

Immigrant Defense Project

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PRACTICE ADVISORY

Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu**

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This practice advisory provides guidance on whether a conviction must be final to trigger negative immigration consequences after the recent en banc Board of Immigration Appeals (BIA) decision in *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA May 4, 2009).

In short, this decision does the following:

***Cardenas-Abreu* holds that a conviction need not be final to trigger negative immigration consequences if a pending appeal was filed late – even where an appellate court has accepted the appeal.**

- On the specific question presented in this case, an 8-6 majority of the en banc BIA decided that an appellate court's acceptance of a late-filed appeal of a criminal conviction does not prevent the conviction from being deemed a valid predicate for a charge of removability.
- Notably, a concurring Board Member whose vote was necessary for the majority to prevail suggested that an exception may apply "if the alien were to present compelling evidence of the likelihood of success on his late-filed criminal appeal."

Nevertheless, *Cardenas-Abreu* indicates, as a general matter, that the traditional requirement that a conviction must be final still applies.

- The decision does not definitively resolve the more general question of whether a direct appeal filed timely "as of right" (as opposed to a discretionary appeal) continues to preclude removability even after the 1996 addition to the Immigration and Nationality Act (INA) of a new definition of "conviction" for immigration purposes. Rather, the lead opinion signed by 5 members of the BIA majority states that "[w]e need not resolve that issue [] because the case before us involves a late-reinstated appeal, not a direct appeal."
- However, while this decision does not permit a practitioner to know for sure how the BIA will rule in any given future case, 7 of the remaining Board Members (1 concurring Board Member plus 6 dissenting Board Members, constituting half of the total 14 en banc Board Members) took the position that, as a general matter, a direct appeal as of right still precludes negative immigration consequences of a conviction unless and until the appeal is dismissed and the conviction becomes final. In addition, the 5 lead majority opinion Board members found "forceful" the argument that this traditional finality requirement remains in force at least where a direct appeal has been filed timely as of right. Only 2 Board Members expressly found that finality is no longer required even where a direct appeal has been filed timely as of right.

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For more details on the above, see discussion below in section entitled “Impact of the BIA’s decision in *Matter of Cardenas-Abreu*.”

**Background on the Traditional Finality Rule
and the Effect of the IIRIRA Definition of “Conviction”**

Most of the criminal grounds of deportability require a “conviction.” In addition, while most of the criminal grounds of inadmissibility do not require a conviction, the Department of Homeland Security (DHS) in practice usually relies on a “conviction” when charging inadmissibility. Many bars on relief from removal are also triggered by “conviction” of certain offenses. The question addressed by this advisory is when does a conviction have to be final before the government may impose these and other negative immigration consequences.

Pre-1996 case law -- The traditional rule prior to 1996 was that the government could not rely on a conviction to impose negative immigration consequences if the conviction was not yet final. See *Pino v. Landon*, 349 U.S. 901 (1955) (per curiam), *rev’g Pino v. Nicools*, 215 F.2d 237 (1st Cir. 1954) (“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 [former section] 241 of the Immigration and Nationality Act.”); *Grageda v. United States INS*, 12 F.3d 919, 921 (9th Cir. 1993) (“[a] criminal conviction may not be considered by an IJ until it is final” and a conviction is not final until an alien has “exhausted the direct appeals to which he is entitled.”) (quoting *Morales-Alvarado v. INS*, 655 F.2d 172, 174 (9th Cir. 1981)); *Marino v. INS*, 537 F.2d 686, 691-92 (2d Cir. 1976) (“an alien is not deemed to have been ‘convicted’ of a crime under the [INA] until . . . direct appellate review of the conviction . . . has been exhausted or waived.”) (citations omitted); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971). Based in part on this federal court case law, the BIA stated prior to 1996 that “[i]t is well settled that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.” *Matter of Thomas*, 21 I. & N. Dec. 20 at n.1 (BIA 1995); see also *Matter of Ozkok*, 19 I&N Dec. 546 at n.7 (BIA 1988) (“It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.”). With respect to the effect of a state procedure authorizing acceptance of a late appeal, the BIA held that a conviction was final despite a respondent’s request for acceptance of a late “nunc pro tunc” appeal where the respondent did not show that the request was granted. See *Matter of Polanco*, 20 I&N Dec. 984 (BIA 1994).

