"THE FEDERAL CORNER"

Surprise! Pre-Trial Interventions Become Convictions for Immigration Purposes!

Buck Files

On September 6, 2017, I received an email from my immigration guru, Richard Fischer of Nacogdoches. Attached to that email was a copy of *Matter of Ali Mohamed Mohamed*, 27 I&N Dec. 92 (BIA 2017), Interim Decision #3900. This was a September 5th decision of a panel of the U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals. The panel determined that a respondent's entry into a pretrial intervention agreement under Texas law qualifies as a conviction for immigration purposes. [Board Panel: Grant, Pauley and Mann; Opinion by Grant.]

For those of us who are representing non-citizens accused of criminal offenses in our Texas courts, we have – at least temporarily – been stripped of what we believed to be an alternative to a conviction and deportation. If you are representing any non-citizens, you need to be familiar with this opinion which reads, in part, as follows:

[An Overview of the Case]

> In a decision dated November 14, 2016, an Immigration Judge terminated the proceedings, holding that the respondent is not removable because his pretrial intervention agreement pursuant to section 76.011 of the Texas Government Code and article 102.012 of the Texas Code of Criminal Procedure is not a 'conviction' within the meaning of section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2012). The Department of Homeland Security ('DHS') has appealed from that decision. The appeal will be sustained, the removal proceedings will be reinstated, and the record will be remanded to the Immigration Judge.

[The Facts in the Case]

> The respondent is a native and citizen of Somalia who was admitted to the United States as a lawful permanent resident on December 1, 2004. He was indicted on October 31, 2012, for possession of a controlled substance with intent to deliver in violation of section 481.113(c) of the Texas Health and Safety Code. On February 19, 2016, the respondent entered into a pretrial intervention agreement, which included the following terms: (1) 24 months of community supervision; (2) $60 per month community supervision fee; (3) 100 hours of community service; (4) restitution in the amount of $140; (5) $500 pretrial intervention program fee; and (6) no contact with the co-defendant.
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> In addition to these terms, the respondent agreed to waive his right to a speedy trial. He also agreed that if he violated the terms of the agreement during the 24-month period of community supervision, he would appear in court; enter a plea of guilty to the charged offense; allow the 'stipulation of evidence' to be admitted

into evidence without objection; and either accept the punishment offered by the prosecution or allow the judge to determine punishment following a contested punishment hearing. Under the State's portion of the agreement, the prosecution agreed to 'dismiss this case' if the respondent 'follow[ed] the terms of this agreement and the rules of community supervision.'

During the 24-month community supervision period, the respondent was required to follow numerous rules mandated by the county Community Supervision and Corrections Department ('CSCD'). Among other things, these rules required the respondent to cooperate and maintain contact with his Community Supervision Officer. He was subject to random searches of his 'person, home, and . . . possessions' and had to submit to random urine analysis and obtain prior permission to change his address or leave the county 'for an overnight stay.' The presiding judge expressly authorized the respondent's participation in the pretrial intervention program and ordered him to pay 'all fees specified' in the rules of community supervision.

In summary, the respondent's criminal record consists of the October 31, 2012, indictment and the February 19, 2016, pretrial intervention agreement, which is comprised of the agreement itself, the rules of community supervision (the pretrial intervention program), and the stipulation of evidence.

[The Stipulation in the Case]

ALI MOHAMED MOHAMED, hereby swear, under oath, that I am completely familiar with the indictment/charge in the above referenced cause number, if any, which is currently pending against me. I understand that I am charged with POSS CS PG 2 >= 400G W/INTENT TO DELIVER. . . . I have read the charging instrument and my attorney has explained it to me and I committed each and every element alleged and have no defense in law. I swear, under oath, that I am guilty of the offense set out therein and all lesser included offenses charged against me.

