What Qualifies as a Conviction for Immigration Purposes?

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Avoiding a Conviction for Immigration Purposes

Immigration law has its own definition of what constitutes a criminal "conviction." Because most (although not all) immigration consequences require a conviction, if your client does not have a conviction, the immigration case might be saved. This Advisory discusses which dispositions that come out of criminal court actually constitute a conviction for immigration purposes, and how to avoid a conviction.

Of course, some immigration penalties are triggered just by conduct, even absent a conviction. A noncitizen might be found inadmissible or deportable if immigration authorities have evidence that the person engaged in prostitution, made a false claim to citizenship, used false immigration or citizenship documents, smuggled aliens, is or was a drug addict or abuser, or formally admitted committing certain drug or moral turpitude offenses, or if the government has "reason to believe" the person ever has supported or participated in drug trafficking or money laundering. In those situations, avoiding a conviction is a good step, but will not necessarily protect the person.

This Advisory will discuss the following topics:

A. Definition of Conviction, Effect of Rehabilitative Relief

The immigration statute contains its own definition of when a conviction has occurred in state criminal court – regardless of what state law says. For immigration purposes, a conviction occurs:

- Where there is "a formal judgment of guilt of the alien entered by a court" *or,*
- "if adjudication of guilt has been withheld, where … 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. [1]

The BIA has held that a guilty plea or finding of guilt, plus any imposition of probation, fine, or jail will equal a conviction for immigration purposes.[2] This means that if the person pled guilty, it is very likely that she has a conviction for immigration purposes. In limited cases, advocates have succeeded in arguing that the criminal court imposed absolutely no punishment, penalty, or restraint of liberty and therefore there was no conviction despite a guilty plea – but this is a difficult argument that will be hard-fought.[3]

Once a conviction exists, what can erase it? In general, a conviction is not eliminated for immigration purposes by mere "rehabilitative relief" – meaning, where a state permits withdrawal of a plea or dismissal of charges because the defendant completed probation or other requirements, rather than because of some legal error.[4] Immigration authorities will not accept rehabilitative relief to eliminate a conviction even if state law provides that there absolutely no conviction or even arrest record remains. In California, people who complete all requirements and have pleas withdrawn or charges dismissed under "expungements" (what immigration authorities call Pen C § 1203.4), Prop 36 (Pen C § 1210) or the former Deferred Entry of Judgment (former Penal C § 1000) still have a "conviction" for immigration purposes. (But for DEJ only, withdrawal of plea under Pen C § 1203.43, another form of relief, will eliminate the "conviction"; see Part D, below.) The result is that thousands of immigrants are advised in good faith, by defense counsel, prosecutors, and judges, that certain alternative programs would not be a conviction for any purpose – when in fact the dispositions were convictions for the purpose of deportation.

For this reason, effective January 1, 2018 California amended Pen C § 1000, to change it from DEJ to a true pretrial diversion. New pretrial diversion does not require a plea or finding of guilt, and therefore is not a conviction for immigration purposes. See Part C.

There are two instances where rehabilitative relief does eliminate a conviction for immigration purposes. Within the Ninth Circuit only, rehabilitative relief will eliminate a qualifying minor drug conviction from on or before July 14, 2011. And nationally, it, rehabilitative relief can eliminate a conviction as an absolute bar to eligibility for Deferred Action for Childhood Arrivals (DACA). See Part B.

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[1] INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

[2] *Matter of Cabrera,* 24 I&N Dec. 459, 460–62 (BIA 2008), *Matter of Mohamed,* 27 I&N Dec. 92 (BIA 2017).

[3] But see *Retuta v. Holder,* 591 F.3d 1181 (9th Cir. 2010) (California deferred entry of judgment was not a conviction because there was no punishment, penalty, or restraint on liberty where the only punishment was an unconditionally suspended fine; the court implicitly found that a requirement to attend drug education classes is not a punishment or penalty). But see *Matter of Mohamed*, *supra*, which includes such a requirement in a longer list of "penalties."

