police reports and criminal history at the time of the offense.

The importance of full disclosure of your client's criminal history cannot be over-emphasized. Keep in mind that if your client's self-petition is approved, and he or she has failed to disclose prior convictions, your client risks having the petition revoked and a subsequent adjustment of status application denied.

An Overview of the Requirement to Establish Good Moral Character (GMC)

Practitioners should be familiar with both the good moral character (GMC) regulation at 8 C.F.R. § 204.2(c)(1)(vii) and the US Citizenship and Immigration Services (CIS) GMC memorandum from William Yates dated January 19, 2005, and available on the ASISTA website.[4]

The statute requires a self-petitioner to establish that he or she is a person of good moral character in order to qualify.[5] This requirement applies to self-petitioning spouses, parents and children who are 14 years of age or older. Although the immigration statute under INA § 204 uses the term, "is" a person a GMC, implying that an applicant only have *present* good moral character at the time of filing, USCIS will require an applicant to provide evidence showing GMC for a period of 3 years immediately preceding the date self-petition is filed. Additionally, the USCIS may also examine conduct beyond 3 years if there is reason to believe the person may not have been a person of good moral character in the past. [6]

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[4] William R. Yates, Ass. Dir. Opers. U.S.C.I.S., Memo re: Determinations of Good Moral Character in VAWA-Based Self-Petitions, Jan. 19, 2005, http://www.asistahelp.org/documents/resources/GMC_011905_C59955EE7B784.pdf

[5] *See* INA § 204(a)(1)(A)(iii)(II)(bb) (for petitioners with U.S. citizen spouses); INA § 204(a)(1)(B)(ii) (petitioners with lawful permanent resident spouses).

[6] *See* Yates Memo, *supra* note 4, at 1. See also the preamble to the interim self-petitioning regulations which states: "Section 40701 of the Crime Bill requires all self-petitioners to be persons of good moral character, **but does not specify the period for which good moral character must be established. This rule requires self-petitioning spouses and self-petitioning children who are 14 years of age or older to provide evidence showing that they**

Evaluation of the self-petitioner's claim of GMC is supposed to occur on a case-by-case basis, taking into account the definition of GMC at INA § 101(f) and the standards of the average citizen of the community. It is important to emphasize again the importance of obtaining comprehensive records. Additionally, the self-petitioner client should strive to maintain good moral character, and inform his or her attorney of any possibly disqualifying incidents. You don't want your client to be too ashamed to tell you he or she was arrested for shoplifting last week. According to the regulations, if record checks that DHS conducted prior to the issuance of an immigrant visa or adjustment of status approval show that the self-petitioner is no longer a person of GMC, or "that he or she has not been a person of GMC in the past, a pending self-petition will likely be denied," or an approved self-petition will likely be revoked.[7]

In general, self-petitioners are encouraged to submit primary evidence to prove the elements of their case whenever possible. [8] While "primary evidence" usually means original documents, by regulation the self-petitioner's affidavit is considered primary evidence of good moral character. [9] The affidavit should be accompanied by a local police clearance or state-issued criminal background check from each locality or state in the U.S. where the self-petitioner has resided for at least six months during the 3-year period preceding the filing of the self-petition. If self-petitioner lived abroad, similar clearance should be submitted from the appropriate authorities in each foreign country in which he or she resided for at least six months during the 3-year period preceding the filing of the self-petition. If police clearances, criminal background checks or similar reports are not available in some or all locations, the self-petitioner may submit an explanation and other evidence in support of a good moral character determination. Credible evidence of good moral character may

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have been persons of good moral character *for the 3 years* immediately preceding the date the self-petition is filed. It does not preclude the Service from choosing to examine the self-petitioner's conduct and acts prior to that period, however, if there is reason to believe that the self-petitioner may not have been a person of good moral character in the past." Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,066 (emphasis added).

[7] Petitions for relatives, widows and widowers, and abused spouses and children, 8 C.F.R. §§ 204.2(c)(1)(vii) (2010), (i)(F) (2010). This 3-year GMC period may exceed the scope of INA § 204, which requires only current GMC, *if* it is treated as a flat bar. *See* INA § 204(a)(1)(A)(iii)(II)(bb), (iv); 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb), (iv) (U.S.C. abuser). *See also* INA § 204(a)(1)(B)(ii)(II)(bb), (iii); 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(bb) & (iii) (abuser is LPR). Cf. *Matter of Sanchez-Linn,* 20 I. & N. Dec 362, 365 (BIA 1991) (when statute doesn't specify a GMC period, must show GMC for "reasonable period of time" which will vary depending on specific facts of the case.)

