



The Commonwealth of Massachusetts

Committee for Public Counsel Services

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys **September 2017**

Board of Immigration Appeals

Matter of Ali Mohamed Mohamed, 27 I & N Dec. 92 (2017)

Mr. Mohamed was a lawful permanent resident charged with possession of a controlled substance with intent to deliver under Texas law. To avoid a state conviction, he entered into a pre-trial intervention agreement with the court. The pre-trial agreement required that Mr. Mohamed stipulate to his guilt and agree that the stipulation could be used against him if he violated the terms of the pre-trial agreement. The agreement also required Mr. Mohamed to submit to court fees, restitution, community service and supervision.

Subsequently, Mr. Mohamed was placed in removal proceedings where the Department of Homeland Security (DHS) argued that the pre-trial agreement met the definition of conviction under the immigration laws at 8 U.S.C. §1101(a)(48)(A) and therefore made Mr. Mohamed deportable.

Under the statute a conviction is defined as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Mr. Mohamed argued that under a pre-trial agreement the case is dismissed before a defendant ever enters a formal plea and therefore did not meet the definition of conviction because no “adjudication of guilt has been withheld.”

In reviewing the pre-trial agreement the Board disagreed. Although the Board found that although there was no “formal judgement of guilt of the alien entered by the court,” it was clear that in his stipulation Mr. Mohamed had “admitted to sufficient facts to warrant a finding of guilt” and that the obligations

imposed on his pre-trial agreement were a form of punishment, penalty or restraint on liberty ordered by the judge. Therefore, having met the definition of conviction, the pre-trial agreement could serve as the basis of a removal order.

Practice Tip

This case is a good reminder that state dispositions which are not considered convictions under state law may still be convictions for immigration purposes. In particular, in Massachusetts a Continuance Without a Finding (CWOFF) meets both prongs of the definition of conviction under immigration law and is therefore treated as a conviction for immigration purposes.

***Matter of Juan Delgado*, 27 I & N Dec. 100 (2017)**

At issue in this case was whether robbery under California law can constitute a “theft offense” aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Mr. Delgado raised two arguments in front of the Board: (1) the California statute is overbroad because a “taking” under California law also requires asportation, and (2) the California law is overbroad because it could be used to prosecute an aider and abettor who only participated in the asportation, but not the taking itself.

As to the first argument, the Board held that the inclusion of asportation criminalizes a *narrower* subset of takings within the broader universe of the generic theft offense and so categorically fell within the aggravated felony definition. As to the second argument, the Board found that under California law, a person who is convicted as an aider and abettor to robbery, but who only assisted in the asportation aspect of the offense, is still treated as a principal perpetrator and must have the specific intent and purpose to facilitate both the taking and the asportation. Therefore, such an individual still falls within the generic definition.