[4] *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).

A conviction does not result from an acquittal, a dismissal under a pretrial diversion, or a deferred prosecution, verdict, or sentence. In addition, juvenile delinquency dispositions, and judgments vacated for cause or reversed on appeal, are not convictions. It appears that California infractions should not be held convictions, but reportedly they are so held in at least some cases. In the Ninth Circuit, criminal cases pending on direct appeal *are* convictions for immigration purposes. See Parts E-H.

Court-martial, not guilty by reason of insanity. A judgment of guilt that has been entered by a general court-martial of the United States Armed Forces has been held a "conviction" for immigration purposes.[5] There is a grave risk that a not guilty by reason of insanity (NGI) disposition constitutes a conviction, at least under California procedure, since the defendant is required first to enter a guilty plea, and in effect be convicted, before entering a NGI plea and receiving treatment rather than a sentence.

B. When Does Rehabilitative Relief Eliminates a Conviction? DACA and *Lujan-Armendariz*

If there has been a plea or finding of guilt and the court has ordered any kind of penalty or restraint, including probation, immigration authorities will recognize the disposition as a conviction even if the state regards the conviction as eliminated by some kind of rehabilitative relief leading to a withdrawal of the judgment or charges. See discussion in Part A.

> **Example:** Katrina is convicted of felony grand theft under P.C. § 484, 487. She successfully completes probation and the plea is withdrawn under P.C. § 1203.4. For immigration purposes, the conviction still exists.

There are at least two exceptions where this rule does not apply.

1. Exception: State Rehabilitative Relief Might Eliminate a First Minor Drug Conviction from On or Before July 14, 2011, in the Ninth Circuit only

This section provides a basic outline of the requirements the *Lujan-Armendariz* benefit. For further discussion of this rule, see the APPENDIX at the end of this Advisory.

Previously, the Ninth Circuit held that any state rehabilitative relief would eliminate a first conviction for certain minor drug charges, because the state relief was an analogue to the Federal First Offender Act (FFOA), 18 USC § 3607. *Lujan-Armendariz v. INS,* 222F.3d 728 (9th Cir. 2000). On July 14, 2011, the Ninth Circuit reversed *Lujan-Armendariz*, but it applied its decision prospectively only, to convictions coming after the decision. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), prospectively overruling *Lujan-Armendariz, supra*.

The result is that, in immigration proceedings arising within the Ninth Circuit only, the good *Lujan-Armendariz* rule continues to apply to qualifying drug convictions that occurred on or before July 14, 2011. State rehabilitative relief such as, in California, withdrawal of plea or dismissal of charges under Prop 36, the former DEJ, or Pen C § 1203.4, will eliminate a conviction for immigration purposes as long as the following requirements are met:

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[5] *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).

- The conviction occurred on or before July 14, 2011 and the immigration proceedings arise within the jurisdiction of the Ninth Circuit.
- It is the person's first drug conviction (although the *Lujan-Armendariz* benefit should apply to multiple pleas in the same hearing, as long as the person has no drug priors);
- The conviction was for simple possession, possession of paraphernalia or other offense less serious than possession and not covered under federal law, or for giving away a small amount of marijuana; but the *Lujan-Armendariz* benefit does not apply to conviction for use or being under the influence;
- The person was not found to have violated probation, and did not participate in any earlier diversion program, including pretrial diversion. (Arguably these disqualifiers do not apply to people who were under age 21 when they committed the offense, because they come within a different FFOA provision, 18 USC § 3607(c).)

  Example: Yali pled guilty to a first drug offense, possession of cocaine, in January 2011. She completed probation conditions without a problem and had no prior pre-plea diversion. She withdrew the plea in July 2017, under Pen C § 1203.4. She does not have a conviction for any immigration purposes.

WARNING: NINTH CIRCUIT ONLY: This benefit will only be recognized in immigration proceedings held in Ninth Circuit states. If ICE detains the immigrant in California and transports her to detention and removal proceedings in Texas, that circuit's law applies and the disposition will be treated as a conviction.