[8] 8 C.F.R. § 204.2(c)(2)(i). *See generally* Applications, petitions, and other documents, 8 C.F.R. § 103.2 (b)(2)(iii) ("Evidence provided with a self-petition filed by a spouse or child of abusive citizen or resident. The Service will consider **any credible evidence relevant to a self-petition** filed by a qualified spouse or child of an abusive citizen or lawful permanent resident under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act. **The self-petitioner may, but is not required to, demonstrate that preferred primary or secondary evidence is unavailable**. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.")

[9] Petition to Classify Alien, *supra* note 6, at 13,067. ("Under this rule, primary evidence of good moral character is the self-petitioner's affidavit.")

include not only the self-petitioner's affidavit, but also affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.[10] The final determination of whether evidence is credible, and the weight that will be given to it, is within the sole discretion of the Service.

Criminal Convictions/Conduct as Statutory Bars to Establishing Good Moral Character

Generally, a self-petitioner will be found to lack GMC if he or she is a person described in one of the categories listed under INA § 101(f), unless the applicant can demonstrate that she qualifies for the exception under INA § 204(a)(1)(C). The delineated categories of persons lacking good moral character are as follows:

1. INA § 101(f)(1) – Habitual Drunkards
2. INA § 101(f)(3) – Selected Grounds of Inadmissibility (particularly for crimes)[11]
3. INA § 101(f)(4) & (5) - Gamblers
4. INA § 101(f)(6) – False Testimony
5. INA § 101(f)(7) – Served 180 Days Or More In Jail Within GMC Period
6. INA § 101(f)(8) – Aggravated Felony Conviction
7. INA § 101(f)(9) – Nazi Persecutors

[10] 8 C.F.R. § 204.2(c)(2)(v).

[11] INA §101(f)(3) incorporates the criminal grounds of inadmissibility under § 212(a)(2)(A)-(D), § 212(a)(6)(E), § 212(a)(10)(A), with the exception that a single simple marijuana possession of less than 30 grams explicitly does not bar GMC – *See* § III(A), *infr*a for detailed analysis of conduct covered by this section.

For quick guidance on various statutory bars to GMC, and whether waivers may be available, advocates may refer to the chart provided in the USCIS' memo on Determinations of GMC in VAWA-Based Self-Petitions at http://www.asistahelp.org/documents/resources/GMC_011905_C59955EE7B784.pdf; *see* chart at http://www.asistahelp.org/documents/resources/GMC_chart_AB1F3D59E59A8.pdf; *see* also http://www.asistahelp.org/documents/resources/GMC__false_tesimony_INS__memo_exce_9D9EDB1714103.pdf.

INA § 101(f)(3) – INA § 212(a)(2)'s Crime-related Inadmissibility Grounds

INA § 101(f)(3) includes classes of persons, "whether inadmissible or not," described in INA § 212(a)(2)(A) and (B), which are the grounds of inadmissibility relating to criminal convictions, including crimes of moral turpitude, drug related crimes, and multiple convictions. The client is not "within the class of aliens described" in § 212(a)(2)(A) if the statutory exception for one CIMT, known as the "petty offense" exception, applies to his or her offense.[12] The "whether inadmissible or not" was interpreted by the Board of Immigration Appeals (BIA) to mean only that the definition applies to non-citizens in deportation proceedings, as well as to those in pre-1996 "exclusion proceedings."[13] The 1996 change from "whether excludable or not" to "whether

[12] *Matter of Garcia-Hernandez*, 23 I. & N. Dec. 590, 593 (BIA 2003).

[13] *Matter of M-*, 7 I. & N. Dec. 147, 150-51 (BIA 1956).

inadmissible or not" simply updated the elimination of exclusion proceedings brought about by the IIRIRA.[14]

Self-petitioners who fall into these categories are presumed to lack GMC unless evidence proves otherwise. The inadmissibility grounds incorporated as bars to GMC at § 101(f)(3) become directly applicable to self-petitioners at the time they file for adjustment of status to lawful permanent residents, under INA § 245(a).