[Before the Immigration Judge]

After the initiation of the removal proceedings, the respondent conceded alienage but denied that he is removable based on the charge that he has been convicted of a crime. The respondent moved for termination, arguing that his entry into the pretrial intervention agreement is distinguishable from a deferred adjudication and is not a 'conviction' under section 101(a)(48)(A) of the Act.3

The Immigration Judge granted the respondent's motion, concluding that a pretrial intervention agreement is not a 'conviction' for immigration purposes because no 'adjudication of guilt has been withheld,' as required for a conviction under section 101(a)(48)(A) when a formal judgment of guilt has not been entered. In reaching this conclusion, the Immigration Judge distinguished the

respondent's pretrial intervention agreement from a deferred adjudication under article 42.12, section 5 of the Texas Code of Criminal Procedure, which both we and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, have held qualifies as a 'conviction' for immigration purposes.

* * *

First, the Immigration Judge noted that a pretrial intervention agreement, which provides for dismissal of the criminal charges before the defendant enters a formal plea or the judge makes a formal finding of guilt, differs from a deferred adjudication under Texas law, which requires a plea of guilty or nolo contendere, as well as a judicial finding that the evidence substantiates the defendant's guilt. He therefore concluded that since an adjudication of guilt is not entered on the record in a pretrial intervention agreement, it is not 'withheld' for purposes of section 101(a)(48)(A) of the Act. In addition, the Immigration Judge determined that the fees and costs imposed on a participant in the pretrial intervention program do not constitute a 'form of punishment, penalty, or restraint on the alien's liberty' that is 'ordered' by a judge, as required by section 101(a)(48)(A)(ii) of the Act.

In finding that a pretrial intervention agreement is not a conviction for immigration purposes, the Immigration Judge accorded significant weight to two opinions issued by the Attorney General of Texas. In a 2013 opinion, the Attorney General explained that 'the purpose of pretrial intervention is to provide the defendant with an opportunity to have the charges dismissed prior to a finding of guilt or innocence.' Op. Tex. Att'y Gen. GA-0986, at 2 (Feb. 5, 2013) (citing *Fisher v. State*, 832 S.W.2d 641, 643 (Tex. Ct. App. 1992)). The Immigration Judge understood this to mean that a guilty plea is not required for entry into a pretrial intervention agreement and noted that such a requirement would be, as the Attorney General stated, 'inconsistent with the purposes of pretrial intervention.' *Id.*

In a 2003 opinion, the Attorney General stated that a 'participant in a pretrial intervention program has not been ordered to receive services by a court but rather receives services under an agreement with a prosecutor.' Op. Tex. Att'y Gen. GA-0114, at 4 (Oct. 8, 2003). The Immigration Judge recognized that article 102.012 of the Texas Code of Criminal Procedure, which authorizes the imposition of pretrial intervention program fees and reimbursement for expenses, was amended in 2005 to require that the court with jurisdiction over the pretrial intervention agreement, rather than the CSCD, order the payment of the fees. However, he deemed this amendment to be 'merely administrative' and determined that the program fees ordered by the judge are 'the same as those agreed upon between the prosecutor and the defendant.' In other words, the Immigration Judge concluded that the fees were part of a contract between the respondent and the prosecutor, rather than a penalty 'ordered' by the judge.

Finding that the Texas pretrial intervention program does not fall within the statutory requirements of section 101(a)(48)(A) of the Act, the Immigration Judge concluded that the respondent's entry into the pretrial intervention agreement is not a 'conviction' for immigration purposes. He therefore determined that that the DHS did not establish the respondent's removability and terminated the proceedings.

[The Question Presented and the Board's Analysis]

The question presented on appeal is whether the respondent's entry into a pretrial intervention agreement under Texas law qualifies as a conviction for immigration purposes. We review this question of law de novo and conclude that it does. 8 C.F.R. § 1003.1(d)(3)(ii) (2017). (emphasis added)

* * *

[A Conviction, for Immigration Purposes is a Question of Federal Law]

We note first that 'whether or not a conviction exists for immigration purposes is a question of federal law and is not dependent on the vagaries of state law.' … If Congress intended the existence of a conviction to depend upon the operation of State law, it would have written the Federal law to that effect. …('[W]hen Congress has intended for state law to control in defining when a conviction exists for a federal purpose, it has expressly said so.'). Therefore, the question is not whether the State of Texas regards a pretrial intervention agreement as a conviction, but rather whether the agreement meets the Federal definition of a 'conviction' in section 101(a)(48)(A) of the Act.