For futher discussion of *Lujan-Armendariz* see APPENDIX to this Advisory and see Chapter 3, § 3.6, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org, 2013).

2. Exception: Rehabilitative Relief Eliminates a Conviction as an Absolute Bar to Eligibility for Deferred Action for Childhood Arrivals (DACA),

Rehabilitative relief will eliminate a conviction as an absolute bar to Deferred Action for Childhood Arrivals (DACA), the relief for people brought to the U.S. as children. DACA may or may not continue in 2018. DACA materials refer to rehabilitative relief as "expungement." For more information, see materials at www.ilrc.org/daca. The conviction still may be considered as a negative factor in the discretionary decision of whether to grant DACA.

C. Not a Conviction: Pretrial Diversion, Pen C § 1000 (January 1, 2018)

For a conviction to exist under immigration law, the defendant must plead guilty or *nolo contendere* before a judge, or the judge must find the person guilty. INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

As of January 1, 2018, California has a pretrial diversion program. See Pen C § 1000 et seq., amended effective Jan. 1, 2018 by AB 208 (Eggman). The program does not require a guilty plea. Rather, a defendant charged with one or more minor drug offenses, who is not disqualified because of other criminal record issues, can plead not guilty, and the case will be diverted to a civil drug education program. If the person successfully completes the program, the charges will be dropped. Because there was no guilty plea, this disposition is not a conviction for immigration or other purposes. If the person is not successful, ultimately he or she will have to face the drug charges back in regular criminal proceedings. For further information see

Practice Advisory: New California Pretrial Diversion at https://www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges.

This pretrial diversion can be a great option for a motivated and fairly functional defendant. But if a defendant is not as functional and is likely to fail the diversion program, counsel should push hard for another defense strategy, because failure of the program is very likely to result in a drug conviction. See discussion in the Practice Advisory.

Before January 1, 1997, Pen C § 1000 also set out a pretrial diversion program. Carefully check clients with dispositions from that time period, to see if they may have avoided pleading guilty. Note that even after the law changed in 1997, for some years many criminal court judges did not actually take a guilty plea or admission. From January 1, 1997 to December 31, 2017, Pen C § 1000 was "deferred entry of judgment," which did require a guilty plea and generally was held a conviction. See Part D, below.

Some counties have drug court programs. Assume that if drug court requires a plea or other admission of guilt, the result is a conviction; if not, it is not. Even without a plea, a drug court disposition creates immigration problems if the person must admit to being in danger of becoming an addict, which itself is a ground of inadmissibility or deportability. Defense counsel should try hard to get another option, such as pretrial diversion. However, if necessary, admitting to abuse generally is less dangerous than having a drug possession conviction.

D. Former California Deferred Entry of Judgment: Problems and Solutions

Between January 1, 1997 and December 31, 2017, California Pen C § 1000 et seq. set out "deferred entry of judgment" (DEJ) as an alternative for minor drug offenders. The person would plead guilty and then be diverted to a drug education program and monitoring for 18-36 months. If the person was successful the charges would be dropped, and Pen C § 1000.3 promised that the person would not have a conviction or arrest record based on the incident, and would suffer no loss of any legal benefit. Due to the guilty plea, however, immigration authorities generally ruled that even a successfully completed DEJ was a drug "conviction" for immigration purposes.

If your client pled guilty under DEJ and actually completed the program, there are two main solutions to the problem: relief under Pen C § 1203.43, and coming within the *Retuta* exception >>was a little unclear as previously stated- or caused a double take<<. If your client pled guilty under DEJ, dropped out of the program, and never returned to court for sentencing, it is possible that the criminal case might be reopened. See discussion of § 1203.43 below, and especially materials cited. If your client pled guilty to DEJ, failed the program, and then was sentenced to probation, Prop 36, or jail, then your client does have a conviction.