Convictions under Immigration Law

a. The Definition of "Conviction."

If your case deals with an inadmissibility ground that requires a conviction, such as the controlled substances violation ground or the CIMT ground, it is essential to first understand how convictions are defined under immigration law. Added in 1996, the INA now has its own specific definition of what constitutes a criminal conviction for immigration purposes. [15] How a particular state treats the disposition of the criminal offense is not controlling under immigration law.

The Immigration and Nationality Act defines a conviction 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.[16]

Many state and local courts permit a first-time or minor offender to plead guilty but later withdraw the plea after completion of a jail sentence, probation or other requirement. However, under the BIA interpretation of the above definition this does not eliminate the conviction for immigration purposes. [17] Thus, even where the state that imposed the conviction considers it completely eliminated (including by expungement), it remains a conviction for immigration purposes if the offender pleaded guilty and the court imposed some type of restraint on the defendant.

Infractions and violations where there is no right to a jury trial, jail may not be imposed, and guilt is not found "BARD"—beyond a reasonable doubt—are not convictions under the INA.[18]

b. Deferred Adjudications.

In many states and courts, there is often a process that allows for some first-time offenders to resolve a case without incurring a criminal conviction. These are generally referred to as "deferred

[14] *Garcia-Hernandez*, 23 I. & N. Dec. 590, n2.

[15] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). A statutory definition of a conviction and a sentence for immigration purposes was enacted on September 30, 1996. Before that it was decided by case law.

[16] INA § 101(a)(48)(A).

[17] *Matter of Roldan-Santoyo,* 22 I. & N. Dec. 512 (BIA 1999).

[18] *Matter of Eslamizar,* 23 I. & N. Dec 684 (BIA 2004).

adjudications." [19] Dispositions that might *avoid* being a conviction could include a deferred prosecution in which the defendant does not make a formal plea (or admit or stipulate to facts), and where the final resolution of the case is deferred and the defendant agrees to meet conditions while the case is continued with the understanding that the prosecution may dismiss or reduce the charges based on the defendant's good performance. This disposition is not a conviction for immigration purposes if no guilty plea was taken, and as long as the defendant has not "admitted facts sufficient to warrant a finding of guilt."[20] Usually a defendant signs an agreement, and knowing the exact language of that agreement is critical to evaluating whether it is a conviction for immigration purposes. If a disposition meets the immigration definition of a conviction, then the subsequent dismissal for rehabilitative reasons will be ineffective.[21]

If the records obtained in your client's case indicate that it was dismissed after your client complied with conditions imposed by the court, you should consult with experienced practitioners to see if the client's criminal case does or does not constitute a conviction under immigration law. To consider making such an argument you need copies of the entire court record. Additionally, even if your client's offense is not a conviction that triggers a statutory inadmissibility bar, you will need to disclose it on the application and provide relevant records.

c. Juvenile Dispositions.

It is well established that juvenile delinquency dispositions do not constitute convictions under the INA.[22] If the court record indicates that the proceedings were in juvenile court, then the offense(s) will not be a conviction under immigration law.

Some juvenile dispositions that do not result in a conviction may nonetheless involve conduct that triggers an inadmissibility ground, and that ground must also be listed to be waived under INA § 212(d)(14). The clearest example of this would be a juvenile disposition related to drug-dealing. Such a juvenile disposition will not trigger inadmissibility as a controlled substance conviction. It will, however, likely trigger the non-conviction-based ground of inadmissibility that requires mere knowledge or "reason to believe" that the offender engaged in drug trafficking.[23]

d. Convictions on Direct Appeal.

[19] *See* http://www.defensenet.org/immigration-project/immigration-resources/deferred-adjudication-agreements-e.g.-socs-and-other-deferred-dispositions/Deferred%20Adjudication%20Agreements/view for a discussion of how a disposition might be crafted that is not a conviction.

[20] INA § 101(a)(48)(A).

