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Practical Analysis of Immigration and Nationality Issues

"CONVICTION" AS DEFINED UNDER THE IMMIGRATION AND NATIONALITY ACT: AN EVOLVING MEANING

by

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INTRODUCTION

To be removable from the United States for criminal activity in most instances, an alien must stand convicted of specified categories of criminal offenses. State criminal procedures, including forms of convictions, differ widely. The states employ a variety of statutory mechanisms to mitigate the consequences of criminal convictions for policy purposes, e.g., to provide an opportunity for first time offenders who successfully complete rehabilitative requirements to start with a clean slate.

The goals of criminal statutes differ from the goals of the immigration statutes. The criminal statutes anticipate the individual's continued relationship to American society. While the citizen criminal will remain in the United States, the alien criminal may be subject to civil deportation consequences subsequent to satisfying his criminal liability. Even where the prosecuting jurisdiction expunges a criminal conviction upon successful completion of court-imposed conditions, an alien defendant remains "convicted" for immigration purposes.

With the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (enacted Sept. 30, 1996) ("IIRIRA"), Congress created the first statutory definition of conviction under the Immigration and Nationality Act ("the Act"). The definition resolved at least one significant legal issue, left a number of questions unanswered, and spawned significant litigation.

This *Briefing* will address the following questions:

1. When does a criminal conviction meet the definition of a conviction under section 101(a)(48)(A) of the Act?

The Issue In Brief

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2. Which criminal convictions, as mitigated by post-conviction relief or modification, retain vitality for immigration purposes?

◆ Previously Prevailing Standard of Conviction for Immigration Purposes

Prior to 1996, a lengthy body of case law addressed whether various criminal dispositions would equate to a conviction for purposes of removal from the United States. The 1996 statutory definition altered the prevailing jurisprudential standard to evaluate whether a conviction existed for immigration purposes as set forth by the Board of Immigration Appeals in *Matter of Ozkok*.[1]

Under *Ozkok*, a conviction would sustain a charge of deportability if a finding of guilt, a guilty plea, or a nolo contendere plea had been entered. Deferred adjudications of guilt qualified as convictions only in the absence of the possibility of further proceedings regarding guilt or innocence. Thus, under *Ozkok*, a state deferred adjudication that provided for a contingent right to contest guilt did not equate to a conviction.[2] *Ozkok* was widely upheld by federal circuit courts of appeal.[3]

In addition to meeting the *Ozkok* criteria, an alien's criminal conviction did not support a finding of deportability until it became final. Generally, a conviction attained finality when the alien had either exhausted or waived his direct appeal rights, or the appeal was resolved in the government's favor.[4] During the pendency of an alien's direct appeal of a criminal conviction, the Immigration and Naturalization Service did not commence deportation proceedings.[5] If commenced on the basis of a criminal conviction under such direct appellate review, the Immigration Judge would have a legal basis to terminate the proceedings. Direct appeals for purposes of finality were interpreted to mean direct appeals of right, and did not include the potential for discretionary review on direct appeal. For example, the Board held in *Matter of Polanco*[6] that an alien who did not exercise his direct appeal of right under New Jersey law had a final conviction despite the potential for seeking a discretionary *nunc pro tunc* appeal. Of significance to the Board in *Polanco* were the indeterminate time available to file the appeal and the appeal's discretionary nature. The Board referenced the Ninth Circuit's analysis in *Morales-Avardo v. INS*,[7] analogizing discretionary appeals of right to the pendency of post-conviction collateral attacks, which do not eliminate a conviction's immigration effect.[8]

◆ Not Addressed Under *Ozkok*

The *Ozkok* standard did not address the effect of state post-conviction remedies, e.g., expungements, to mitigate the criminal liability attached to a conviction. The Board of Immigration Appeals and federal courts examined this issue in a long line of cases with differing results, depending on various factors, e.g., the nature of the crime. Generally, the expungement of a controlled substances crime did not eliminate the immigration consequences.[9] If, however, the controlled substances conviction was expunged under the Federal First Offender Act, 18 U.S.C. § 3607(a), or a state equivalent, the conviction would not support an order of deportation.[10] On the other hand, the general rule under the Act for crimes involving moral turpitude provided that an expungement of the criminal conviction also operated to avoid deportation consequences.[11]

◆ The Statutory Definition Under Section 101(a)(48)(A) of the Act

In 1996, Congress amended the Act via section 322(a) of the IIRIRA to include a statutory definition of conviction. Section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) provides:

> 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—

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> (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.

The 1996 definition attempted to achieve uniformity in the immigration consequences arising from different forms of deferred adjudications. Rather than have a deferred adjudication constitute a conviction in some jurisdictions and not others depending on the sequence of events, the statute now encompasses all deferred adjudications as convictions. The interpretation is explicitly supported by the legislative history, as described in the Congressional Conference Committee Report accompanying IIRIRA:

> This section deliberately broadens the scope of the definition of "conviction" beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). As the Board noted in Ozkok there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered "convicted" have escaped the immigration consequences normally attendant upon conviction. *Ozkok, while making it more difficult for alien criminals to escape such consequences, does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien's future good behavior.* For example, the third prong of Ozkok requires that a judgment of adjudication of guilt may be entered if the alien violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. *This new provision, by removing the third prong of Ozkok, clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws.*[12]

While speaking specifically to deferred adjudications, the statute did not address the issues of finality or post-conviction measures to amend the original conviction or modify a sentence. These issues are the subject of significant debate and development in the case law.

◆ Criminal Proceeding Required

As a threshold issue, the type of proceeding giving rise to the entry of a judgment of guilt matters. This issue may manifest in adjudicative settings that do not afford traditional constitutional safeguards, e.g., the right to appointed counsel, or that rely on a standard of proof less than the "beyond a reasonable doubt" standard. In *Matter of Eslamizar*[13] the Board held that an alien found guilty of a "violation" in a proceeding under section 153.076 of the Oregon Revised Statutes did not have a conviction for immigration purposes. The Board reasoned that Congress, without specifically saying so in section 101(a)(48)(A), intended to refer to a judgment of guilt from a criminal proceeding. For example, civil judgments resulting in the payment of fines or punitive damages had never been used to support removability. According to the Board, Congress intended that the proceeding resulting in a conviction be criminal in nature under the laws of the prosecuting jurisdiction within the traditional confines of criminal process. A guilty disposition in other than a criminal proceeding does not rise to the level of a conviction for immigration purposes.

THE MEANING OF SECTION 101(A)(48)(A) OF THE ACT

Section 101(a)(48)(A) of the Act was enacted against a background of significant legal analysis as reflected in a large body of case law. Some of the case law remains intact in the aftermath of the definition, other aspects have changed, and a number of questions remain.

Since the enactment of the federal statutory definition of a "conviction" in September 1996, the Board and the Attorney General have issued a number of precedent decisions interpreting the definition.[14] Most of these precedent decisions examine whether a particular court action mitigating the consequences of a conviction constitutes a "conviction" within the meaning of section 101(a)(48)(A) of the Act.[15] In *Matter of Song*, the Board addressed a distinct, but related, issue involving whether a state court's sentence

modification will be given effect under section 101(a)(48)(B) of the Act.[16] Reactions to these decisions vary among the circuits.

An examination of the sequence of events resulting in the entry of a criminal conviction, as well as post-conviction appellate review, is critical to evaluating the subsequent immigration effect. To this end, the Board has considered the application of section 101(a)(48)(A) of the Act to various court actions disposing of criminal cases, including: (1) accepting a defendant's plea to a criminal charge; (2) expunging or vacating a conviction; (3) granting pardons; (4) findings of guilt entered outside the United States; (5) findings of guilt that do not constitute convictions *ab initio*; and (6) sentence modification.

◆ **Type of Plea**

Courts accept a variety of pleas in criminal proceedings, in addition to pleas of not guilty and guilty. The plea of *nolo contendere* represents a common alternative, which was long established as supporting a conviction for immigration purposes before *Ozkok*.[17] Moreover, *nolo contendere* pleas are specifically referenced in section 101(a)(48)(A), as they were under *Ozkok*.

A related type of plea, known as the Alford plea, which originates from *North Carolina v. Alford*,[18] has been held to constitute a conviction in the immigration context.[19] In entering into an Alford plea, the defendant does not admit guilt, but accepts the entry of a guilty plea in light of the strength of the state's evidence against him. Such pleas are generally categorized as the functional equivalent of a "nolo" plea or a guilty plea. The advantage to a defendant of such a plea is that the plea pertains to the current case and may not be used as evidence of the defendant's admission of guilt in a subsequent proceeding. For immigration and criminal purposes, a "nolo" or an Alford plea supports the fact of a conviction, not whether the defendant admitted the criminal conduct.