1996 IIRIRA definition of conviction – In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which for the first time included a definition of “conviction” for immigration purposes. As a result of IIRIRA, the Immigration and Nationality Act now provides that a criminal disposition may be considered a conviction for immigration purposes in the following two circumstances: (1) a “formal judgment of guilt” has been entered by a court, or (2) “adjudication of guilt has been withheld,” but “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 the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” See INA § 101(a) (48) (A), added by IIRIRA § 322(a). After IIRIRA, the government began to argue in certain cases that this definition eliminated the traditional requirement that a conviction must be final to trigger negative immigration consequences since the definition does not expressly require finality.

Post-1996 case law – The federal courts have split, often in dicta, on whether the 1996 IIRIRA definition of “conviction” means that finality is no longer required before a conviction may be found to trigger negative immigration consequences. Compare *Puello v. BCIS*, 511 F.3d 324, 332 (2d Cir. 2007) (“IIRIRA . . . eliminate[d] the requirement that all direct appeals be exhausted

or waived before a conviction is considered final under the statute.”) (citations omitted); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 291 (5th Cir. 2007) (“Garcia’s failure-to-stop conviction is valid for immigration purposes, regardless of whether it was on appeal at the time of the IJ and BIA determinations.”); *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2003) (“IIRIRA eliminated the finality requirement for a conviction.”); *Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999) (“There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of “conviction” found in IIRIRA § 322(a).”) *with Paredes v. Att’y Gen. of U.S.*, 528 F.3d 196, 198 (3^d Cir. 2008) (“[A] conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.”) (quoting *Matter of Ozkok*); *Walcott v. Chertoff*, 517 F.3d 149, 154 (2^d Cir. 2008) (“Petitioner’s March 1996 conviction was not deemed final for immigration purposes until July 1, 1998, when direct appellate review of it was exhausted”) (citing *Marino v. INS*, 537 F.2d at 691-92); *United States v. Garcia-Echaverria*, 374 F.3d 440, 445 (6th Cir. 2004) (“To support an order of deportation, a conviction must be final.”) (citation omitted). The BIA has declined to resolve this issue. See, e.g., *Matter of Punu*, 22 I&N Dec. 224, 234, n.1 (BIA 1998) (concurring Board Member observes that this opinion “does not address the circumstance of an alien against whom a formal adjudication of guilt has been entered by a court, but who has pending a noncollateral post-judgment motion or direct appeal.”).

Impact of the BIA’s decision in *Matter of Cardenas-Abreu* – In *Matter of Cardenas-Abreu*, 24 I&N Dec. 795, the respondent was convicted of burglary in New York. He did not file an appeal within the 30-day deadline provided under New York law. He was placed in removal proceedings and was charged with deportability based on conviction of an aggravated felony. After the Immigration Judge ordered removal, the respondent applied to the New York criminal court for permission to file a late appeal of his criminal conviction under section 460.30 of the New York Criminal Procedure Law. The New York criminal court granted this request and accepted his late appeal. The respondent then filed a timely motion to reopen his removal proceedings.

In seeking reopening, the respondent pointed out that his conviction was now not final under New York law and argued that, under the traditional requirement of finality, he was no longer deportable. *Id.* at 797. DHS opposed reopening arguing that, under the IIRIRA definition of “conviction,” the conviction would still be valid for immigration purposes because the state criminal court had entered “a formal judgment of guilt.” *Id.*

The lead BIA majority opinion adopted neither the respondent’s or the DHS’ position. *Id.* at 796-802 (lead opinion of Board Member Malphrus joined by 4 other Board Members). This opinion reviewed the 1996 IIRIRA definition of “conviction” and the legislative history and stated that “a forceful argument can be made that Congress intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law.” *Id.* at 798. Nevertheless, the opinion stated: “We need not resolve that issue, however, because the case before us involves a late-reinstated appeal, not a direct appeal. At the time Congress acted in 1996, the opinion explained, there was no understanding of the effect on finality of late-reinstated appeals similar to the well-established rule for direct appeals.” *Id.* at 798-99 (maintaining that *Matter of Polanco* left this issue open).

