

Tales from the Arena



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Immigration consequences of admitting the commission of a crime

WE have recently discussed how criminal convictions could lead to removal or inadmissibility. However, under INA 212(a)(2)(A)(i), an alien is also inadmissible if he admits committing acts which constitute the essential elements of a crime involving moral turpitude (CIMT) or a controlled substance violation. Thus, to be inadmissible due to a CIMT or controlled substance violation, a conviction is not necessary if the alien admits committing these crimes.

In *Matter of K*, 7 I&N Dec. 594 (BIA 1957), the alien admitted to the police that he had committed rape. The Board of Immigration Appeals (BIA) found that the alien did not make a valid admission because the police failed to give him a definition of the crime of rape. The government argued that the statute did not require that the alien be given a definition of the crime. However, the BIA explained that this rule is not based on any specific statutory requirement but it was adopted to insure fair play and avoid a later claim that the alien had been unwittingly entrapped into admitting the crime. Thus, the BIA held that a "valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms".

Based on BIA rules, the Department of State (DOS) provides under 9 FAM 40.21(a) Note 5.1 (09-24-2009) a procedure for obtaining admissions: (1) the consular officer should explain the purpose of the questioning and place the alien under oath; (2) the crime must appear to constitute a CIMT based on the statute and statements from the alien; (3) before the actual questioning, the consular officer must give the alien an adequate definition of the crime, including all essential elements, in terms that the alien

understands; (4) the alien must then admit all factual elements, which constitute the crime; and (5) the alien's admission of the crime must be explicit, unequivocal and unqualified.

In *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002), the Ninth Circuit summarized the BIA requirements for a valid admission of a crime, as follows: (1) the admitted conduct must constitute the essential elements of a crime in the jurisdiction where it occurred; (2) the alien must have been provided with the definition and essential elements of the crime prior to his admission; (3) the admission must have been voluntary. *Pazcoguin*, however, created an exception to these rules.

In *Pazcoguin*, the alien underwent psychiatric examination as part of his immigrant visa application. During this examination, he told the doctor that he had used marijuana in the past. The doctor wrote about this marijuana use in her report and submitted it to the US consulate. The alien received an immigrant visa but when he arrived at the Honolulu International Airport, the immigration inspector asked him about his reported marijuana use. The alien repeated his admission. He was then placed in exclusion proceeding. The Court held that the admission before the doctor may be considered in the exclusion proceeding but the admission of marijuana use at the port of entry may not.

The Court reasoned that since the admission of the crime occurred during a routine medical examination where the purpose was not obtain an admission, then the failure of the doctor to define the offense did not invalidate such admission. In contrast, the alien's statement at the airport was not a valid admission of a crime because it occurred during an immigration inspector's

questioning for the purpose of determining whether the alien is excludable. The Court stated that the immigration inspector should know and apply BIA rules and this duty is not excused by the alien's previous admission to his doctor.

It's interesting to note that the Administrative Appeals Office of USCIS, in at least one unpublished decision, does not follow *Pazcoguin* outside the jurisdiction of the Ninth Circuit.

So a voluntary admission of a crime before police, immigration or consular officers is valid if the alien was first given a definition of the crime but such definition is not necessary if the admission is made during a medical examination. What if the admission was made in court?

In *Perez-Mejia v. Holder*, 663 F.3d 403 (9th Cir. 2011), the Court held that an alien's admissions of the facts alleged in the notice to appear (NTA) during the "pleading stage" of the removal proceeding are valid admissions. However, if the removal proceeding enters the "evidentiary stage" to resolve disputed issues, an alien's admissions are not valid unless these admissions are also found in certain documents which the Immigration Judge (IJ) is allowed to examine.

Finally, in *Urzua v. Gonzales*, 487 F.3d 742 (9th Cir. 2007), the Court clarified that the IJ need not comply with the requirements of *Matter of K* when it obtains admissions from an alien after the pleading stage because an alien is often questioned in the presence of his counsel and the Court implied that there are already enough safeguards in place.

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