A murkier situation arises if a defendant enters into a conditional plea. These types of pleas would need to be evaluated under the individual circumstances of the case, both before and after the enactment of section 101(a)(48)(A) of the Act. In a recent unpublished decision, the Board declined to accord immigration effect to a conditional plea.[20] The respondent entered a conditional guilty plea under District of Columbia Superior Court Rule of Criminal Procedure 11(A)(2) to the charges of unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. The conditional plea agreement reserved the right to directly appeal the trial court's denial of the respondent's motion to suppress, which presented a dispositive legal issue. The Board concluded that this conditional plea was not sufficiently final to meet the definition of a conviction and upheld the Immigration Judge's termination of removal proceedings.[21]

◆ **Rehabilitative Measures**

States have individually enacted rehabilitative laws, each with its own purpose and parameters, to mitigate the legal consequences of a criminal conviction. The question then arises whether state actions taken to vacate, expunge, or otherwise erase a conviction should be accorded effect in the immigration context. For purposes of this *Briefing*, it is useful to divide these rehabilitative measures into three types: first, "deferred adjudications" where a formal judgement of conviction is withheld after guilt has been established; second, "expungements" of non-drug convictions where a formal judgment of conviction is entered and then erased due to post-conviction events; and third, expungements of drug convictions.

Deferred Adjudications . In its first case analyzing the new statutory definition, the Board, in *Matter of Punu*,[22] was presented with the issue of whether a deferred adjudication under article 42.12, section 5 of the Texas Code of Criminal Procedure is a conviction for immigration purposes. In light of the statutory language of section 101(a)(48)(A) of the Act and the legislative history, the Board found that the standard set forth in *Ozkok* was superseded by the new statutory definition and concluded that the respondent's deferred adjudication is a conviction within the meaning of section 101(a)(48)(A) of the Act.

To date, the federal circuit courts have upheld the Board's decision in *Punu*.[23] Since the enactment of section 101(a)(48)(A) of the Act it is clear that a deferred adjudication constitutes a conviction and will support a finding of deportability, obviating the need to examine this type of state ameliorative procedure. The structure of section 101(a)(48)(A) in comparison to the *Ozkok* standard, as well as the legislative history, target deferred adjudications.

Expunged Non-narcotic Convictions. Prior to the enactment of the statutory definition of the term "conviction," the Board consistently held that expunged or otherwise vacated convictions (except for drug offenses) were not considered convictions and could not support a finding of

deportability.[24] In contrast, following the enactment of section 101(a)(48)(A) of the Act, the Board determined that expunged or otherwise vacated convictions remain convictions for immigration purposes. This change is exemplified in the *Luviano* case that was decided by the Board in a precedent decision issued prior to the adoption of the statutory definition and subsequently decided by the Attorney General in 2005, well after the enactment of section 101(a)(48)(A) of the Act.[25]

As the Tenth Circuit observed, the Board set forth its approach to the legal effect of expunged non-narcotic convictions in a trilogy of cases decided after the enactment of the "conviction" definition.[26] The Board held that a conviction expunged or vacated based on immigration hardships or rehabilitation remained a conviction for immigration purposes.[27] However, convictions expunged or otherwise vacated on the basis of a substantive or procedural defect in the underlying criminal proceeding will not be considered convictions for immigration purposes.[28]

In the first of these cases, *Matter of Roldan*,[29] the Board was presented with the issue of whether a drug possession conviction vacated pursuant to section 19-2604(1) of the Idaho Code constitutes a conviction under section 101(a)(48)(A) of the Act. In finding that the vacated conviction remained valid for immigration purposes, the Board adopted a broad interpretation of section 101(a)(48)(A) of the Act, holding that "no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute."[30] The Board explicitly limited its interpretation of the "conviction" definition to convictions expunged or vacated under a state rehabilitative statute, "rather than as the result of a procedure that vacates a conviction on the merits or on the grounds relating to a statutory or constitutional violation."[31]

After first considering the definition of a conviction for immigration purposes, the Board reexamined its treatment of expunged convictions in light of the new definition. The Board observed that it would "defy logic" to consider a deferred adjudication a conviction, yet give effect to a technical erasure of a conviction.[32] To treat these two types of rehabilitative statutes–deferred adjudications and expungements–differently would be contrary to clear Congressional intent.[33] Both the statutory text and the legislative history showed that Congress clearly intended that the focus be on the *original* finding of guilt and imposition of sentence. Congress also clearly intended that there be a uniform federal approach in making such a determination. Consequently, the Board found that it could no longer treat all state expungements as eliminating the immigration effects of the conviction because the ultimate effect of the post-conviction relief statute depended on whether the *original* finding of guilt survived the state court action.[34]

The following year, the Board turned its attention to that issue in *Matter of Rodriguez-Ruiz*, *supra*. The Board distinguished its holding in *Roldan* and found that a conviction vacated pursuant to Article 440 of the New York Criminal Procedure Law does not fit within the meaning of section 101(a)(48)(A) of the Act. Without providing the text of Article 440 of the New York Criminal Procedure Law or an analysis of the statute, the Board held that it was "neither an expungement statute nor a rehabilitative statute."[35] The Board did examine the state court order that vacated the respondent's conviction. According to the order, the respondent's conviction was vacated "on the legal merits" of the underlying proceedings. Citing 28 U.S.C. § 1738, the Board concluded that it was obliged to give full faith and credit to state court judgments, and, consequently, it would not look behind the state court judgment to determine whether the court acted in accordance with state law in vacating a conviction. The Board gave effect to the respondent's vacated conviction and terminated the removal proceedings.

Next, in *Matter of Pickering*, *supra*, the Board confronted an issue not directly controlled by either *Roldan* or *Rodriguez-Ruiz*. *Pickering* involved a Canadian court order quashing the respondent's conviction for drug possession. The Board followed the approach adopted by a number of federal circuit courts and held that in determining whether to give effect to a vacated conviction it would examine the reason for the subsequent vacatur of the conviction.[36] A conviction set aside for reasons solely related to post-conviction events such as rehabilitation or immigration hardships will remain a conviction for immigration purposes, while a conviction set aside due to a defect in the underlying proceeding is eliminated.

In determining the purpose for the subsequent vacation of Pickering's conviction, the Board examined the law under which the Canadian court acted, the order itself, and the respondent's reasons for requesting the court to

quash the conviction. The Board was unable to ascertain the law under which the court acted, nor could it discern the basis for the court's action from the order. The Board examined an affidavit submitted by the respondent in support of his request for post-conviction relief in which he stated that he sought to eliminate his drug conviction because it precluded him from immigrating to the United States. The Board concluded that the respondent's vacated drug conviction remained a conviction under section 101(a)(48)(A) of the Act because it appeared that the conviction was quashed solely for immigration purposes.

In sum, in interpreting the statutory definition of a "conviction," the Board has made a critical distinction between convictions vacated on the basis of a procedural or legal defect in the underlying criminal proceedings, as in *Rodriguez-Ruiz,* and convictions vacated because of post-conviction events such as rehabilitation or immigration hardships, as in *Roldan*. In deciding whether a conviction has been vacated due to a substantive or procedural defect, the Board will examine the statute under which the court acted, the post-conviction court order, and the respondent's moving papers to ascertain the reasons for the court action. While this distinction is critical, it is not always easy to make.[37] Where the conviction constitutes the factual basis for the sole charge of inadmissibility or deportability, the Department of Homeland Security bears the burden of proving that the expungement was based on post-conviction events such as immigration hardships or rehabilitation.[38]

An alien defendant's assertion that he was not properly advised of the immigration consequences of a criminal conviction serves as a frequent basis for seeking an expungement. Many states have enacted statutes that require a criminal defendant to be advised of the immigration consequences of entering into a guilty plea.[39] It appears that in these jurisdictions an alien whose conviction is vacated due to his or her failure to receive such advice is not convicted within the meaning of section 101(a)(48)(A) of the Act.[40]

In February 2006, the Board employed its "*Roldan-Rodriguez-Pickering*" approach and gave effect to a state court expungement of a drug conviction pursuant to section 2943.031 of the Ohio Revised Code because the respondent was not advised of the immigration consequences of his plea.[41] The Board held that in "the absence of a statutory directive to the contrary, we are required by 28 U.S.C. § 1738,[42] to give full faith and credit" to the state court judgement.[43]

The broader issue presented is whether giving effect to an expungement based on failure-to-advise is consistent with the Board's general rule of not giving effect to an expungement entered pursuant to a state rehabilitative statute, especially where guilt is not an issue. In giving full faith and credit to the state court judgment, the Board accepts the state court's determination as to what constitutes a procedural or legal defect.

