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FOR immigration purposes, INA 101(a)(48)(A) defines a conviction as: (1) a formal adjudication of guilt entered by a court; or, (2) if adjudication of guilt is withheld: (a) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or has admitted sufficient facts to warrant a finding of guilt; and (b) the judge has ordered some form of punishment, penalty or restraint on the alien's liberty. Convictions for certain criminal offenses are grounds for removal or inadmissibility.

We have seen in a previous article that juvenile delinquency adjudications are not convictions for purposes of immigration law. There are other legal proceedings that have outcomes that do not qualify as convictions under immigration law. We will now discuss some of the more common exceptions.

The first exception is the petty offense exception. Under INA 212(a)(2)(A)(i)(I), an alien who is convicted of a crime involving moral turpitude (CIMT) is inadmissible or disqualified from obtaining a visa or admission into the US. However, under INA 212(a)(2)(A)(ii)(II), a CIMT conviction cannot be a basis for inadmissibility if: (1) the alien committed only one crime; (2) the maximum penalty possible for the crime does not exceed imprisonment for one year; and (3) the alien was not sentenced to a term of imprisonment in excess of 6 months regardless of the extent to which the sentence was ultimately executed.

The second exception involves some pardons. INA 237(a)(2)(A)(vi) states that a full and unconditional pardon by the President of the US or any US Governor for: (1) a CIMT conviction; (2) multiple CIMT convictions; (3) aggravated felonies; and (4) certain high speed flight convictions, would not make an alien

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removable under INA 237(a)(2)(A).

In *Matter of Suh*, 23 I&N Dec. 626 (BIA 2003), the Board of Immigration Appeals (BIA) observed that a full presidential or gubernatorial pardon would not exempt an alien from removal based on convictions for controlled substance, certain firearms offenses, domestic violence, or child abuse, among others, because INA 237(a)(2)(A)(vi) exempts only the offenses that it enumerates.

Under 22 CFR 40.21(a)(5), which mirrors INA 237(a)(2)(A)(vi) to a certain extent, an alien will not be inadmissible under INA 212(a)(2)(A)(i)(I) by reason of a CIMT if he has received a full presidential or gubernatorial pardon. However, in *Balogun v. US Atty. Gen.*, 425 F.3d 1356 (11th Cir. 2005), the Eleventh Circuit Court of Appeals held that a pardon would not exempt an alien from inadmissibility under INA 212(a)(2)(A)(i)(I) because there is no comparable exemption under INA 212(a) for inadmissible aliens. Thus, at least in the Eleventh Circuit, an alien who has received a pardon will still be inadmissible based on a CIMT.

The third exception involves violations that are not genuine criminal proceedings. In *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), the BIA held that a formal judgment of guilt entered by a court qualifies as a conviction under INA 101(a)(48)(A) so long as it was entered in a genuine criminal proceeding, i.e. a proceeding that was criminal in nature under the governing laws of the prosecuting jurisdiction.

The BIA found that a proceeding conducted under Section 153.076 of the Oregon Revised Statutes is not a conviction for purposes of immigration law because guilt under this proceeding is established by "a preponderance of the evidence" rather than by the higher standard of "beyond reasonable doubt" which is required in criminal proceedings. Moreover, the Oregon Court of Appeals does not consider offenses prosecuted under Section

153.076 to be criminal prosecutions.

In contrast, the BIA found in *Matter of Cuellar-Gomez*, 25 I&N Dec. 850 (BIA 2012), that an alien's conviction by a municipal court in Wichita, Kansas for violation of Section 5.26.010 of the Wichita, Kansas Code of Ordinances qualifies as a conviction under immigration law because guilt is established beyond reasonable doubt and Kansas sentencing laws consider a judgment of guilt by a municipal court as a valid conviction for calculating a defendant's criminal history.

The last exception we will examine involves vacated convictions. In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the BIA explained that a state action to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or record of guilt or conviction by operation of a state rehabilitative statute has no effect in immigration proceedings. Thus, an expunged conviction may still be used as basis for removal, inadmissibility or disqualification from immigration benefits.

However, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the BIA recognized that if a criminal court vacates a conviction based on a defect in the underlying criminal proceeding, then an alien no longer has a conviction within the meaning of INA 101(a)(48)(A). Thus, a conviction that is vacated due to procedural or substantive defect in the underlying proceeding is not a conviction under immigration law but a conviction vacated due to post-conviction events such as rehabilitation or immigration hardships are still considered convictions.

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