The lead BIA majority opinion went on to point out that New York law allows a defendant to file a motion requesting permission to file a late appeal up to one year from the unmet 30-day deadline based on evidence showing that certain enumerated factors resulted in the defendant’s failure to appeal, and that the resolution of such motion has no time limit. *Id.* at 800-801. The opinion stated: “Thus, the late-reinstated appeal procedure under New York law is very different from the typical direct appeal as of right, which imposes prompt filing deadlines and requires only

a ministerial act in accepting a notice of appeal.” *Id.* at 801. The opinion likened New York’s late appeal process to deferred adjudications “because both procedures present an added measure of delay and uncertainty regarding the consequences of criminal convictions in immigration proceedings,” *id.* at 799, and concluded: “Given the indeterminate nature of the New York late appeal procedure and Congress’s clear intent to give broad effect to the definition of a conviction in the deferred adjudication context, we find that the respondent’s conviction remains a valid factual predicate for the charge of removability.” *Id.* at 802. This conclusion of the lead majority opinion was joined by the two concurring opinions. *Id.* at 802-803 (concurring opinion of Board Member Grant) and 803-811 (concurring opinion of Board Member Pauley joined by Board Member Cole). However, one of the concurring Board Members suggested that an exception may apply “if the alien were to present compelling evidence of the likelihood of success on his late-filed criminal appeal.” *Id.* at 803 (concurring opinion of Board Member Grant).

While the 5 Board Members signing the lead majority opinion do not resolve the more general question of whether a direct appeal filed timely as of right would preclude removability, it appears that 7 of the remaining Board Members (half of the total 14 en banc Board Members) have determined, as a general matter, that a direct appeal as of right precludes negative immigration consequences of a conviction unless and until the appeal is dismissed and the conviction becomes final. *Id.* at 802-803 (concurring opinion of Board Member Grant) and 811-823 (dissenting opinion of Board Member Greer, joined by 5 other Board Members). Only 2 Board Members would have found that finality is no longer required even where a direct appeal has been filed timely as of right. *Id.* at 803-811 (concurring opinion of Board Member Pauley joined by Board Member Cole).

Practice Tips

In light of *Cardenas-Abreu*, immigration practitioners representing clients with convictions on appeal may wish to consider the following tips:

If your client’s criminal conviction is on direct appeal filed timely:

If your client’s conviction is on direct appeal filed timely or within the time to appeal as of right (meaning the appellate court’s acceptance of the appeal is not discretionary), you can argue to Immigration Judges and the BIA that the traditional finality requirement still applies. Prior to 1996, the BIA repeatedly expressed that “[i]t is well settled that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.” *Matter of Thomas*, 21 I. & N. Dec. 20 at n.1 (BIA 1995); see also *Matter of Ozkok*, 19 I&N Dec. 546 at n.7 (BIA 1988). The BIA has not overruled these prior precedents. In fact, the en banc decision in *Matter of Cardenas-Abreu* shows that 7 out of the total 14 Board Members would find, as a general matter, that a direct appeal as of right continues to preclude negative immigration consequences of a conviction unless and until the appeal is dismissed and the conviction becomes final. Only 2 Board Members would find that finality is no longer required even where a direct appeal has been filed timely as of right. And the remaining 5 Board Members, by describing as “forceful” the argument that Congress intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law, appeared to signal that they too might be disposed to finding that finality is still required under these circumstances. See discussion in above section entitled “Impact of the BIA’s decision in *Matter of Cardenas-Abreu*.”

If an Immigration Judge and the BIA nevertheless order removal based on a conviction that is on direct appeal, you may pursue federal court review. While the federal circuit courts have issued conflicting holdings and dicta on whether the finality requirement still applies after