Except for the treatment of certain convictions for first time drug offenders,[44] the Board's "*Roldan-Rodriguez-Pickering*" approach has been upheld in the United States Courts of Appeals for the First, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[45] Recently, in determining whether to give effect to an alien's vacated drug conviction, the Third Circuit analyzed the Board's approach and concluded that it is a reasonable interpretation of section 101(a)(48)(A) of the Act.[46] The Third Circuit found that the Board's determination preserved a long-standing "distinction between substantive and rehabilitative vacaturs [that] is rooted in the history of immigration enforcement."[47] The Court observed that it was providing proper deference to the Board under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,[48] as well as avoiding potential constitutional issues.[49] The Court enunciated a categorical test to determine the basis for a vacated conviction.[50]

To date, only the Fifth Circuit has rejected the Board's approach to the legal effect of expunged non-drug convictions.[51] The Fifth Circuit has determined that the language of section 101(a)(48)(A) of the Act encompasses all judgments of guilt entered by a court, including those that have been vacated due to procedural or substantive defects in the underlying criminal proceeding.[52] The court observed that Congress could have included an exception for vacated convictions in the definition of "conviction" at section 101(a)(48)(A) of the Act, but did not.[53] "This lack of an exception for vacated convictions. . .strongly implies that Congress did not intend such exception."[54] Notably, another Fifth Circuit panel observed that its Circuit "is out of step with the rest of the nation."[55] The Board has declined to adopt the Fifth Circuit's approach outside that Circuit.[56]

Expunged Narcotic Convictions. Prior to the enactment of IIRIRA, expunged drug convictions historically were treated differently from expunged non-drug convictions. The general rule set forth by the Attorney General in 1959 was that an expunged drug conviction will support an order of deportation.[57] Over time, exceptions to the general rule developed so that under certain circumstances an expunged drug conviction

would not support an order of deportation.[58] As discussed, under the FFOA, a federal rehabilitative statute, a first-time drug offender who commits a simple drug possession offense receives a deferred adjudication and avoids the legal consequences of a criminal conviction. Following the enactment of the FFOA, and in response to the Ninth Circuit's holding in *Garberding v. INS*, [59]the Board held in *Matter of Manrique* that a first-time drug possession conviction expunged under the FFOA or a state equivalent would not support an order of deportation.[60]

After the enactment of IIRIRA, the Board has employed its *"Roldan-Rodriguez-Pickering"* approach in determining whether to give effect to the subsequent vacation of a drug conviction. Prior to its recent precedent decision in *Matter of Adamiak, supra.*,[61] the Board examined the purpose of the subsequent vacation of the conviction to determine whether the vacated conviction remains a conviction for immigration purposes in several unpublished cases.[62] The Third Circuit recently set forth and applied the Board's *"Roldan-Rodriguez-Pickering"* approach in deciding whether to give effect to a vacation of an alien's drug conviction.[63]

Consistent with this approach, the Board has determined that drug convictions expunged pursuant to state rehabilitative provisions, such as state counterparts to the FFOA, remain convictions for immigration purposes. In *Matter of Roldan, surpa,* the Board was confronted with the issue of whether its holding in *Manrique* survived the enactment of the statutory definition of conviction. The Board held that the policy exception in *Manrique* was superseded by the enactment of section 101(a)(48)(A) of the Act, which gives no effect to state rehabilitative actions in immigration proceedings.[64] It observed that Congress defined the term "conviction" and did not provide any statutory exceptions to the definition even though it was presumably aware of the administrative exception in *Manrique*. The Board concluded that adopting such a policy exception after the enactment of section 101(a)(48)(A) of the Act, would be "tantamount to creating a new form of relief that is not provided for under the Act."[65]

To date the Ninth Circuit alone has rejected the Board's holding in *Roldan*, insofar as it determined that the policy exception in *Manrique* was superseded by the statutory definition of conviction.[66] In *Lujan-Armendariz v. INS*,[67] the Ninth Circuit held that the enactment of section 101(a)(48)(A) of the Act did not repeal the FFOA, and did not alter the rule set forth by the Board in *Matter of Manrique*.[68] The Ninth Circuit observed that there was no indication that Congress intended to repeal the FFOA either expressly or by implication.[69] The Court also determined that on equal protection grounds, an alien whose offense is expunged under a state rehabilitative statute cannot be deported if he or she would have received FFOA treatment if prosecuted in federal court. Thus, the Ninth Circuit concluded that the aliens, Lujan-Armendariz and Roldan-Santoyo, did not stand convicted under federal immigration law and were not subject to removal. The Ninth Circuit has extended the *Lujan-Armendariz* exception to aliens whose state convictions were expunged while their appeals were pending before the Board.[70]

In *Matter of Salazar*,[71] the Board responded to the Ninth Circuit's *Lujan-Armendariz* decision. In that case, the specific question before the Board was whether the respondent's adjudication of guilt, deferred pursuant to article 42.12, section 5(a) of the Texas Code of Criminal Procedure following her plea of guilty to drug possession, is a conviction under section 101(a)(48)(A) of the Act.[72] In a decision dated February 22, 1999, the Immigration Judge, relying on *Matter of Manrique, supra*, determined that the respondent's deferred adjudication did not constitute a conviction because she would have been eligible for FFOA treatment had she been prosecuted in federal court. The Board stated that the issue presented was "whether, because of the nature of the crime, we should carve out an exception to accord special treatment to first-time drug offenders who have received state rehabilitative treatment under a state law."[73] The Board concluded that nothing in the statutory language or the legislative history indicated that Congress envisioned any exceptions to the federal definition of a conviction set forth at section 101(a)(48)(A) of the Act. Accordingly, the Board held that a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction under section 101(a)(48)(A) of the Act, except in the Ninth Circuit. Thus, the Board reaffirmed its decision in *Roldan* and declined to apply *Lujan-Armendariz* on a nationwide basis.

The issue of whether a drug conviction expunged under the FFOA will be given legal effect in immigration proceedings remains unsettled. The Board noted in *Roldan* that it left unanswered "the question of the effect to be given in immigration proceedings to first offender treatment accorded to

an alien under 18 U.S.C. § 3607 by a federal court to a case when that issue is directly presented."[74] In 2003, the Third Circuit observed that neither the Board nor the federal courts of appeals have "squarely decided whether proceedings that have been dismissed under the FFOA should be excepted from" the statutory definition of a conviction.[75] The Seventh Circuit recently echoed that observation when it stated that it did not know what the Board would do if it were confronted with the issue of whether a FFOA conviction would support a finding of removability.[76]

If the Board follows its "*Roldan-Rodriguez-Pickering*" approach, it would seem that a drug conviction expunged under the FFOA, a federal rehabilitative statute, would be treated the same as a state court expungement pursuant to a rehabilitative statute. On the other hand, given the express language of 18 U.S.C. § 3607 and the well-established policy considerations, it may be decided that the FFOA survived the statutory enactment of the definition of the term "conviction" similar to juvenile delinquency determinations under the Federal Juvenile Delinquency Act ("FJDA") and its state counterparts.[77] If that were the case, it would be difficult to avoid a "*Garberding*"[78] extension to include those first-time drug offenders who have received state rehabilitative treatment if the offender would have been eligible for treatment under the FFOA had the prosecution been held in federal court—just as the Ninth Circuit did in *Lujan-Armendariz v. INS, supra.*

◆ **Pardons**

The adoption of the statutory definition of "conviction" has not altered the legal effect given pardons under the Act.[79] Both before and after the enactment of IIRIRA, a pardon was effective to waive certain listed criminal offenses. Prior to the enactment of the IIRIRA, former section 241(a)(2)(A)(iv) of the Act provided that clauses (i) (crimes involving moral turpitude), (ii) (multiple criminal convictions), or (iii) (aggravated felony) of section 241(a)(2)(A) of the Act, as pertaining to grounds of deportation, shall not apply if an alien has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states.[80] IIRIRA added high speed flight offenses to the list of criminal offenses that can be waived if the alien receives a presidential or gubernatorial pardon.[81]

Even though a pardon is an extraordinary remedy that cures all consequences of a criminal conviction,[82] section 237(a)(2)(A)(v) of the Act, does *not* extend the effect of a pardon to other criminal convictions that render an alien deportable, such as controlled substance convictions under section 237(a)(2)(B), certain firearm convictions under section 237(a)(2)(C), or convictions for acts of domestic violence under section 237(a)(2)(E)(i). For example, the Board held in *Matter of Suh, supra*, that the respondent's pardon did not waive his removability as an alien convicted of a crime of domestic violence or child abuse under section 237(a)(2)(E)(i) of the Act because that section is not specifically included in section 237(a)(2)(A)(v).