Solution 1: California Penal Code § 1203.43. Immigration authorities recognize that a conviction vacated on the basis of a legal defect no longer exists for immigration purposes. As of January 1, 2016, Californians who successfully completed DEJ have a relatively quick and easy way to obtain such a ruling. Section § 1203.43 provides that the DEJ statute makes an affirmative misrepresentation to some defendants, including all noncitizens, because it promises that successful completion of all conditions will result in no conviction and no loss of legal benefits. Therefore, § 1203.43 specifically provides that a defendant who had charges dismissed under Pen C § 1000.3 due to successful completion of DEJ is entitled to withdraw the guilty plea as being *legally invalid*, based on the misrepresentation. This vacation of judgment for cause is sufficient to

eliminate the DEJ "conviction" for immigration purposes. See discussion of vacating a conviction for cause at Part H, below.

For further information about applying for Pen C § 1203.43, see *Practice Advisory: New California Pretrial Diversion* at https://www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges and other materials at https://www.ilrc.org/new-california-drug-provision-helps-immigrants-plea-withdrawal-after-deferred-entry-judgment-dej.

Solution 2: *Retuta* exception and suspended fine. The Ninth Circuit held that a California DEJ disposition was not a conviction for immigration purposes when the only consequence imposed in the particular case was an *unconditionally suspended* fine. The court reasoned that no penalty or restraint had been imposed, and therefore the disposition did not meet the definition of conviction at INA § 101(a)(43) (discussed in Part A, above). *Retuta v. Holder,* 591 F.3d 1181 (9th Cir. 2010). In most cases the *Retuta* defense will not be needed because of the availability of Pen C § 1203.43, but it may be useful in some cases where a § 1203.43 withdrawal of plea has not yet been obtained.

E. Not a Conviction: Juvenile Delinquency Dispositions

Adjudication in juvenile delinquency proceedings does not constitute a conviction for almost any immigration purpose, regardless of the nature of the offense.[6] If the record of proceedings indicates that proceedings were in juvenile court, there was no conviction.

In addition, formally admitting conduct that one committed while a juvenile does not make a person inadmissible for admitting to a moral turpitude or controlled substance offense. This is because the person is admitting to having committed civil delinquency conduct[7], not a "crime."

Juvenile court proceedings still can create problems for juvenile immigrants, however. A juvenile delinquency disposition will cause problems if it establishes that the youth has engaged in prostitution, is or has been a drug addict or abuser, or – by far the worst -- has been or helped a drug trafficker, or benefitted from an inadmissible parent or spouse's trafficking within the last five years. Undocumented juvenile defendants might be eligible to apply for lawful immigration status.

FOR A HANDOUT ON REPRESENTING JUVENILES in delinquency or dependency proceedings or family court proceedings, see *§ N.15 Juveniles* at www.ilrc.org/chart. See also free materials available at www.ilrc.org/immigrant-youth. For a comprehensive discussion of representing non-citizens in delinquency or dependency, see ILRC's manual, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth.*

F. Not a conviction: California Infractions?

The Board of Immigration Appeals has held that certain offenses that are less than a misdemeanor – sometimes called infractions or offenses – do not qualify as criminal convictions. This is because they are handled in non-conventional criminal proceedings that do not provide the usual constitutional protections of

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[6] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). The exceptions are that certain delinquency dispositions may form a bar to applying for Family Unity (see *Defending Immigrants in the Ninth Circuit*, Chapter 11, § 11.24) or to petitioning for a relative under the Adam Walsh Act (see *§ N.13. Adam Walsh Act* at www.ilrc.org/chart.

[7] *Matter of M-U-*, 2 I&N Dec. 92 (BIA 1944). See INA § 212(a)(2)(A), 8 USC § 1182(a)(2)(A) for the inadmissibility ground.

a criminal trial, and/or the disposition does not have effect as a prior conviction in subsequent prosecutions.[8]

There is a strong argument that a California infraction is not a conviction under these criteria. For example, the defendant does not have a right to a jury trial at any stage of the proceedings, an infraction is a "noncriminal offense" for which imprisonment may not be imposed, and a prior infraction cannot be the basis of a sentence enhancement for a subsequent misdemeanor or felony offense. For further discussion of the argument see Yi, "Arguing that a California Infraction is Not a Conviction" at www.ilrc.org/crimes.