[21] Formerly an exception existed in the jurisdiction of the nine western states of the Ninth Circuit Court of Appeals only that allowed a first offense, simple drug possession (not a CIMT) that was expunged or dismissed for rehabilitative reasons, to not be a conviction. *Lujan-Armendariz* v. INS, 222 F.3d 728 (9th Cir. 2000). As of July 2011 the Ninth Circuit itself reconsidered the issue *en banc* and overruled its holding in *Lujan-Armendariz*. *Nunez-Reyes,* 646 F.3d 684 (9th Cir. 2011). Outside the 9th Circuit, the BIA has ruled that this exception does not exist. *In re Salazar-Regino,* 23 I. & N. Dec. 223, 227 (BIA 2002).

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

[23] INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C). This ground is not waivable at adjustment of status.

It has long been held that a conviction currently on direct appeal of right does not have sufficient finality to constitute a conviction for any immigration purpose.[24] As such, if your client's criminal conviction is on appeal there may be a strong argument that it does not trigger an inadmissibility bar where a conviction is required. However, the First, Second, Fifth and Seventh Circuits have held that the new statutory definition of a conviction erodes this requirement.[25] In its July 5, 2011 ruling in *Planes v. Holder*, the Ninth Circuit also found that the definition of "conviction" in INA § 101(a)(48)(A) does not require a waiver or exhaustion of direct appeals.[26] This reasoning arguably violates well-established rules of statutory construction.[27] Other circuits have not ruled, and the BIA has not overruled the finality requirement in a precedent decision. Although some DHS attorneys have argued that under the new definition, a conviction on appeal can support deportation, it is unlikely that either the BIA or the Ninth Circuit would support this.

However, if you have a client with a pending conviction on direct appeal, you need to think about what would happen if

[24] *Pino v. Landon*, 349 U.S. 901 (1955) (holding that an "on file" system in Massachusetts did not constitute sufficient finality to be a basis for deportation under the Act); *Matter of Ozkok*, 19 I. & N. Dec. 546, n. 7 (BIA 1988). *See Matter of Polanco,* 20 I. & N. Dec. 894 (BIA 1994) (potential for only discretionary review on direct appeal will not prevent the conviction from being considered final for immigration purposes.) *Matter of Adetiba,* 20 I. & N. Dec. 506, 508 (BIA 1992) ("[I]t is well established that a conviction attains a sufficient degree of finality for immigration purposes when direct appellate review of the conviction has been exhausted."); *Matter of Thomas*, 21 I. & N. Dec. 20 (BIA 1995) (same).

[25] *Griffiths v. INS*, 243 F.3d 45, 54 (1st Cir. 2001) (deferred adjudication did not require finality even though right to appeal later theoretically possible; but this applied only to the deferred adjudication prong of INA § 101(a)(48)(A), where the noncitizen must have "admitted sufficient facts," and not to the guilty plea prong: "[t]he INS was careful at oral argument to say that it was not taking the position it could deport someone adjudicated guilty while their appeal or appeal period was pending."). *Compare Puello v. Bureau of Citizenship and Immigration Services,* 511 F.3d 324, 332 (2d Cir. 2007) ("IIRIRA . . . eliminate[d] the requirement that all direct appeals be exhausted or waived before a conviction is considered final . . . ") *with Walcott v. Chertoff*, 517 F.3d 149, 154 (2d Cir. 2008) ("[The]conviction was not deemed final for immigration purposes until . . . direct appellate review of it was exhausted."); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007) (following *Renteria-Gonzalez v. INS* to hold a conviction on direct appeal is conviction for immigration purposes); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) ("deferred adjudication of guilt" under Texas law with limited appeal rights is final conviction); *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998)(*en banc*)(same statute); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (noncitizen ordered removed even though a writ of certiorari to US Supreme Court and appeal of denied post-conviction petition -- neither of which were an "appeal of right"-- were both still pending); and *U.S. v. Saenz-Gomez* 472 F.3d 791, 794 (10th Cir. 2007).

For further discussion of appeals and finality, see Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, § 2.18 (West Publishing). Some of these cases deal with a complex Texas deferred adjudication law with limited appeal rights (even so, the Fifth Circuit's decision has been heavily criticized), and situations where it has long been accepted that a conviction is final: petitions for certiorari, and appeals of request for post-conviction relief. The First and Seventh Circuits have not yet ruled on a case where there is a clear appeal of right.