◆ **Convictions Entered Outside the United States**

The adoption of the federal statutory definition of conviction has not altered the Board's general rule that foreign convictions will be treated the same as domestic dispositions. In *Matter of Dillingham*,[83] the Board addressed the effect of an expungement of an alien's foreign drug-related conviction pursuant to a foreign rehabilitation statute. It held that a foreign expungement is not effective to prevent a finding of inadmissibility even if the alien would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) had the alien been prosecuted in the United States.

The Ninth Circuit reversed the Board in *Dillingham v. INS*,[84] and extended its *Lujan-Armendariz* exception to convictions expunged under the laws of a foreign country. The Court held that a foreign expungement will be given full faith and credit if the alien would have qualified for expungement under the federal first offender statute had the conviction occurred in the United States. *See* 18 U.S.C. § 3607(a).

◆ **Findings of Guilt That do not Constitute Convictions Ab Initio**

In 2000, in *Matter of Devison*,[85] the Board held that an adjudication of youthful offender status pursuant to Article 720 of the New York Criminal Procedure Law, which corresponds to a determination of juvenile delinquency under the FJDA, does not constitute a judgment of conviction for a crime within the meaning of section 101(a)(48)(A) of the Act.[86] In addition, under New York Law, the resentencing of a youthful offender following a violation of probation does not convert the youthful offender adjudication into a judgment of conviction.

Although decided after the enactment of section 101(a)(48)(A) of the Act, the Board's *Devison* decision is consistent with its well-established

view "that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[87] Additionally, the Board observed that the New York procedure vacated the conviction *prior to* the initial sentencing of the defendant.

Earlier this year, the Sixth Circuit applied the Board's reasoning in *Devison* and upheld the Board's decision that an alien sentenced to probation as a "youthful trainee" under Michigan's Holmes Youthful Trainee Act, Mich. Comp. Laws §§ 762.11-16, for his offense of criminal sexual conduct in the third degree, was convicted within the meaning of section 101(a)(48)(A) of the Act.[88] In its decision, the Sixth Circuit observed several important distinctions between Michigan's youthful trainee program and the FJDA, found that Michigan's program was not analogous to the FJDA, and concluded that an alien's designation and sentencing as a youthful trainee under Michigan's program was more akin to a rehabilitative expungement than a finding of juvenile delinquency. The Court noted that unlike the FJDA, under Michigan's youthful trainee program,[89] a judge may revoke the youthful trainee status at any time, and a criminal action against a person is not completely vacated until an individual completes his or her probation or sentence. [90]

◆ **Sentence Modification**

A separate but related issue is whether a post-conviction sentence modification will be given effect in immigration proceedings. Prior to the enactment of IIRIRA, the Board gave effect to a sentence modification so that where an alien was re-sentenced for a crime, the new sentence—not the original sentence—was considered for immigration purposes.[91]

The issue here is *not* whether a particular criminal court action constitutes a conviction within the meaning of section 101(a)(48)(A) of the Act; instead, the issue is whether a post-conviction court order to classify an offense or modify a sentence will be given effect within the meaning of section 101(a)(48)(B) of the Act.

Section 101(a)(48)(B) of the Act provides:

> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

In *Matter of Song*,[92] the Board distinguished expunged convictions from sentence modifications. In *Song*, the respondent's 1992 conviction of a theft offense for which he was sentenced to one year in prison constituted an aggravated felony under section 101(a)(43)(G) of the Act, which requires a term of imprisonment of at least one year. In 1999, the criminal court reduced his sentence *nunc pro tunc* to 360 days. The issue before the Board was whether the original criminal sentence or the reduced sentence determined whether the respondent had been convicted of an aggravated felony. The Board determined that its decision in *Roldan* was not controlling because there the Board addressed only the definition of a "conviction" set forth in section 101(a)(48)(A) of the Act. Instead, this case was governed by section 101(a)(48)(B) of the Act, which defines a "term of imprisonment." The Board gave effect to the criminal court's sentence reduction and concluded that the respondent's theft offense could not be considered an aggravated felony under section 101(a)(43)(G) of the Act because he was no longer sentenced to a one-year term of imprisonment.[93]

Recently, in *Matter of Cota*,[94] the Board clarified its decision in *Matter of Song*, *supra*, and distinguished its holding in *Matter of Pickering*, *supra*. In *Cota*, the respondent's criminal sentence for his 2001 theft conviction was reduced from a 365 day jail sentence to 240 days for the sole purpose of avoiding immigration consequences. When the respondent requested the sentence reduction from the trial court he explained that he would be eligible for an immigration waiver if his criminal sentence was less than 365 days. He did not allege any substantive or procedural defect in the underlying conviction. The issue before the Board was whether to give effect to the respondent's sentence modification under *Song*, or to apply the *Pickering* rationale and disregard a modification to a conviction designed to mitigate immigration hardships.[95]

The Board concluded that the ultimate determination as to sentencing controls under section 101(a)(48)(B) of the Act. Thus, sentence modifications will be given effect for immigration purposes regardless of the reasons underlying the change in sentencing. The Board affirmed its decision in *Matter of Song*, gave full faith the credit to the respondent's sentence modification, and preserved the distinction between sentence modification and expungements.

This distinction between expunged convictions and sentence modifications is critical because convictions expunged pursuant to a rehabilitative statute or for immigration purposes are ineffective in immigration proceedings, whereas sentences modified for immigration purposes are effective. The DHS has unsuccessfully argued before the Board that such a distinction is invalid, asserting that there is no difference between modifying a sentence to avoid immigration consequences and expunging a conviction for the same purpose.[96]

The Ninth Circuit has upheld the Board's decision in *Matter of Song*, *supra*. In *Garcia-Lopez v. Ashcroft*,[97] the Ninth Circuit cited *Song* to support its finding that a state court order vacating or modifying a sentence is valid for immigration purposes and is distinguishable from the expunged convictions at issue in *Murillo-Espinoza v. INS*.[98] The Ninth Circuit emphasized that "a state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify an offense."[99] The Court explained that when a court classifies an offense or modifies a sentence it "is clearly construing the nature of the conviction pursuant to state law."[100] The Court concluded that a state court's designation of a "wobbler" offense as a misdemeanor was effective for purposes of applying the "petty offense" exception set forth in section 212(a)(2)(A)(ii)(II) of the Act.

Making a distinction between a state court expungement of a conviction and a state court order to re-classify an offense or modify a sentence, is not always obvious.[101] For example, in a case decided before the Board issued its decision in *Matter of Song, supra,* the Seventh Circuit was confronted with the issue of whether a post-conviction sentence modification was effective for immigration purposes.[102] In that case, the alien (Sandoval) was originally convicted following a plea of guilty to the offense of possession of more than 30 grams but less than 500 grams of cannabis pursuant to section 704(d) of the Ill. Rev. Stat, for which he was sentenced to a two-year period of probation.

Sandoval filed a post-conviction motion pursuant to the Illinois Post-conviction Hearing Act,[103] asserting that his guilty plea was invalid based on an ineffective assistance of counsel claim. Sandoval explained that when entering his plea, his attorney advised him not to be concerned about his status as an alien. The state court judge granted Sandoval's motion and modified his sentence to 24 months of first offender probation pursuant to section 710 of the Ill. Rev. Stat. Under section 710, probation may only be entered in the case of a first-time offender who had been found guilty of misdemeanor marijuana possession offenses involving no more than 30 grams of marijuana. Sandoval argued that he was no longer deportable under former section 241(a)(2)(B)(i) of the Act, because he had not been convicted of possessing more than 30 grams of marijuana. The Board, relying on its decision in *Roldan*, gave no effect to the subsequent state court action.

On review, the Seventh Circuit determined that the case was controlled by *Rodriguez-Ruiz*, not *Roldan*, because it does not involve a state rehabilitative scheme. Rather, the Illinois Post-conviction Hearing Act provides a remedy for defendants claiming substantial violations of their federal or state constitutional rights by allowing a collateral attack on the criminal conviction. The Court determined that in order to modify Sandoval's sentence, the state court must have vacated his original conviction. Accordingly, the Court evaluated the case under *"Roldan-Rodriguez-Pickering"* approach and gave effect to the expungement because it was based on a defect in the underlying proceedings. The question remains whether the case could have been considered solely as a case involving a sentence modification where the sentence modification would have been given effect regardless of the reasons for the state court action.