However, there are multiple reports of immigration authorities treating a California infraction as a conviction, and some unpublished Ninth Circuit decision have deferred to them. For that reason, counsel should assume conservatively that an infraction might be held a conviction, prepare to litigate the matter (contact ILRC), and seek an additional defense where possible. The best practice may be to vacate an infraction with Pen C § 1473.7. This may be especially true if the person was found guilty of an infraction without representation by criminal defense counsel.

G. Convictions on Appeal

The Ninth Circuit has held that a conviction that is pending on direct appeal of right remains a conviction for immigration purposes.[9] Criminal defense counsel must assume that filing a timely appeal will ***not prevent*** a conviction from having immigration effect. It is possible that at some point the Ninth Circuit rule will change, or the Supreme Court will consider the issue. See also *Matter of Montreal*, 26 I&N Dec. 555 (BIA 2015) (in some circumstances the fact that a case is on direct appeal of right supports the grant of continuance pending resolution of the appeal).

If the conviction is actually reversed on appeal, it will no longer have immigration effect.[10]

H. Vacation of Judgment Based on Legal Error

The BIA will not question the validity of a state order vacating a conviction for cause. When a court vacates a judgment of conviction for cause, the conviction no longer exists for immigration purposes.[11]

The conviction must have been vacated *for cause,* meaning based on a legal defect in the proceeding. A conviction is not eliminated for immigration purposes if the court vacated it for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."[12] However, a legal defect that has some relationship to immigration does have effect, for example, ineffective assistance of counsel based on a failure to adequately advise the defendant regarding immigration consequences.

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[8] *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012), clarifying Matter of *Eslamizar*, 23 I&N Dec. 684 (BIA 2004).

[9] *Planes v. Holder*, 652 F.3d 991, 995-96 (9th Cir. 2011) (petition for rehearing denied). See also The BIA had held that a timely filed appeal is not a conviction. See *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA 2009) and Practice Advisory by Manuel Vargas, "Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*" at www.immigrantdefenseproject.org.

[10] *Planes* at 996.

[11] *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000). See also *Padilla v. Kentucky*, 129 S.Ct. 1317 (2009).

[12] *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

As of January 1, 2017, California has a new form of post-conviction relief, Pen C § 1473.7. This permits an immigrant to apply to vacate a conviction "due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." With § 1473.7, many immigrants are coming back to court to challenge unconstitutional convictions. See also discussion at Part D, above, of Pen C § 1203.43, a means of vacating a "conviction" obtained under the former California Deferred Entry of Judgment for legal error, which is procedurally very easy to obtain.

In 2016 California voters passed Proposition 64, which legalized some conduct involving marijuana. Proposition 64 also provided some post-conviction relief to reduce or eliminate older convictions relating to conduct that is now legal. This includes Health & Safety C § 11361.8(e)-(h), which permits a person to ask "to have the conviction dismissed and sealed because the prior conviction is now legally invalid…" While the "legally invalid" language is promising, it is not yet clear that immigration authorities will accept this disposition as eliminating a prior drug conviction. Until there is clarification, the safest course is to eliminate the conviction with some other relief such as Pen C § 1473.7.

For more information about California post-conviction relief, see materials at www.ilrc.org/immigrant-post-conviction-relief, and consult with expert practitioners in the local court or with the ILRC Attorney of the Day line (see information at www.ilrc.org/technical-assistance).

