

RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

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The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

WHEN IS A CONVICTION “FINAL” FOR IMMIGRATION PURPOSES?

Under the INA §101(a)(48)(A), a “conviction” is defined as a formal judgment of guilt or an admission of facts that constitute the offense plus some form of punishment or restraint on liberty. When Congress enacted this definition, in 1996, nothing was said about finality, but the principle that a conviction is not final for immigration purposes until a direct appeal is exhausted or waived has long been followed in the federal courts, beginning with *Pino v. Landon* (349 U.S. 901 (1955)) and the Board of Immigration Appeals (BIA). See, *Matter of Ozkok*, 19 I&N Dec. 546, 552 n.7 (BIA 1988).

This means that if your client becomes removable for a criminal conviction, filing a Notice of Appeal can effectively delay your client being placed in removal proceedings in Immigration Court (with certain exceptions) until the first appeal is exhausted. This seemingly simple rule has undergone some twisting, however, when it comes to the issue of a late-filed appeal under CPL §460.30(1).

In 2018, while continuing to uphold the finality rule, the BIA added that once the initial 30-day period for filing the NOA expires, all convictions are *presumed* to be final. This presumption could be rebutted by submitting proof of a timely filed appeal, *including any extensions or permissive filings granted by the appellate court*, and by presenting “evidence that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings.” *Matter of J.M. Acosta*, 27 I&N Dec. 420, 432 (BIA 2018) (emphasis added).

The problem with *Acosta* is that noncitizens were now required to set forth detailed legal arguments relating to the merits of their underlying case at a stage of the appeal when such arguments cannot possibly be formulated. A Notice of Appeal does not contain the legal arguments that form the basis of the appeal, nor could it, because the record on appeal has not been developed at that point in the appeal process. It is impossible, at the notice stage, to

In This Issue:

When is a Conviction “Final” for Immigration Purposes?

UPCOMING EVENTS:

10/13/2021: 12:00 – 1:30 PM
CRIM IMM 101
for Criminal Defense Attorneys
Online via Webex. To register:
marcello@ocgov.net

10/21/2021: 12:00 – 1:30 PM
CRIM IMM 101
for Family Court Attorneys
Online via Webex. To register:
marcello@ocgov.net

11/09/2021: 12:00 – 1:30 PM
Advanced Crim Imm: The MRTA
and its Impact on Noncitizens
Online via Webex. To register:
marcello@ocgov.net

11/18/2021: 12:00 – 3:30 PM
Understanding Your Noncitizen
Client’s Culture & Properly
Working with an Interpreter
Online via Webex. To register:
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**Chief Defenders &
 Assigned Counsel
 Administrators:**
 Contact the RIAC2 to
 schedule your next
 training, lunch hour or
 other session in your
 office/county.
We will provide CLE credit!

address, in any detail, the merits of the underlying case, nor, under New York law, is it required.

Recognizing the shortcomings of *Acosta*, on July 1, 2021, the Second Circuit Court of Appeals held that while the finality requirement persists with respect to convictions for immigration purposes, the BIA's *presumption* of finality was unreasonable and arbitrary. The Court found that there was no legislative history to support the presumption and that the *Acosta* holding ignores the realities of appellate practice in New York. *Braithwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021).

What does this mean for your noncitizen client?

1. After filing a NOA, Counsel will not know the outcome of the appeal, so RIAC will continue to advise as if the conviction is final.
2. If a conviction is already on direct appeal, and the NOA was timely filed, the conviction is *not final* for immigration purposes.
3. If a late NOA is filed and accepted, the conviction is *not final* for immigration purposes.
4. If the conviction is *not final*, the conviction should not be a basis for ICE enforcement action, including removal proceedings, arrests or mandatory detention. (There may be some risk, however, if ICE does not know about the appeal.)
5. **Other circuit courts disagree**, so there is a risk of ICE enforcement if your client travels to other jurisdictions where *Matter of Acosta* has been upheld, including the presumption of finality (5th, 9th, 10th, 11th Circuits).
6. If the conviction is *not final*, and your client is in removal proceedings based solely on that conviction, client/immigration counsel can move to terminate the removal proceedings.

Strategies:

- Timely file a Notice of Appeal. Advising your client of the right to appeal and, if your client wishes to appeal, filing the NOA is required by law. Filing the NOA may protect your client from removal; it may allow for the granting of relief in immigration court; or, it may allow an application to be approved granting your client status or citizenship.
 - Appeal both the judgment and the sentence; **not just the sentence**. *Acosta* incorrectly held that sentence-based appeals are not merit-based and, therefore, the conviction remains final. By appealing both the judgment and the sentence, the merit-based claim is preserved to rebut the presumption of finality.
 - If your client has prior conviction(s), be sure to find out whether client may have a pending appeal.
 - Watch out for prior convictions that are within the window (13 months) of filing a late NOA! Advise the client about traveling outside the 2d Circuit and the risk of ICE enforcement if you are dealing with a late-filed NOA.

As with all of our rules and strategies, there are exceptions. Depending on your client's circumstances, there may be a case where it is not advisable to file a NOA. We will advise you if that is the case and why. It's complicated, so call the RIAC as soon as possible in your representation of a noncitizen client. Prevention is the best medicine!