For a 2009 analysis of the position of the Board of Immigration Appeals (BIA), see this advisory by the Immigrant Defense Project (IDP), http://www.immigrantdefenseproject.org/docs/09_Cardenas_Abreu_Practice_Advisory_1.pdf which concludes that the BIA has not overruled prior cases requiring finality and that a majority may support retaining it.

[26] 652 F. 3d 991 (9th Cir. 2011).

[27] *See* discussion in *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998) (*en banc*), separate opinion of BIA member Rosenberg, *concurring and dissenting*.

a conviction for a CIMT or other inadmissible offense became final after approval of an I-360. If you think the pending offense could affect the determination of moral turpitude, you should develop any argument as to why — if the conviction were final — it either would not bar GMC, or would qualify for a finding under the § 204(a)(1)(C) GMC exception, or both.[28]

e. Post-Conviction Relief

What is "post-conviction relief"?

"Post-conviction relief" is any legal effort to go back to the court of conviction and change what happened after the conviction has become final. A motion to withdraw a guilty plea is one type of post-conviction relief. Most jurisdictions have rules about the filing of such motions, including time limits. In some cases, a time limit can be "tolled" if the person did not become aware of the consequence. A lawyer will need to return to the court of conviction and file a petition or motion. Sometimes, you may seek to vacate a conviction or withdraw a guilty plea, or have the record of conviction expunged. In that case you are seeking to affect the actual judgment of guilt. The BIA has set up a rigorous standard for when such post-conviction relief, or PCR, is valid for immigration purposes. If it is due to a legal flaw in the original proceeding, the vacation of judgment is valid for immigration purposes.

If, a conviction was expunged under a rehabilitative statute (one that allows an offender to vacate a conviction after a period of good behavior if there are no new crimes, or after probation or treatment; or one dismissed under a court's purely equitable powers) or the PCR was granted by the criminal court purely to avoid a harsh immigration consequence, the BIA has ruled that the conviction remains for immigration purposes.

To vacate a conviction for immigration purposes, the elimination of the judgment of guilt must be based on a legal error or deficiency in the original proceedings.[29] For example, some states

[28] As to why the person did not, or had not yet, pleaded guilty, you can argue that a non-citizen who used all her rights under the criminal justice system should not have it held against her as a discretionary factor, or a sign of lack of remorse and rehabilitation, since a person can both sincerely regret unwise behavior and desperately wish to avoid the stigma attached to a criminal conviction.

[29] *See Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003) ("[T]here 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."); *see also Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute). *But see Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (reversing *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003) in 6th Circuit). In *Matter of Chavez-Martinez,* 24 I. & N. Dec. 272 (BIA 2007) the BIA ruled that, in a motion to reopen, it is the noncitizen's burden to show why a conviction was vacated. There is a split among the Circuit Courts about which party bears the burden of proving *why* a conviction has been vacated in motions to reopen: see *Nath v. Gonzales,* 467 F.3d 1185 (9th Cir. 2006) (DHS has burden) vs. *Rumierz v. Gonzales*, 456 F.3d 31, 40-41 (1st Cir. 2006) (alien bears the burden of proving conviction was not vacated solely for immigration reasons); and who generally has the burden of proving whether a conviction bars relief like cancellation of removal: see *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009) (burden on applicant) and *Matter of Almanza-Arenas,* 24 &N Dec. 771(BIA 2009)(same) vs. *Sandoval-Lua v. Gonzales,* 499 F.3d 1121, 1130 (9th Cir. 2007) (applicant meets burden of eligibility if conviction record is inconclusive). For a 9th Circuit advisory on the general 'burden' issue see

have a statutory requirement that there be a warning to defendants of possible immigration consequences. A violation of that requirement is a legal error, even though it pertains to immigration consequences, because it is a violation of a state law.[30] Although it is ultimately undecided who has the burden to show why a non-citizen's conviction was vacated, it is critical to make a criminal defense lawyer filing such a petition understand that they must make a record that the proposed vacation is based on a legal error or deficiency, for it to be effective.

In 2010 the United States Supreme Court ruled in a key case called *Padilla* that criminal defense lawyers have an obligation, not only to ***not give*** bad advice to non-citizen defendants, but to advise them of the immigration consequences of criminal convictions.[31] Not advising is as bad as misadvising since "deportation is an integral part-indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[32] The decision may apply retroactively.[33] Such misadvice or omission can be a basis to withdraw a guilty plea, if the client was harmed by it.

