



## Issue-Spotting Finality Arguments in Immigration Practice

### **Checklist for Immigration Attorneys Representing Clients with Criminal Convictions in Affirmative Applications and Removal Proceedings**

This checklist is a companion piece to IDP's practice advisory titled "Conviction Finality Requirement: The Law Circuit-by-Circuit and the Potential Impact of *Matter of J.M. Acosta*." It is meant to identify the procedural postures where an argument about conviction finality might benefit your client if they are pursuing an affirmative immigration benefit or if they are in removal proceedings. For a comprehensive exploration of the state of the law on conviction finality and potential arguments for noncitizens in each circuit, please see the practice advisory, available on our website. As the practice advisory explains, the conviction finality question applies to all INA provisions that use the statutory term "conviction" found at INA § 101(a)(48).

#### Affirmative Applications

- Appeal a denial to the Administrative Appeals Office (AAO).** If your client's application was denied based on a conviction that is not final, submit an AAO appeal.
- Advocate against the issuance of a Notice to Appear (NTA).** If your client has status and would only be removable if their conviction becomes final, argue with the U.S. Citizenship and Immigration Services (USCIS) officer that your client cannot be issued a Notice to Appear (NTA) even if they deny the application.

#### Removal Proceedings

- Contest removability**
  - Move to terminate removal proceedings.** If the only removability charge is based on a conviction that is not yet final at the time the NTA was filed with the court, move to terminate removal proceedings. Make this argument even if the conviction is final by the time you are filing the motion. ICE may seek to issue a new NTA once the conviction becomes final, but there are significant advantages to seeking termination of removal proceedings anyway.

**Challenge the removability charge that is based on the non-final conviction.**

Even if your client is otherwise removable, challenge the removability charge that is based on the non-final conviction. Even if your client does not ultimately prevail in their removal case, having successfully challenged the charge can have other benefits, such as avoiding the reentry bar applied to those deported following an aggravated felony.

**Argue your client is entitled to release from custody or is eligible for a bond hearing.**

If your client would only be subject to detention under INA §§ 236(a) or 236(c) if their conviction becomes final, argue that they are not subject to detention and request a bond hearing seeking outright release from custody or release on bond. Note that if the immigration judge finds your client is subject to the detention statutes but is statutorily eligible for bond, your client may still need to overcome a discretionary hurdle since bond determinations include a discretionary component.

**Maintain statutory eligibility for relief.** If your client is convicted of an offense that would make them statutorily ineligible for relief, argue the conviction is not final and cannot trigger the “conviction” bar to relief eligibility. Note that most forms of relief are discretionary. Therefore, your client may still need to overcome a discretionary hurdle. Additionally, if your client pursues this strategy, be mindful of the effect of a relief grant with a non-final conviction, if the conviction subsequently becomes final.

**Appeal to the Board of Immigration Appeals (BIA).** If your client is ordered removed based on a non-final conviction, appeal to the BIA.

### Post Removal Order

**File a Petition for Review (PFR) with the Circuit Court of Appeals.** If the BIA orders your client removed based on a non-final conviction, file a PFR with the Circuit Court of Appeals that has jurisdiction over your client’s removal proceedings.

**Consider filing a motion to reopen or reconsider.** If you are consulting with a client who was ordered removed based on a non-final conviction and the period to file a PFR has lapsed, consider filing a motion to reopen or reconsider to seek termination or a new form of relief.<sup>1</sup>

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<sup>1</sup> For more information about motions to reopen and reconsider, read “The Basics of Motions to Reopen EOIR-Issued Removal Orders,” a practice advisory released by the American Immigration Council on February 7, 2018, or “Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues,” a practice advisory released by the National Immigration Project of the National Lawyers Guild and the American Immigration Council on November 20, 2013.

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### Working with Criminal Defense Counsel

Work with criminal defense counsel to determine whether the conviction at issue is pending direct appeal and thus can benefit from a finality argument, and whether there is a mechanism within the criminal court system to appeal the conviction so that it can benefit from a finality argument:

- Check to see if a direct appeal of the conviction is already pending.
- If a direct appeal is not pending and the judgment is recent, check to see if there is a way to file an appeal. If there is, work with criminal defense counsel to do so.
- If the judgment is not recent, see if you can do a late-filed appeal. If so, work with criminal defense counsel to do so.
- Once on appeal, work with criminal defense counsel on the strategies discussed in the advisory, particularly rebutting the presumption of finality in *Matter of J.M. Acosta*.

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