



# The Commonwealth of Massachusetts

Committee for Public Counsel Services

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## **Practice Advisory: Impact of Direct Appeals on the Immigration Consequences of Criminal Convictions**

### Immigration Consequences of a Conviction Pending on Direct Appeal

In a recent decision, *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018), the Board of Immigration Appeals (BIA) clarified an outstanding issue in removal proceedings: A conviction pending on direct appeal – assuming that appeal challenges the merits of the underlying conviction – is not sufficiently final for immigration consequences to attach. In other words, a conviction cannot provide the basis for deportation or bar any relief from removal (i.e. from a defense to deportation) until the right to direct appellate review on the merits has been exhausted or waived.

Several important caveats:

- \*For a noncitizen who is subject to removal for a reason unrelated to the conviction that is pending on appeal – e.g. for a civil immigration violation or because of other criminal convictions that are final – the fact that a direct appeal is pending will not slow the removal process.
- \*Where a final criminal conviction is not required by immigration law for alleged criminal conduct to carry immigration consequences – e.g. where an immigration benefit involves discretion, such as a decision whether to release someone on bond or grant them lawful status – immigration authorities may argue that they can consider the underlying alleged criminal conduct of the case pending on direct appeal.

### Burden on Noncitizen to Show a Direct Appeal on the Merits is Pending

The BIA also addressed issues of burden of proof. *First*, the Board held that “absent proof of a waiver of appeal rights, a conviction does not achieve finality for immigration purposes until the time for filing an initial direct appeal has expired under the laws of the applicable jurisdiction.” *Second*, once that period has expired, the burden is on the noncitizen to provide “evidence” (a) “that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court” and (b) “that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings” (and does not, for example, merely challenge the sentence or seek to ameliorate the conviction for rehabilitative purposes).

### Practice Tips

- **Trial counsel** should provide all noncitizen clients with a certified copy of any notice of appeal as soon as it is filed.
- **Appellate counsel** should provide all noncitizen clients with
  - A certified copy of any notice of appeal AND

- If not yet docketed at the appeals court: a signed letter from appellate counsel, on office letterhead, stating that a direct appeal is pending, the status of that appeal, and that the appeal “relates to the issue of guilt or innocence” of your client and/or “concerns a substantive defect in the criminal proceedings.”
- If docketed at the appeals court, but no brief has been filed: a certified copy of the appellate docket sheet and a signed letter from appellate counsel, on office letterhead, stating that the direct appeal is pending, the status of that appeal, and that the appeal “relates to the issue of guilt or innocence” of your client and/or “concerns a substantive defect in the criminal proceedings.”
- If docketed and briefed at the appeals court: a certified copy of the appellate docket sheet and a copy of your brief on appeal (assuming it establishes that the appeal challenges the conviction on the merits).