CRIMMIGRATION COMMUNICATION

LONG ISLAND
REGIONAL IMMIGRATION ASSISTANCE CENTER

Filing A Notice of Appeal Preserves the Finality Argument in Removal Proceedings

Sometimes, an attorney's best efforts to understand a client's immigration status, learn about the potential negative consequences of the charges the client is facing, and zealous efforts to negotiate a plea that will mitigate those consequences fails. Then, all we can do is explain to a client what impact the plea will have on the client's immigration status. If a client fully understands the negative immigration impact and clearly wants to accept the People's offer, the client may indeed elect to accept a guilty plea to a deportable offense. So, are we as attorneys left with no way to protect our clients? No. We can take one final step to set our client in a favorable position in removal proceedings. File a Notice of Appeal.

Immigration Law is a creature of Congress and the federal government. As such, the immigration law (The Immigration and Nationality Act, or INA) defines important terms that are otherwise defined in the varied laws of the fifty states. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which, inter alia, contained a new definition of the term "conviction." INA §101(a)(48) focuses on the "formal judgement of guilt," or, if judgement has been withheld, an admission of "facts sufficient to warrant a finding of guilt," coupled with a form of "punishment, penalty, or restraint on liberty" to define conviction. [This definition of conviction is why immigrants who make an up-front plea of guilty that is later vacated and reduced after successful completion of court-imposed conditions will not gain the benefit of that vacatur in removal proceedings (Matter of Pickering, 23 I & N Dec. BIA 2003).]

However, Congress said nothing there about appeals or conviction finality. The Board of Immigration Appeals, an administrative court which decides most immigration appellate cases, as well as the federal courts, had recognized before 1996 that a conviction overturned on appeal could not support an order of removal. Pino v. Landon, 349 US 901 (1955). The 1996 law introduced ambiguity into the long-held rule. Despite the BIA's "arbitrary and unreasonable" attempt in 2018 to impose a "presumption of finality," subsequent litigation before the Second Circuit has clarified the rule. Brathwaite v. Garland, 3 F.4th 542 (2d Cir 2001).

In Matter of J.M. Acosta, 27 I & N Dec. 420(BIA 2018), the BIA imposed a new rule requiring the non-citizen to prove that an appeal that would "relate to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings" was indeed pending if the time for filing an appeal had expired. This rule was particularly troubling in New York, given the generous standards set forth in CPL §460.30, allowing up to a year to file a late notice of appeal under certain circumstances. The Second Circuit found that the definition of "conviction" in the INA was ambiguous, and even assuming that authority to impose conditions on that rule exists in the BIA, the conditions imposed in J.M. Acosta did not survive.

Thus, where a client has been convicted of a deportable offense and will face removal proceedings, filing a Notice of Appeal will preserve the finality argument. It will prevent the client from entering or continuing with removal proceedings, prevent the conviction from barring relief in removal proceedings, and will prevent the mandatory detention triggered by the conviction at issue. File a Notice of Appel to protect your client when a conviction triggers deportability.

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