Sometimes the defendant is only seeking is a modification of the sentence. The judgment of guilt remains intact. For example, if an assault or theft conviction had a suspended sentence of 365 days and so might be an aggravated felony, a sentence modification of one day could eliminate the aggravated felony. Or, if a sentence for a "crime involving moral turpitude" like petty theft could be reduced to 180 days suspended from 365 or 364, if that were the only such conviction, it might fit into the petty offense exception to inadmissibility for a single CIMT, and keep the client from being inadmissible at all.[34] The statute and the case law of the BIA is less restrictive than when treating PCR for a judgment of guilt, and says that a sentence modification ordered by a criminal court is valid. [35]

Qualifying Admissions That Can Trigger Certain Inadmissibility Grounds

Two key crime-related grounds of inadmissibility, for drug convictions and crimes involving moral turpitude (CIMT), are introduced in the immigration statute by the phrase: "[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of [drugs or CIMT] is inadmissible."[36]

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http://www.ilrc.org/immigration_law/pdf/Burden%20of%20Proof%20Victory%20Rosas%20Castanedas.pdf

[30] *Matter of Adamiak,* 23 I. & N. Dec. 878 (BIA 2006) (conviction vacated under § 2943.031 of the Ohio Revised Code for failure of trial court to advise defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes.)

[31] *Padilla v. Kentucky,* 130 S. Ct. 1473 (2010). *See* http://www.defensenet.org/immigration-project/immigration-resources/padilla-v.-kentucky-resources/WDAIP%20Padilla%20Advisory%204-8-10.doc/view.

[32] *Id.* at 1480.

[33] *See Padilla* retroactivity advisory at http://www.fd.org/pdf_lib/padilla%20retroactivity.pdf.

[34] 8 U.S.C. § 1182(a)(2)A)(ii)(II), INA § 212(a)(2)A)(ii)(II).

[35] *See* 8 U.S.C. § 1101(a)(48)(B), INA § 101(a)(48)(B); *Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001); *Matter of Oscar Cota-Vargas,* 23 I. & N. Dec. 849 (BIA 2005) (holding that as long as it is a valid order by a court, the reason for a sentence modification should not matter.).

[36] 8 U.S.C. § 1182(a)(2)A)(i), INA § 212(a)(2)(A)(i).

The most important aspect of this language for advocates is to be aware that it does not implicate mere "garden variety" admissions. This may explain why immigration officials seldom invoke it. The information is included here, in part, to give advocates the tools to guard against wrongful application of this provision by immigration authorities.

In order for statements by an applicant to constitute an admission under INA § 212(a)(2)(A)(i), there are four requirements that must be met:

a) **Conduct admitted to must be a crime under the laws of the place where it was allegedly committed.** [37] However, an otherwise valid admission will trigger inadmissibility even where non-citizen could have been found not guilty due to an available defense to the crime.[38]

b) **Admission must be to all elements of the crime contained in the criminal statute.** Partial admissions will not suffice, such as an admission to possession of a controlled substance but not to criminal intent (where statute requires criminal intent). General admissions to broad or divisible statutes will not count. Where noncitizen does not admit facts, DHS or consular official cannot use inferences.[39]

c) **DHS or consular official must provide noncitizen with an understandable definition of the crime at issue.**[40]

d) **The noncitizen's admission must be free and voluntary.**[41]

In the past the BIA has declined to find inadmissibility based on a guilty plea if the conviction is followed by effective post-conviction relief, pardon, or where no resolution amounting to a conviction is entered pursuant to the plea.[42] This is true even when the defendant has independently admitted the crime before

[37] *Matter of R-,* 1 I. & N. Dec. 118 (BIA 1941) (fraud in itself not a crime); *Matter of M-,* 1 I. & N. Dec. 229 (BIA 1942) (remarriage not punishable as bigamy); *Matter of De S-,* 1 I. & N. Dec. 553 (BIA 1943) (attempt to smuggle not a crime).

[38] *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (alien can admit the elements even if an "affirmative defense" was clearly available.)