The Seventh Circuit recently refused to give effect to a post-conviction court order to re-classify a felony offense to a misdemeanor offense.[104] Although the Court analyzed the re-classification as a modified conviction under section 101(a)(48)(A) of the Act, it did not distinguish or identify the sentence modification issue. In so holding, the Court observed that under these circumstances it would be absurd for an alien whose conviction was modified for immigration purposes to escape deportation, while Pickering, whose conviction was eliminated for the same reasons, was ordered deported.[105] In *Matter of Cota, supra.*, the Board resolved this apparent dilemma by applying the statutory language at section 101(a)(48) of the Act that distinguishes between the terms "conviction" and "sentence."

- **Finality**

Prior to the enactment of section 101(a)(48)(A), a criminal conviction was clearly required to be final to sustain immigration consequences. The finality requirement emanated most prominently from the Supreme Court's decision in *Pino v. Landon*,[106] which

overturned *Pino v. Nicolls*.[107] In *Nicolls*, Pino had been convicted in a Massachusetts state district court of the offense of petty larceny (for the theft of 12 golf balls) and sentenced to a term of one year's imprisonment. The sentence was suspended, and Pino completed a one-year period of probation. At the end of the year, the Court revoked the sentence and placed the case "on file." By placing the case "on file," the district court could, at any point in the future, elect to impose sentence. The "on file" procedure required the defendant's consent. The exact trajectory of the case was extensive and unclear from the record. For example, the record did not contain a court order placing the case "on file," The First Circuit's conclusions as to the procedural posture of the case were based in part on testimony from the Assistant Clerk of the Court in explaining notations on the docket sheet.[108]

The First Circuit held that the "on file" procedure was sufficiently final to establish the existence of a conviction for immigration purposes, noting that the term "conviction" in the deportation context should be interpreted to "ensure that this legal determination has been made with reasonable certainty and finality."[109] Here, the First Circuit observed that the accused had been found guilty and had served probation for the crime. In the Court's view, the possibility of future proceedings in the event a sentence might eventually be imposed from which Pino could appeal and be granted a new trial, exceeded "the normal routine appellate review provided by law."[110] The Court was clear that finality is required, referencing the "ordinary processes of re-examination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definiteness, that the state has 'convicted' the alien."[111] The Court rejected the Government's argument that a conviction exists for immigration purposes once a verdict of guilty or finding of guilt has been made.[112]

The Supreme Court reversed *Nicolls* with the following two sentences: "*On the record here* we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of section 241 of the Immigration and Nationality Act. The judgment is reversed."[113] The Supreme Court did not provide a rationale for concluding that the Massachusetts "on file" procedure failed to meet the finality requirement. The "reasonable certainty and finality" standard enunciated by the First Circuit was not endorsed or rejected as incorrect.

On this hook hangs further development of the finality requirement in case law, including *Ozkok's* third prong, which made clear that deferred adjudications allowing for the possibility of future proceedings were not sufficiently final to sustain deportation. This broad interpretation preserved a contingent right to reexamination in a trial setting similar to the option that Pino argued remained available to him.

Of course, under *Ozkok*, the three-part test only applied to deferred adjudications. Where adjudication was not deferred, the alien would be convicted "if the court has adjudicated him guilty or has entered a formal judgment of guilt." This portion of the *Ozkok* definition, which is largely intact in the first part of section 101(a)(48)(A), implicitly contained a finality requirement. Arguably, then, by only eliminating *Ozkok's* third prong addressing specific types of deferred adjudications, Congress did not overwrite the requirement for a conviction to attain some form of "reasonable certainty and finality" in terms of exhaustion or waiver of direct appellate review of right. The legislative history, which directly references only deferred adjudications, supports this view, as does some of the developing case law.[114]

Section 101(a)(48)(A) could be read to mean that once the trial court has determined guilt and imposed sentence, a criminal conviction sustains removal consequences without concern for finality. For example, in *Montenegro v. Ashcroft*,[115] the Seventh Circuit Court of Appeals concluded that "IIRIRA eliminated the finality requirement for a conviction, set forth in *Pino*, even for aliens who were found guilty before April 1, 1997." This conclusion was not necessary, given that Montenegro's criminal conviction had attained finality under the *Ozkok* regime in light of his exhaustion of direct appellate review.

Montenegro was convicted on April 25, 1996, of possession of cocaine with intent to deliver. The trial court's disposition was affirmed on appeal on May 18, 1998.[116] On July 30, 1998, the INS charged Montenegro with removability on the basis of his controlled substances trafficking conviction.[117] Montenegro sought leave to appeal to the Illinois Supreme Court, which was denied on October 6, 1998.[118] An Immigration Judge ordered Montenegro removed on the basis of his criminal conviction on October 19, 1998. At the time of the removal order, Montenegro had a petition for certiorari pending before the United States Supreme Court.

Montenegro did not file an appeal of the Immigration Judge's decision with the Board of Immigration Appeals, instead bringing a habeas action in

district court in which he did not prevail.[119] In challenging the Immigration Judge's decision before the Seventh Circuit Court of Appeals, Montenegro argued that his conviction was not sufficiently final to sustain removal consequences. Yet, at the time the Immigration Judge ordered Montenegro removed, no avenue of direct appellate review of right remained open to him. In upholding the removal order, the Seventh Circuit Court of Appeals did not distinguish between type of review available, but stated that finality was not required under section 101(a)(48)(A) of the Act.[120]

In the Seventh Circuit, the Board, in an unpublished case, has relied on *Montenegro v. Ashcroft* to uphold an Immigration Judge's determination that an alien's criminal conviction could serve as a basis for removal during the pendency of a direct appeal of right.[121] Yet, previously, within the Seventh Circuit, the Board discussed the requirement of finality after IIRIRA. In *Matter of Onyido*,[122] a respondent convicted under Indiana law argued that his conviction was not final for immigration purposes. Without resolving whether finality survived IIRIRA, the Board determined that the conviction had attained sufficient finality given that the conviction was based on a guilty plea from which the respondent retained no right of direct appeal.[123]

Section 101(a)(48)(A) could also easily be read to incorporate the type of finality described in *Nicolls*, including "[j]udicial action on the motion for a new trial made immediately after verdict or finding of guilt and judicial action in the normal routine appellate review provided by law."[124] In *Griffiths v. INS*,[125] the Court analogized the "on file" procedure to a deferred adjudication and found that such a disposition could be final provided that both 101(a)(48)(A)(i) and (ii) were met, upholding the Board's reliance on *Punu* in reaching its decision below. The Court specifically reserved the question as to whether any type of finality is required in cases where there is a "formal judgment of guilt" under the first part of section 101(a)(48)(A) and went on to differentiate these types of cases. The Court stated that "[t]here are substantial practical differences between the situation faced by a defendant currently exercising a direct appellate right and that faced by a defendant with a theoretically available right to appeal that lay dormant until and unless the case is later brought forward off the file."[126] This distinction provides for a clear end point in either situation—the defendant who will have a final conviction upon waiver of appeal or exhaustion of the relevant direct appeal period, or the defendant who elects to participate in a deferred adjudication procedure.[127]

The rationale employed by the Board in distinguishing a vacatur based on a defect in the underlying legal proceedings from rehabilitative expungement actions suggests a resolution to the finality issue. As with a conviction overturned on direct appeal, the conviction vacated for substantive reasons no longer exists and cannot sustain removal. Yet, a more attenuated form of appellate review, or an expungement that does not result from legal or procedural error, does not eliminate immigration consequences.

CONCLUSION

Determining whether a conviction exists for immigration purposes under section 101(a)(48)(A) of the Immigration and Nationality Act may be straightforward in many cases; e.g., an adjudication of guilt and imposition of sentence by a criminal court that is upheld on direct appellate review of right. On the other hand, it may be necessary to evaluate various factors, including: (1) the adjudicative setting in which the disposition occurred; (2) the nature of the plea accepted by the court; (3) whether punishment was imposed in the case of a deferred adjudication; (4) the statute governing post-conviction action to change or erase the conviction; and (5) the type of appellate review pending or available to the respondent.

Dispositions that do not reach the level of a criminal conviction in the underlying proceeding, e.g., dispositions obtained in an adjudicative setting without traditional procedural and constitutional safeguards and certain juvenile adjudications, do not sustain removability.[128] Convictions based on pleas in which guilt is not admitted, e.g., *nolo contendere* or Alford pleas, suffice for immigration purposes.[129] However, the outcome may differ if the plea is conditioned on a dispositive legal issue that remains subject to direct appeal of right.