IIRIRA, there are strong arguments that the requirement still applies. For details on the substantive arguments that can be raised in support of the traditional finality requirement before the federal courts (or before the agency), see lead majority opinion of Board Member Malphrus at 798; dissenting opinion of Board Member Greer in *Matter of Cardenas-Abreu*, *id.* at 812-821; see also Brief of Amicus Curiae New York State Defenders Association Immigrant Defense Project in *McKenzie v. Mukasey* (2d Cir. 2008), posted on the Immigrant Defense Project's website at <http://www.immigrantdefenseproject.org/webPages/other.htm>. Even those litigating the finality issue in circuits with varying degrees of adverse case law holdings or dicta on this issue – the First, Second, Fifth, Seventh and Tenth Circuits – may be able to distinguish these adverse precedents or to argue that the adverse language in these decisions was non-binding dicta. See dissenting opinion of Board Member Greer in *Matter of Cardenas-Abreu*, *id.* at 818-820. In fact, at least one of these Circuits – the Second Circuit, the court under whose jurisdiction *Cardenas-Abreu* rises – has later favorable dicta on this issue, which the BIA's decision in *Cardenas-Abreu* failed to observe and take into account. Compare *Puella v. BCIS*, 511 F.3d 324, 332 (2d Cir. 2007) (“IIRIRA . . . eliminate[d] the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute.”) with *Walcott v. Chertoff*, 517 F.3d 149, 154 (2d Cir. 2008) (“Petitioner's March 1996 conviction was not deemed final for immigration purposes until July 1, 1998, when direct appellate review of it was exhausted.”).

If your client's criminal conviction is on direct appeal, but the appeal was filed late:

If your client's appeal was filed late, but the appeal was accepted by the appellate criminal court and your client's conviction is now on direct appeal, you may be able to argue to Immigration Judges and the BIA that your state's late appeal procedures are distinguishable from the New York procedures at issue in *Matter of Cardenas-Abreu*. In *Cardenas-Abreu*, the respondent applied for an extension of the regular 30-day time limit to appeal as is authorized under section 460.30 of the New York Criminal Procedure Law, which provides that such motion must be made with due diligence up to one year after the 30-day time limit has expired. The New York appellate court granted the respondent the requested extension and he was permitted to file a late direct appeal. However, the BIA majority chose not to treat such a late-filed appeal as a direct appeal “as of right.” Among the factors upon which the BIA relied to distinguish such a duly authorized late-filed direct appeal from a direct appeal “as of right” was the length of time allowed to request an extension and the lack of a time limit on the resolution of such request. *Id.* at 800-801. Stating that the New York procedure “introduces a layer of uncertainty and delay far beyond that of a traditional appeal,” *id.* at 801, the BIA majority determined that such a procedure was more akin to the deferred adjudication dispositions that Congress clearly intended to capture within its definition of conviction. *Id.* at 799-802. Practitioners representing individuals who have filed late appeals in other states should seek to distinguish the other state's procedures as not introducing a similar layer of uncertainty and delay.

Practitioners representing individuals who have filed late appeals in New York should take note that the BIA's decision in *Cardenas-Abreu* may be appealed to the U.S. Court of Appeals for the Second Circuit. For further information on this possibility, contact the Immigrant Defense Project (see below “For Further Information”).

Finally, note that one of the Board Members concurring with the majority and whose vote was necessary for the majority to prevail on the late-filed appeal question suggested that an exception may apply “if the alien were to present compelling evidence of the likelihood of success on his late-filed criminal appeal.” *Id.* at 803 (concurring opinion of Board Member Grant).

If an Immigration Judge and the BIA nevertheless order removal because your client's appeal was filed late even though it was accepted as a direct appeal by the criminal appellate court in New York or elsewhere, you may pursue federal court review based on the traditional finality rule. (See discussion under first arrow point above of arguments in support of the traditional finality rule). You can argue that there is no legitimate basis for treating appeals filed late differently for finality purposes as long as the appellate court has duly granted the request to accept the late appeal and treats the late appeal like any other direct appeal. You could point out that the BIA majority's ruling in *Cardenas-Abreu* was based on a false distinction between traditional direct appeals and late-filed direct appeals such as the New York appeal at issue in that case. Once accepted by the criminal appellate court, such a late-filed appeal proceeds as a direct appeal and has the same legal significance as any other direct appeal under New York law. As the dissenting opinion stated: "If New York wishes to authorize extensions of time for filing direct criminal appeals under these kinds of circumstances, I do not believe that it is the province of this Board to effectively determine for immigration purposes that such appeals are not legitimately 'direct' after all." *Id.* at 822 (dissenting opinion of Board Member Greer).

For Further Information

For the latest legal developments or litigation support on the issues discussed in this advisory, contact the Immigrant Defense Project at (212) 725-6422.