



## Arguing that a California Infraction is Not a Conviction; Test for Non-Misdemeanor Offenses

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The BIA held that a violation of a Kansas municipal ordinance is a conviction for immigration purposes despite the lack of appointed defense counsel or right to a jury trial in those proceedings. The BIA reaffirmed that to be a conviction the prosecution must be required to prove guilt beyond a reasonable doubt. *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012) *clarifying Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).

In *Matter of Eslamizar*, the BIA held that an Oregon violation did not constitute a conviction for immigration purposes because the criminal proceedings lacked the usual constitutional protections such as access to counsel, right to a jury trial, and the requirement that the prosecution prove guilty beyond a reasonable doubt. In *Matter of Cuellar*, the BIA reaffirmed that an infraction or other non-misdemeanor that only requires the prosecution prove guilt by a preponderance of the evidence is not a conviction. 25 I&N Dec. at 853. It stated that in order to be a conviction, the proceedings need not provide defendant with an absolute right to counsel, but need only provide indigent defendants with appointed defense counsel if there is a possibility of imprisonment. This is the minimum constitutionally required standard and criminal proceedings will generally satisfy this requirement. The BIA also held that the right to a jury trial is not required at the initial proceeding that resulted in the conviction as long as a jury trial may be provided at a later stage, for example on appeal to a higher court. *Id.* at 854.

***Determining whether your state non-misdemeanor offense is a conviction.*** The BIA has held that an infraction or other non-misdemeanor offense would not constitute a conviction for immigration purposes if plea was entered in proceedings that lack the following constitutional protections:

- The prosecution's burden of proof is lower than beyond a reasonable doubt. In *Matter of Eslamizar*, the BIA found that an Oregon violation was not a conviction because the prosecution only needed to prove guilty by a preponderance of the evidence.
- The defendant does not have a right to a jury trial at the trial or appeal stage. In *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012), the immigrant argued that a conviction under a Kansas municipal ordinance was not a conviction because he was not entitled to a jury trial. The BIA rejected this argument noting that the defendant had a right to appeal the

conviction to a higher court where he would be entitled to jury trial. Without a right to a jury trial at some stage in the proceeding, the offense should not qualify as conviction.

The above factors were central to the BIA's determination of whether the offense qualified as a conviction under INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

The BIA stated that the offense constitutes a conviction "so long as it was entered in a 'genuine criminal proceeding,' that is, a proceeding that was 'criminal in nature under the governing laws of the prosecuting jurisdiction.'" *Matter of Rivera-Valencia*, 24 I&N Dec. 484, 486-87 (BIA 2008) (quoting *Matter of Eslamizar*, 23 I&N Dec. 684, 688 (BIA 2004)). In addition to the above constitutional factors, the BIA has relied on other factors to determine if the plea was entered in "genuine criminal proceedings." The following are factors against holding the disposition to be a conviction:

- The infraction cannot be used as a basis to enhance the sentence for a subsequent misdemeanor or felony offense. *Cuellar*, 25 I&N Dec. at 853. In *Cuellar*, the BIA emphasized that the Kansas criminal code allowed courts to consider prior municipal ordinance violations in calculating the sentence for subsequent convictions. *Id.*; see also *State v. Vega-Fuentes*, 264 Kan. 10, 14-15 (Kan. 1998).
- The infraction is only punishable by a fine or jail of six months or less. In *Eslamizar*, the BIA noted that these offenses would be categorized as "petty offenses" for which there is no right to a jury trial. *See Eslamizar*, 23 I&N Dec. at 684 n. 4.
- The local, state or federal law explicitly states that a plea to the infraction imposes no disability or legal disadvantage or that prosecution of such conduct is not prosecution of a crime. *Id.* at 687.

**California infractions.** Under these criteria, a plea to an infraction under California law should not constitute a conviction. Although the prosecution must prove guilt beyond a reasonable doubt, it should not be a conviction because the defendant does not have a right to a jury trial at any stage of the proceedings,<sup>1</sup> an infraction is a "noncriminal offense"<sup>2</sup> for which imprisonment may not be imposed,<sup>3</sup> and a prior infraction cannot be the basis of a sentence enhancement for a subsequent misdemeanor or felony offense.<sup>4</sup>

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<sup>1</sup> See Calif. P.C. § 19.6 (providing there is no right to a jury trial for an infraction); Calif. P.C. § 1042.5 (providing that trial for an infraction will be by the court, not by jury trial).

<sup>2</sup> *People v. Battle*, 50 Cal.App.3d Supp. 1, 6-8 (Cal.App. 1975).

<sup>3</sup> See Calif. P.C. § 19.6 (providing an infraction cannot be punished by imprisonment); Calif. P.C. § 19.8 (providing that unless otherwise provided in the statute, the maximum fine for an infraction is \$250).

<sup>4</sup> While three or more prior vehicle code infractions within a twelve-month period may result in the case being treated as a misdemeanor (Cal. P.C. § 40000.28), there appears to be no provision permitting an infraction to be used to enhance a misdemeanor or felony.