Section 101(a)(48)(A) speaks most clearly to deferred adjudications, which are given immigration effect irrespective of the contingent right to a new trial in the future as discussed in *Matter of Punu, supra.* The definition is interpreted to also encompass state expungements, or the semantic equivalents, that serve rehabilitative purposes.[130] This interpretation is widely accepted on judicial review with the limited exception of drug crime expungements in the Ninth Circuit that would meet the Federal First Offender Act criteria.[131] According

to the Board and most federal circuit courts of appeal, the breadth of section 101(a)(48)(A) does not extend to substantive vacaturs, as set forth in *Matter of Pickering*, *supra.* In addition, by statute, a pardon eliminates the immigration consequences for specific crimes. While it is clear that a modified sentence is effective for immigration purposes, it is not always clear whether a post-conviction court action is a modified conviction requiring analysis under section 101(a)(48)(A) or a modified sentence requiring consideration under section 101(a)(48)(B) of the Act.

It is not clear whether convictions are required to attain a degree of finality to support removal consequences. Prior to the enactment of section 101(a)(48)(A), deferred adjudications were not "final" in terms of a prospective, contingent possibility for further proceedings. This comported with the Supreme Court's conclusion in *Pino v. Landon*, *supra*. In addressing the deferred adjudication scenario, Congress did not specify whether the finality required for completed adjudications of guilt, i.e., exhaustion or waiver of direct appellate review of right, still applies. Arguably, it does, given the clear attention on deferred adjudication and the retention of the remainder of the *Ozkok* regime. If so, a return to a standard such as "reasonable certainty and finality," as enunciated under *Pino v. Nicolls*, *supra*, would be appropriate.

Under section 101(a)(48)(A) an analysis of state-deferred adjudication statutes is no longer required. However, analysis of state law remains necessary for pre-disposition procedures relating to adjudicative settings and pleas, as well as for post-conviction actions that operate to change the original conviction in some fashion. Section 101(a)(48)(A) has furthered the evolutionary process of analyzing whether a criminal conviction has immigration effect, yet questions remain.

References

1. 19 I&N Dec. 546 (BIA 1988).
2. *See, e.g., Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990) (holding that Texas deferred adjudication procedure, which provided for further proceedings on the issue of guilt before entering judgment and a continuing right of direct appeal, did not constitute a conviction for immigration purposes), *superseded by Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *Cf. Yanez-Popp v. INS*, 998 F.2d 231 (4th Cir. 1993) (finding that a granting of "probation without judgment" under Maryland law, during which time the Court had the power to enter a judgment or adjudication of guilt without further proceedings upon a violation of probation, met the *Ozkok* standard for conviction).
3. *See, e.g., Wilson v. INS*, 43 F.3d 211 (5th Cir.), *cert. denied*, 516 U.S. 811 (1995); *Yanez-Popp v. INS*, *supra*; *Molina v. INS*, 981 F.2d 14 (1st Cir. 1992); *Chong v. INS*, 890 F.2d 284 (11th Cir. 1989).
4. *See, e.g., Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).
5. The functions of the Immigration and Naturalization Service ("INS") transferred to the Department of Homeland Security ("DHS") on March 1, 2003 pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.
6. 20 I&N Dec. 894 (BIA 1994).
7. 655 F.2d 172 (9th Cir. 1981).
8. *See, e.g., Urbina-Mauricio v. INS*, 989 F.2d 1085, 1089 (9th Cir. 1993); *Zinnanti v. INS*, 651 F.2d 420 (5th Cir. 1981).
9. *Matter of A-F-*, 8 I&N Dec. 429 (BIA, A.G. 1959).
10. In *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995), the Board held that an alien would not be deported on the basis of a conviction under a state rehabilitative statute equivalent to the Federal First Offender statute. The alien would be required to establish the following criteria:
    (1) The alien is a first offender in terms of controlled substance convictions.
    (2) The alien's conviction is for the offense of simple possession of a controlled substance.
    (3) The alien has not previously been accorded first offender treatment under any law.
    (4) The court has entered an order pursuant to a state rehabilitative statute under which the alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation.
11. *Matter of G-* , 9 I&N Dec. 159 (BIA 1960; A.G. 1961).
12. H.R. Conf. Rep. No. 104-828, at 224 (1996) ("Joint Explanatory Statement") (emphasis added).
13. 23 I&N Dec. 684 (BIA 2004).
14. *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999); *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002); *Matter of Pickering*, 23 I&N Dec. 621 (BIA

2003); *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004); *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005); and, *Matter of Luviano*, 23 I&N Dec. 718 (A.G. 2005). Not included in this list are *Matter of Dillingham*, 21 I&N Dec. 1001 (BIA 1997), and *Matter of Suh*, 23 I&N Dec. 626 (BIA 2003), because the Board did not analyze section 101(a)(48)(A) of the Act, in adjudicating the case.

15. *Matter of Punu, supra* (a deferred adjudication of guilt for attempted murder under article 42.12, § 5 of the Texas Code of Criminal Procedure is a conviction); *Matter of Roldan, supra* (drug possession conviction vacated pursuant to section 19-2604(1) of the Idaho Code is a conviction); *Matter of Deivson*, *supra* (drug-related youthful offender adjudication pursuant to Article 720 of the New York Criminal Procedural Law is *not* a conviction); *Matter of Rodriguez-Ruiz, supra* (third- degree sexual abuse conviction vacated pursuant to Article 440 of the New York Criminal Procedure Law is *not* a conviction); *Matter of Salazar, supra* (a deferred adjudication of guilt for drug possession under article 42.12, § 5 of the Texas Code of Criminal Procedure is a conviction); *Matter of Pickering, supra* (drug-related conviction vacated by Canadian court is a conviction); *Matter of Marroquin*, *supra*, and *Matter of Luviano*, *supra* (firearms conviction expunged pursuant to section 1203.4 of the California Penal Code is a conviction).
16. *Matter of Song*, *supra*.
17. *See, e.g, Matter of W-*, 5 I&N Dec. 759 (BIA 1954) (stating that a plea of *nolo contendere* is an admission of guilt or in effect a plea of guilty for purposes of the case); *Matter of Fortis*, 14 I&N Dec. 576 (BIA 1974) (observing that a plea of *nolo contendere*, when accepted by the court, becomes for all practical purposes the full equivalent of a plea of guilty).
18. 400 U.S. 25 (1970).
19. *See, e.g., Burrell v. U.S.* 384 F.3d 22 (2d Cir. 2004) (stating that criminal judgment based on an Alford plea constitutes a conviction) and *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (equating an Alford plea to a plea of guilty).
20. In re Gonzalez, No. 78-230-225 (Feb. 26, 2004) (BIA).
21. Unpublished Board decisions bind the parties, but lack precedential value in other proceedings involving the same issue. 8 C.F.R. § 1003.1(g).
22. 22 I&N Dec. 224 (BIA 1998).
23. *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (a deferred adjudication of guilt for indecency with a child by contact under article 42.12, § 5 of the Texas Code of Criminal Procedure is a conviction); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001) (a guilty-filed disposition of firearms violation under Massachusetts law can constitute a conviction).
24. *Matter of Ozkok, supra* (expunged non-drug conviction will not support an order of deportation); *Matter of Gutnick*, 13 I&N Dec. 672 (BIA 1971) (burglary conviction expunged pursuant to Article 13-1744 of the Arizona Criminal Code as amended, is *not* a conviction for immigration purposes); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967) (petty theft conviction expunged pursuant to section 1203.4 of the Penal Code of California is *not* a "conviction" for immigration purposes); *Matter of G-*, 9 I&N Dec. 159 (BIA 1960; A.G. 1961) (forgery conviction expunged pursuant to section 1203.4 of the Penal Code of California is *not* a "conviction" for immigration purposes).
25. Before the enactment of section 101(a)(48)(A) of the Act, an "expunged" conviction did not constitute a conviction for immigration purposes. *See Matter of Luviano*, 21 I&N Dec. 235 (BIA 1996) (state firearms offense expunged pursuant to section 1203.4 of the California Penal Code is *not* a conviction for immigration purposes). After the adoption of the statutory definition, an "expunged" conviction remained a conviction for immigration purposes. *See Matter of Luviano*, 23 I&N Dec. 718 (A.G. 2005) (state firearms offense expunged pursuant to section 1203.4 of the California Penal Code is a conviction for immigration purposes).
26. *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005).
27. *Matter of Roldan*, *supra*; *Matter of Rodriguez-Ruiz*, *supra*; *Matter of Pickering*, *supra*.
28. *Matter of Rodriguez-Ruiz*, *supra*; *Matter of Pickering*, *supra*.
29. *Matter of Roldan, supra.*
30. *Id.*
31. *Id.* at 527.
32. *Id.* at 522.
33. Board Member Gustavo D. Villageliu wrote a concurring and dissenting opinion to *Roldan*. He asserted that the majority's interpretation of the conviction definition was overly broad and well beyond the scope intended by Congress. He argued that when Congress adopted the statutory definition of conviction it never intended to alter the way the Board historically treated expunged or vacated convictions.
34. *Matter of Roldan*, *supra* at 522.
35. *Matter of Rodriguez-Ruiz*, *supra* at 1379.
36. *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000) (conviction dismissed due to rehabilitation and not on a defect in original finding of guilt remains a conviction for immigration purposes); *United States v. Campbell*, 167 F.3d 94 (2nd Cir. 1999) (conviction set aside for reasons other than a legal defect in underlying proceedings remains a conviction for immigration purposes); *Zaitona v. INS*, 9 F.3d 432 (6th Cir. 1993) (conviction vacated for immigration related reasons remains a conviction for immigration purposes).
37. For example, in *Cruz-Garza v. Ashcroft, supra* at 1131, the Tenth Circuit observed that the evidence could be viewed in two different ways: (1) there was evidence to support the finding that Cruz-Garza's post-conviction relief was based on rehabilitative efforts

and would be given no effect under *Roldan*; and (2) there was evidence to suggest that the conviction was vacated due to a substantive defect in the conviction and would be given effect under *Rodriguez-Ruiz*.