Because the term 'conviction' is defined by the Act, the statutory definition alone determines what qualifies as a conviction for immigration purposes.

[Is There a Conviction When the Adjudication of Guilt Has Been Withheld?]

The question remains whether the respondent has been convicted because the 'adjudication of guilt has been withheld.' To establish that an alien has been convicted in this sense, it must first be shown that '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.' Section 101(a)(48)(A)(i) of the Act (emphases added).

Next, it must be demonstrated that 'the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.' Section 101(a)(48)(A)(ii) of the Act. We conclude that the respondent's admission of guilt in the stipulation of evidence satisfies the first requirement, and his entry into the pretrial intervention program satisfies the second.

Under the plain language of section 101(a)(48)(A), neither a finding of guilt by a judge or jury, nor a plea of guilty or nolo contendere is required to establish a conviction. Rather, the definition is satisfied so long as the alien 'has admitted sufficient facts to warrant a finding of guilt.'…

The respondent's sworn admission of guilt brings the pretrial intervention agreement within the definition of a conviction in section 101(a)(48)(A)(i) of the Act. After he was sworn and placed under oath, the respondent admitted in the stipulation of evidence that he 'committed each and every element alleged and ha[d] no defense in law.' He further admitted that he is 'guilty of the offense set out [in the indictment] and all lesser included offenses charged against [him].' Moreover, he agreed that any violation of the pretrial intervention agreement would automatically result in a conviction based on the admission of guilt in the stipulation of evidence.

[Respondent Faced a Form of Punishment, Penalty or Restraint on His Liberty]

In addition, the obligations the respondent incurred in the pretrial intervention program individually and cumulatively constitute a 'form of punishment, penalty, or restraint on the alien's liberty' under section 101(a)(48)(A)(ii) of the Act. As part of his pretrial intervention agreement, the respondent entered into a pretrial intervention program administered by the CSCD. The program imposed numerous costs, conditions, and restrictions to which the respondent agreed in exchange for the prosecution's promise to dismiss the charges. …These include the imposition of periods of community supervision and community service, the community supervision and pretrial intervention program fees, the order of restitution, and the no-contact order. …

As previously noted, the Immigration Judge considered the program fees assessed pursuant to article 102.012 of the Texas Code of Criminal Procedure to be contract terms determined by the prosecutor, rather than a penalty 'ordered' by the judge. However, since 2005, article 102.012 has required the court, as opposed to the CSCD, to order payment of the pretrial intervention program fees and expenses. Moreover, even prior to 2005, a defendant could only enter into a pretrial intervention agreement, and therefore a pretrial intervention program, with the court's authorization. …

[Conclusion]

Because only a judge can authorize a pretrial intervention agreement, which in this case included community supervision and community service, restitution, and a no-contact order in addition to the imposition of fees, we conclude that the respondent's admission into a pretrial intervention program under Texas law is a 'form of punishment, penalty, or restraint on the alien's liberty' that was 'ordered' by a judge.

[My Thoughts]

- Once again, we see the value of having a good working relationship with an outstanding immigration lawyer. Since *Mohamed* has received significant media coverage, I suppose I would have come across the opinion eventually. Having Richard Fischer send it to me, though, ensured that I received a copy of it quickly.
- Mohamed has been represented by Christine Truong, a fine immigration lawyer from Houston. Although she was appropriately reticent to talk about a case that is pending, she did tell me that I could report that an appeal will be filed with the United States Court of Appeals for the Fifth Circuit.
- While I hope she is successful, I'm concerned that Christine has an uphill battle. We should all wish her good luck and Godspeed.