APPENDIX: Further Discussion of *Lujan-Armendariz* and Older Drug Convictions

This appendix provides more information on the *Lujan-Armendariz* rule and the Federal First Offender Act (FFOA), continued from Part B. Federal law provides for a form of rehabilitative relief that eliminates a conviction for immigration and other purposes. See the FFOA at 18 USC § 3607. If a qualifying defendant in federal court pleads guilty under the FFOA to a first drug offense listed in 21 USC § 844, and completes probation without violation, then the charges are dismissed and the disposition "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." See 18 USC § 3607(a), (b). This absolute language in the federal statute, directing that there is no conviction for any purpose whatsoever, is why a disposition under the FFOA is held not to be a conviction for immigration purposes despite the fact that it is a rehabilitative statute.

The Ninth Circuit held that if a person convicted in state court would have qualified for the FFOA had the case been held in federal court, then state rehabilitative relief will eliminate the conviction for immigration purposes. *Lujan-Armendariz v. INS,* 222F.3d 728 (9th Cir. 2000). *Lujan-Armendariz* only applied within the Ninth Circuit. Eleven years later, on July 14, 2011, the Ninth Circuit reversed *Lujan-Armendariz* -- but only prospectively, for convictions appearing after publication of the opinion. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011). It did not reverse *Lujan-Armendariz'* effect on convictions from before the *Nunez-Reyes* opinion, i.e., before July 14, 2011. Within the Ninth Circuit, many older convictions still can be eliminated for immigration purposes by state rehabilitative relief, as long as the person would meet all the requirements for the FFOA.

Under *Nunez-Reyes* and *Lujan-Armendariz,* in immigration proceedings arising ***within the Ninth Circuit only***, state rehabilitative relief will eliminate a conviction as long as:

a) The conviction occurred on[13] or before July 14, 2011

b) It is the person's first drug conviction.

   Actually, the statute says that the person must not have been convicted of a drug offense "prior to the commission of the" instant offense. 18 USC § 3607(a)(2). This gives rise to the argument that a person could use *Lujan-Armendariz* to eliminate multiple offenses pled to in the same hearing, because the person would not have been convicted of a drug offense prior to the commission of any of the offenses.

c) The conviction was for simple possession,[14] possession of paraphernalia or another offense less serious than possession and not covered under federal law,[15] or giving away a small amount of marijuana,[16] but not for use or being under the influence[17];

d) The person was not found to have violated probation,[18] and did not participate in any earlier diversion program, including pretrial diversion[19]

   Arguably these disqualifiers based on a probation violation or a prior pretrial diversion do not apply to people who were under age 21 when they committed the offense. They come within a different FFOA provision, 18 USC 3607(c), which does not include those disqualifiers.

e) Foreign rehabilitative relief will eliminate the immigration consequences of a foreign conviction that meets the above requirements.[20]

Besides not being deportable or inadmissible for having a conviction, the *Lujan-Armendariz* benefit also should prevent the person from being held inadmissible on the ground of having formally admitted the commission of a drug offense. The BIA has held that when conduct is brought before a criminal court judge, and the resulting disposition is something less than a conviction (the case here), then the inadmissibility ground based on admitting that conduct cannot be applied.[21]

For further discussion, see Chapter 3, § 3.6, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org, 2013).

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[13] While *Nunez-Reyes* did not specifically state what happens to convictions on the day the opinion was published, it stated that its decision would affect convictions received "after" the date of publication, and this is the only fair approach. See discussion in *Defending Immigrants in the Ninth Circuit* (www.ilrc.org, 2013), at § 3.6.

[14] The FFOA requires the person to have been charged with an offense listed at 21 USC § 844. See 18 USC 3607(a) (first sentence). Section 844 includes simple possession, whether felony or misdemeanor.

[15] *Cardenas- Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

[16] 21 USC § 841(b)(4) provides that a conviction for "distributing a small amount of marijuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18 [the FFOA]."

[17] *Nunez-Reyes, supra.*

[18] *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

[19] *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

[20] *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001).

[21] See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (1953); *Matter of Winter*, 12 I&N Dec. 638 (1967, 1968) *Matter of Seda*, 17 I&N Dec. 550 (1980).