38. *See* section 240(c)(3)(A) of the Act; 8 U.S.C. § 1229a(c)(3)(A).

39. For example, the following 17 states have enacted statutes requiring that the trial court advise an alien criminal defendant of the immigration consequences of entering into a plea agreement: Cal. Penal Code Ann. § 1016.5; Conn. Gen. Stat. § 54-1j: D.C. Code Ann. § 16-713; Fla. Rule Crim. Proc. 3.172 *as amended* by 2005 Florida Court Order 15 (C.O. 15); Ga. Code Ann. § 17-7-93; Haw. Rev. Stat. § 802E-2; Md. Rule 4-242; Minn. Rule Crim. Proc. 15.01; Mont. Code Ann. § 46-12-210; N.M. Rules Ann., Form 9-406; N.Y. Crim. Proc. Law § 220.50; N.C. Gen. Stat. § 15A-1022; Ohio Rev. Code Ann. § 2943.031; Ore. Rev. Stat. § 135.385; R.I. Gen. Laws § 12-12-22; Tex. Code Crim. Proc. Ann., Art. 26.13(a)(4); Wash. Rev. Code § 10.40.200; Wis. Stat. § 971.08.

40. There are several unpublished Board cases finding that convictions set aside due to a failure to advise a criminal alien of the immigration consequences of a conviction are not considered convictions within the meaning of section 101(a)(48)(A) of the Act, because the convictions were erased due to a defect in the underlying proceeding according to state law. *In re Cortez-Villavicencio*, No. 76 847 100 (June 26, 2003) (BIA) (firearms conviction vacated because alien was not advised of the immigration consequences of his conviction in violation of California Penal Code section 1016.5 was vitiated for immigration purposes); *In re Russman*, No. 78 406 445 (Feb. 24, 2005) (BIA) (prostitution conviction set aside pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure because alien misadvised of immigration consequences of conviction was vitiated for immigration purposes); *In re Adegoke*, No. 37 552 131 (March 14, 2003) (BIA) (burglary conviction vacated pursuant to Minnesota Rule of Criminal Procedure 15.05 because alien not advised of immigration consequences of conviction was vitiated for immigration purposes*). In re Singh*, No 40 049 038 (Aug. 30, 2005) (BIA) (forgery and receiving stolen property convictions vacated under section 2943.031(D) of the Ohio Revised Code alien was not advised of the immigration consequences of his plea was vitiated for immigration purposes). But see *In re Osifuye*, No. 90 345 657 (June 27, 2003) (BIA) (conviction for issuance of dishonest check vacated pursuant to Minnesota Rule of Criminal Procedure 15.05 was found to be not on account of a defect in the underlying proceedings so it remains a conviction for immigration purposes).

41. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

42. 28 U.S.CA. § 1738 provides, in part, that the judicial proceedings of any court of any state, territory, or possession of the United States "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

43. *Matter of Adamiak*, 23 I&N Dec. 878, at 880.

44. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th 2000) (reversed *Roldan* in part and held that the enactment of the federal statutory definition of conviction did not repeal or alter Federal First Offender Act or state counterparts).

45. *Cruz-Garza v. Ashcroft*; *supra*; *Resendiz-Alcaraz v. U.S. Atty. Gen.*, 383 F.3d 1262, 1268-71 (11th Cir. 2004); *Acosta v. Ashcroft*, 341 F.3d 218, 222 (3rd Cir. 2003); *Ikenokwalu-White v. INS*, 316 F.3d 798, 804 (8th Cir. 2003); *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (upholds the Board's holding that a state rehabilitative expungement will not be given effect); *Sandoval v. INS*, 240 F.3d 577, 582-83 (7th Cir. 2001); *Ali v. Ashcroft*, 395 F.3d 722 (7th Cir. 2005) (deferring to the Board's interpretation in *Pickering*); *Herrera-Inirio v. INS*, 208 F.3d 299, 304-05 (1st Cir. 2000).

46. *See Pinho v. Gonzales*, 432 F.3d 193, 195 (3rd Cir. 2005).

47. *Id*. at 208.

48. 467 U.S. 837 (1984).

49. *See Pinho v. Gonzales*, at 207.

50. *Id*. at 215. The Court set forth the following categorical test: "To determine the basis for a vacatur order, the agency must look first to the order itself. If the order explains the court's reasons for vacating the conviction, the agency's inquiry must end there. If the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was issued. No other evidence of reasons may be considered."

51. *See Renteria-Gonzalez v. INS*, 322 F.3d 804, 812 (5th Cir. 2002).

52. *Id*.

53. *Id*. at 813.

54. *Id*.

55. *See Discipio v. Ashcroft*, 369 F3d. 472, 474 (5th Cir. 2004), vacated 417 F.3d 448 (5th Cir. 2005) (vacated pursuant to parties' agreement to apply *Matter of Pickering* to respondent's case).

56. *See Matter of Pickering*, *supra*, at 624, n. 2.

57. *Matter of A-F*, 8 I&N Dec. 429 (BIA, A.G. 1959).

58. Federal First Offender Act, 18 U.S.C. § 3607(a) ("FFOA"), and the former Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1982) (repealed 1984) ("FYCA").

59. 30 F.3d 1187 (9th Cir. 1994) (aliens whose drug offense was expunged under state law and who could have received an expungement under the FFOA were not subject to deportation).

60. *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995).

61. 23 I&N Dec. 878 (BIA 2006).

62. *In re McKnight*, No. 44 851 462 (July 15, 2005) (BIA) (drug conviction vacated pursuant to section 2943.031(D) of the Ohio Revised Code because alien

was not advised of the immigration consequences of his plea was vitiated for immigration purposes); *In re Verdugo-Hernandez*, No. 38 841 390 (Feb. 8, 2005) (BIA) (drug conviction vacated under unspecified Arizona statute remained a conviction for immigration purposes); *In re Brham, No. 29 586 211* (Oct. 5, 2004) (BIA) (drug conviction vacated pursuant to sections 948.08 and 397.344(3) of the Florida Statutes Annotated because alien not advised of his eligibility to participate in a pretrial intervention was vacated due to defect in original conviction and was vitiated for immigration purposes); *In re Arteaga-Garcia*, No. 29 529 957 (Aug. 3, 2004) (BIA) (drug conviction vacated under section 1016.5 of the California Penal Code because alien not advised of the immigration consequences of his plea was vitiated for immigration purposes); *In re Cuevas-Hernandez*, No. 90 618 576 (March 12, 2003) (BIA) (drug conviction vacated under unspecified Utah law was not based on any defect in the conviction and so remained a conviction for immigration purposes).

