

### Diversion Program Pleas and Immigration Law

State criminal convictions can create numerous challenges for noncitizens who are in removal proceedings or applying for immigration relief. Diversion program type pleas, such as conditional pleas, treatment court pleas, and Interim Probation, are problematic for noncitizen clients because immigration law does not recognize state court vacatur of conviction for rehabilitative reasons, but these programs often condition a promise of future vacatur and reduction of the gravity of the conviction on an up-front guilty plea and successful participation in a treatment program. The non-citizen is then subject to the immigration consequences of the original conviction and does not receive any benefit under immigration law from the subsequent reduction.

#### The Definition of “Conviction” Under Immigration Law

The Immigration and Nationality Act defines a conviction for immigration purposes: “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 those required for a conditional plea or treatment court plea, plus court ordered treatment, will satisfy the immigration statute’s conviction definition, even if defendant complies with the conditions and the plea is subsequently withdrawn. These up-front convictions can serve as a basis for deportation (‘removal’) or denial of important immigration benefits, such as lawful resident status (green card) and citizenship and for immigration purposes, result in *two* convictions pursuant to the decision in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

#### Matter of Pickering

In *Pickering*, the Board of Immigration Appeals specifically addressed conviction vacatur. The BIA held that when analyzing the immigration consequences of a conviction, the federal government only recognizes state court vacatur that occurred as a result of a procedural or substantive defect. Therefore, vacatur that occur solely for rehabilitation or immigration hardship still fall within the INA definition of “conviction.”

To avoid problematic diversion pleas consider the following strategies:

- Entering a pretrial diversion plea that carries no adverse immigration consequences, and ensuring that the post-vacatur reduction is to an equally immigration-safer conviction.
- Entering a pretrial diversion agreement that *does not require* a formal plea before the court because it will avoid a conviction for immigration purposes
- Rely on CPL § 216.05(4), which permits a judge to determine that an upfront plea is not required when severe collateral consequences (e.g., adverse immigration consequences) would likely result.

Please reach out to the Long Island Regional Immigration Assistance Center regarding your assigned noncitizen clients facing a diversion program plea so that we can discuss strategies to ensure that the diversion agreement is immigration-safe.

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