

## WHAT IS A CONVICTION FOR IMMIGRATION LAW PURPOSES



by

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There are many immigrants who have been convicted of a crime for immigration purposes and don't even know it. Immigrants faced with a criminal charge often hire a criminal law attorney to represent them in the criminal case. In many cases, the immigrant believes that if he has not spent a significant amount of time in jail then he hasn't been convicted of the crime and there is no harmful side effect except for the inconvenience and expense associated with going to court and hiring a criminal defense lawyer. The problem with this thinking is that immigrants need to think not only about what it means to be convicted for criminal law purposes but also what it means to be convicted for immigration law purposes. If an immigrant is convicted for immigration law purposes, there can be severe consequences – denial of a green card, being refused admission or entry to the United States, or even deportation.

Immigration law defines a “conviction” much broader than traditional criminal law. Basic criminal law states that you are convicted only if you have been found guilty by a judge or jury. This is the concept that most people are familiar with. Unfortunately, the immigration laws provide a much broader definition of “conviction”.

### **Definition of “Conviction”**

Section 101(a)(48) of the Immigration and Nationality Act defines the term “conviction” as:

*“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.”*

The immigration law definition of “conviction” has two main prongs:

### **The First Prong**

An immigrant can be “convicted” of a crime for immigration purposes when he or she is found guilty by the court (“a formal judgment of guilt of the alien is entered by a court”).

Sounds simple enough. This is what most people think of when I ask them, as an immigration attorney, whether they have been convicted of a crime.

### **The Second Prong**

It is the remaining part of the definition of “conviction” that most immigrants are not familiar with. That part of the definition states that, even if there has been no formal judgment of guilty by the court, an immigrant will be considered “convicted” where the following two conditions are met:

- (1) There has been a finding of guilt, OR the alien has entered a guilty plea, OR the alien has entered a plea of nolo contendere (no contest), OR the alien has admitted sufficient facts to warrant a finding of guilt;

AND

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

This means that even if you have not been found guilty, you can be convicted if you admit the facts which are the basis of the crime and some penalty or punishment has been imposed on you by the court. The most common situations in which this occurs are in certain drug offense cases and certain domestic violence cases.

In many cases involving relatively minor drug offenses involving “first offenders” (for example, simple possession of marijuana) the court will give the offender the opportunity to participate in a drug counseling or drug treatment program. In these cases, the criminal charge will be held in abeyance until such time as the drug offender completes this program. Once the program is completed, the drug offender can go back to court and the case often times will be dismissed. In such a case, the drug offender believes that he hasn’t been convicted since the criminal charge ultimately was dismissed. While this may be true for criminal law purposes, these types of cases often require the drug offender to admit to the crime or enter a guilty plea as a condition to entering the “first offenders program”. By admitting the facts of the crime or entering a guilty plea AND the court requiring you to participate in a drug counseling or drug treatment program (which is considered a form of penalty, punishment or restraint on your liberty), you are considered “convicted” of that crime for immigration law purposes. Remember, this may be true even if your criminal record check shows that the charge was ultimately dismissed.

Similarly, in certain parts of North Carolina, if an individual is charged with domestic violence (or spousal abuse), the court may agree to dismiss this charge where the accused enters a plea of guilty or admits the facts of the case and participates in some sort of anger management program. Again, even if the case is ultimately dismissed, the accused can be considered “convicted” of domestic violence for immigration purposes.

I recently had a case which illustrates this concept. I met with a client who had recently been charged with domestic violence (spousal abuse). He showed me a copy of his criminal record from the county where he was charged. His criminal record showed that the charge was dismissed. He thought there was no problem as a result of the dismissal. I asked him to get a full copy of the criminal file from the courthouse. When he brought it back to me, I noticed that the prosecutor had agreed to enter into a deferred prosecution program whereby the court agreed to dismiss the case against him if he entered a guilty plea and attended anger management classes. He did, and the case was dismissed. However, this resulted in a conviction for immigration purposes. Why? Because he entered a plea of guilty and there was a penalty or restraint on his liberty (the requirement of participating in the anger management classes and paying the court fines). If he had not pleaded guilty, there would not be a conviction for immigration purposes. That is why it is so important to understand what you are signing in court, what you are agreeing to, and how it can impact your future immigration cases.

It is important to note that in this particular case, the individual is actually deportable as a result of this domestic violence conviction since an individual (even a green card holder) can be found deportable under Section 237(a)(2)(E) of the Immigration and Nationality Act for a domestic violence offense which occurs after September 30, 1996.

Based on the foregoing, an immigrant charged with a criminal offense should consider meeting not only with a criminal defense attorney prior to his court date, but also with an immigration attorney to evaluate the potential impact the case may have on his or her immigration future.

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