[39] *Matter of B-M-,* 6 I. & N. Dec. 806 (BIA 1955); *Matter of A-,* 3 I. & N. Dec. 168 (BIA 1948); *Matter of Espinosa,* 10 I. & N. Dec. 98 (BIA, 1962); *Matter of G-M-,* 7 I. & N. Dec. 40 (AG 1956); *Matter of E-N-,* 7 I. & N. Dec. 153 (BIA 1956). Remember that drug offenses normally have fewer elements than "crimes involving moral turpitude," and so are easier to "admit."

[40] *Matter of K-,* 9 I. & N. Dec. 715 (BIA 1962); *but compare US ex rel. De La Fuente v. Swing,* 239 F. 2d 759 (5th Cir. 1956); *Matter of G-M-,* 7 I. & N. Dec. 40, 42 (AG 1956); *but see Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

[41] *Matter of G-,* 6 I. & N. Dec. 9 (BIA 1953); *Matter of G-,* 1 I. & N. Dec. 225 (BIA 1942); *Matter of M-C-*, 3 I. & N. Dec. 76 (BIA 1947).

[42] *Matter of E-V-*., 5 I. & N. Dec. 194 (BIA 1953) (P.C. §1203.4 expungement); *Matter of G*, 1 I. & N. Dec. 96 (BIA 1942) (dismissal pursuant to Texas statute); *Matter of Winter*, 12 I. & N. Dec. 638 (BIA 1967, 1968) (case placed "on file" under Massachusetts statute); *Matter of Seda*, 17 I. & N. Dec. 550 (BIA 1980) (effective pre-IIRIRA state counterpart of federal first offender provisions, no conviction or admission); but see also *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988), recognized as overruled by subsequent legislation, *Matter of Roldan-Santoyo* 22 I. & N. Dec. 512 (BIA 1999), providing pre-IIRIRA definition for resolutions not amounting to a conviction.

an INS officer or immigration judge.[43] However, there is no guaranteed that a person who is acquitted will be protected from independent admissions.

In the most recent Ninth Circuit decision on this issue, the court found that the non-citizen's admission to a doctor of using marijuana during his medical examination for his immigrant visa was sufficient under the INA to establish that he committed acts which constituted the essential elements of the violation of Philippine controlled substance law.[44] Admissions by juveniles should not trigger inadmissibility under this provision because such admissions are only to acts of juvenile delinquency--to civil, not criminal, law violations.[45]

PRACTICE POINTER: Beware! The "reason to believe" suspected drug-trafficker ground at INA § 212(a)(2)(C) is an entirely separate ground of inadmissibility and is not limited by the requirements of a "qualifying admission" outlined above. It is not based on the "elements" of a crime, does not require a conviction, and is subject to a much lower standard of proof. See discussion in subsequent portions of this practice advisory in forthcoming editions of the ASISTA newsletter.

[43] *Matter of C.Y.C.*, 3 I. & N. Dec. 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); *Matter of E.V.*, *supra*, (expungement under P.C. §1203.4 controls even where admission made to immigration judge). But *see Matter of I*, 4 I. & N. Dec. 159 (BIA, AG 1950) (independent admission supports exclusion where alien convicted on same facts of lesser offense not involving moral turpitude.)

[44] *Pazcoguin, supra* note 38, at 1214-15. The above-cited protections only applied to an admission to immigration officials, not to the doctor.

[45] *Matter of M-U-*, 2 I. & N. Dec. 92 (BIA 1944); *Matter of Devison*, 22 I. & N. Dec. 1362 (BIA 2000); but *see US v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997) (juvenile's guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant's minority status).

Getting Help on Your Case

Understanding the immigration consequences of your client's criminal conviction(s) or criminal history can, at first, appear daunting. In light of the complexities in trying to understand the immigration consequences of crimes, the ASISTA team includes Annie Benson and Jonathan Moore, two nationally recognized experts in the area of immigration law & crimes. They are available to provide individual technical assistance to you on your case.

For assistance on crime-related issues please contact:

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- **Annie Benson:** abenson@defensenet.org **360-385-2538**

UPCOMING EVENTS AND TRAININGS

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This publication is supported by Grant No. 2009TAAXK009 awarded by the United States Department of Justice, Office on Violence Against Women. The opinions, findings, and recommendations expressed in this document are those of the author(s) and do not necessarily reflect the views of the United States Department of Justice, Office on Violence Against Women.