63. *Pinho v. Gonzales,* 432 F.3d 193, 195 (3rd Cir. 2005).
64. *Roldan* at 528; *Matter of Salazar,* 23 I&N Dec. 223 (BIA 2002).
65. *Roldan* at 527.
66. *See Lujan-Armendariz v. INS* and *Roldan-Santoyo v. INS*, 222 F.3d 728 (9th 2000) (overruled insofar as Board decision relates to Federal First Offender Act (FFOA) or state counterparts); *Vasquez-Velezmoro v. INS*, 281 F.3d 693 (8th Cir. 2002) (expunged Texas conviction for possession of marijuana constituted a conviction under the Act); *Acosta v. Ashcroft*, 341 F.3d 218 (3rd Cir. 2003) (dismissed Pennsylvania conviction for drug possession constituted a conviction under the Act); *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003) (expunged Illinois conviction for drug possession is a conviction under the Act); *Resendiz-Alcarez v. U.S. Attorney Gen.*, 383 F.3d 1262 (11th Cir. 2004) (expunged Missouri conviction for drug possession is a conviction under the Act); *Salazar-Regino v. Trominski*, 415 F.3d 436 (5th Cir. 2005) (deferred adjudication of guilt in Texas of drug possession is a conviction under the Act).
67. *Id.*
68. 21 I&N Dec. 58 (BIA 1995). In *Matter of Manrique, surpa,* the Board held that certain drug offenders guilty of simple possession offenses may escape the immigration consequences of the their conviction if they received rehabilitative treatment.
69. *Lujan-Armendariz v. INS, supra* at 743-748.
70. *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).
71. 23 I&N Dec. 223 (BIA 2002).
72. Had the respondent's crime been non-drug-related, the case would have been easily resolved under *Matter of Punu,* 22 I&N Dec. 224 (BIA 1998) (holding a deferred adjudication under article 42.12, section 5(a) of the Texas Code of Criminal Procedure is a conviction for immigration purposes).
73. *Matter of Salazar, supra,* at 228.
74. *Matter of Roldan*, *supra* at 524 n. 9.
75. *Acosta v. Ashcroft*, *supra* at 224, n. 7.
76. *Ramos v. Gonzalez*, 414 F.3d 800, 806 (7th Cir. 2005). Earlier, in *Sandoval v. INS,* 240 F.3d 577, 580 n. 4 (7th Cir. 2001), the Seventh Circuit did not address the Board's findings concerning the FFOA because the respondent failed to seek federal court review of the issue. *See also Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697 (8th Cir. 2002) (whether section 101(a)(48)(A) of the Act implicitly repealed the FFOA is an unsettled question).
77. 18 U.S.C. §§ 5031-5042.
78. *See supra* note 59.
79. For discussion of both state and federal pardons, including the legal framework and procedures for seeking pardons, see Anna Marie Gallagher, "Remedies of Last Resort: Private Bills and Pardons," 06-02 Immigration Briefings 1 (Feb. 2006).
80. *See Matter of Nolan*, 19 I&N Dec. 539 (BIA 1988) (discussion of the pardon requirements for immigration purposes).
81. Section 237(a)(2)(A)(v) of the Act, 8 U.S.C. § 1227(a)(2)(A)(v).
82. The United States Supreme Court recognized the profound effect of a Presidential pardon, stating that "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." *Ex parte Garland*, 71 U.S. 366, 377 (1867).
83. 21 I&N Dec. 1001 (BIA 1997).
84. 267 F.3d 996 (9th Cir. 2001).
85. 22 I&N Dec. 1362 (BIA 2000).
86. In several unpublished decisions the Board has employed the same analysis to determine if a juvenile or youth criminal disposition constitutes a conviction under section 101(a)(48)(A) of the Act. *In re Loutchko*, No. 75 309 233 (March 24, 2005) (BIA) (respondent's sentence to probation as a "youthful trainee" under Michigan's Holmes Youthful Trainee Act, Mich. Comp. Laws §§ 762.11-14, is *not* substantially analogous to that of a person treated under the FJDA); *In re Schettini*, No. 37 318 551 (Aug. 8, 2001) (BIA) (conviction pursuant to the Florida Youthful Offender Act is *not* substantially analogous to that of a person treated under the FJDA); *In re Funes-Castellon*, No. 74 291 326 (Nov. 4, 2004) (BIA) (D.C.'s Youth Rehabilitation Act does *not* correspond to the FJDA); *In re Aparicio-Coreas*, No. 44 024 340 (Feb. 9, 2000) (BIA) (respondent's criminal disposition as a juvenile under section 16.1-308 of the Virginia Code does not constitute a conviction under section 101(a)(48)(A) of the Act).
87. 22 I&N Dec. 1365. *See, e.g., Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Ramirez-Rivero,* 18 I&N Dec. 135 (BIA 1981); *Matter of C-M-*, 5 I&N Dec. 327 (BIA 1953); *Matter of F-*, 4 I&N Dec. 726 (BIA 1952).

88. *Uritsky v. Gonzalez*, 399 F.3d 728 (6th Cir. 2005).
89. Mich. Comp. Laws §§ 762.12, 14.
90. *Uritsky v. Gonzalez*, *supra* at 734.
91. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (terminating deportation proceedings because the alien's sentence was modified to less than 1 year, rendering her not deportable).
92. 23 I&N Dec. 173 (BIA 2001).
93. In re Soto-Torres, No. 92 275 994 (Dec. 27, 2004) (BIA), the Board rejected the DHS's request that the Board reconsider its decision in *Song*.
94. 23 I&N Dec. 849 (BIA 2005).
95. A dissenting opinion in *Matter of Cota*, *supra*, outlines issues presented by treating vacaturs of convictions obtained for immigration purposes differently from sentence modifications designed to achieve the same result.
96. In re Velasquez-Morales, No. 79 192 790 (Oct. 29, 2003) (BIA) (in bond proceedings, the Board held that the case was controlled by *Matter of Song*, *supra*, and found that the Immigration Judge's reliance on *Matter of Pickering*, *supra*, was misplaced).
97. 334 F.3d 840 (9th Cir. 2003).
98. 261 F.3d 771 (9th Cir. 2001) (holding that the Board permissibly construed the statute defining "conviction" as precluding the recognition of state rehabilitative expungement of convictions).
99. 334 F.3d 840, 846 (9th Cir. 2003).
100. *Id*.
101. For example, in one unpublished case the Board gave effect to the respondent's sentence reduction based on its decision in *Matter of Rodriguez-Ruiz*, *supra*. *See* In re Nguyen, No. 43 071 717 (Nov. 27, 2000) (BIA). *But see* In re Velasquez-Morales, No. 79 192 790 (Oct. 29, 2003) (BIA) (the Board gave effect to the respondent's sentence reduction based on its decision in *Matter of Song*, *supra*, and found that the Immigration Judge's reliance on *Matter of Pickering*, *supra*, was misplaced). The later decision comports with the Board's conclusion in *Matter of Cota*, *supra*.
102. *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001).
103. Ill. Rev. Stat. Ch. 38, para. 122 et seq. (1991), *now codified as* 725 Ill. Comp. Stat. Ann. 5/122-1 (West Supp. 2000).
104. *Ali v. Ashcroft*, 395 F.3d 722 (7th Cir. 2005).
105. *Id*. at 729 n. 4 (7th Cir. 2005).
106. 349 U.S. 901 (1955).
107. 215 F.2d 237 (1st Cir. 1954).
108. *Id*. at 241.
109. *Id*. at 244.
110. *Id*.
111. *Id*.
112. *White v. INS*, 17 F.3d 475, 479 (1st Cir. 1994) (contains a more recent description of the Massachusetts "on file," or "guilty-filed" procedure, stating that it "suspends the adjudicative process, including the defendant's right to appeal, until such time as the court reactivates or makes some further disposition of the case").
113. *Pino v. Landon*, *supra* (emphasis added).
114. *See*, *e.g.*, *Griffiths v. INS*, *supra*.
115. 355 F.3d 1035 (7th Cir. 2004).
116. *People v. Montenegro*, 726 N.E.2d 1188 (Ill. 1998).
117. *Montenegro v. INS*, 245 F.Supp.2d 936 (C.D. Ill. 2003).
118. *People v. Montenegro*, 705 N.E.2d 445 (Ill. 1998).
119. *Montenegro v. INS*, *supra*.
120. The petition for certiorari was denied. *Montenegro v. Illinois*, 525 U.S. 1158 (1999).
121. *See*, *e.g.*, *In Re Manoto*, No. 39-155-948 (BIA August 22, 2005).
122. 22 I&N Dec. 552 (BIA 1999).
123. *Id*. at 555.
124. *Nicolls*, 215 F.2d at 244.
125. 243 F.3d 45 (1st Cir. 2001).
126. *Id*. at 54.
127. The Court in *Montenegro* relied on *Griffiths v. INS*, *supra*, and *Moosa v. INS*, *supra*, in declaring broadly that finality does not survive the enactment of section 101(a)(48)(A). However, both *Griffiths* and *Moosa* involved deferred adjudication scenarios, rather than direct appeals of right.
128. *See Matter of Devison*, *supra* and *Matter of Eslamizar*, *supra*.
129. *See e.g.*, *Abimbola v. Ashcroft*, *supra*.
130. *See*, *Matter of Roldan*, *supra*.
131. *See Lujan-Armendariz v. INS*, *supra* and *Matter of Salazar*, *supra*.

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