**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Padharia, Aroon Roy, Esq.**
**Law Office of Aroon Roy Padharia**
**7600 Georgia Ave., NW, Ste. 412**
**Washington, DC 20012**

**DHS/ICE Office of Chief Counsel - WAS**
**901 North Stuart St., Suite 1307**
**Arlington, VA 22203**

**Name: BIRHAN, SALLAHADIN** **A076-911-298**

**Date of this notice: 4/23/2012**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Mullane, Hugh G.
Pauley, Roger

File: A076 911 298 - Arlington, VA

Date: APR 23 2012

In re: SALLAHADIN BIRHAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Aroon Roy Padharia, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

The respondent appeals from the Immigration Judge's October 13, 2011, decision sustaining the above charges of removability and ordering the respondent's removal. We review findings of fact by the Immigration Judge for clear error, while all other issues, including whether the parties have met the relevant burden of proof, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(i)-(ii). The respondent's appeal will be dismissed.

The record reflects that the respondent was convicted by jury trial in the Superior Court for the District of Columbia in 2011 for possession with intent to distribute marijuana in violation of D.C. Code § 48-904.01(a)(1) (2007). The respondent does not argue that these criminal proceedings did not result in a verdict of guilty and resultant sentence. Rather, the respondent contests the "finality" of his conviction for immigration purposes on the basis that he presently has an appeal pending before the District of Columbia Court of Appeals. He argues that "finality" is necessary in order for there to be a "conviction" as described in section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A).

The starting point for the analysis in this case is the definition of the term "conviction" in the Immigration and Nationality Act:

> The term "conviction" means, with respect to an alien, 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.

8 U.S.C. 1101(a)(48)(A). We must first ascertain whether the above quoted language is plain and unambiguous. This is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Section 101(a)(48)(a) can be satisfied in two ways. The first is a formal judgment of guilt entered by a court. The second is where adjudication of guilt is withheld, a judge or jury has found the alien guilty (or the alien has entered a guilty plea) and the judge has ordered some form of punishment, penalty, or restraint. In this case, we are dealing with the first definition of conviction. Moreover, because a "defendant cannot appeal a conviction until after the entry of a judgment of guilt," it follows that "a 'conviction' exists once the district court enters the judgment, notwithstanding the availability of an appeal as of right." *Planes v. Holder*, 652 F.3d 991, 994 (9th Cir. 2011).

As the Court points out in *Planes*, there is near unanimity among the courts of appeals "that the first definition of 'conviction' in § 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived." *Planes*, 652 F.3d at 991; *see Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324 (2d Cir. 2007); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001). Therefore, the plain language of the statute means that the respondent is removable because he has a conviction and that conviction is covered by sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i).[1]

The respondent, on the other hand, essentially asks that we not apply the plain language of the statute. There are situations where a court will not apply the plain language of a statute, but those situations are rare. *See, e.g., In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) ("This Court, in interpreting the words of a statute, has some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute . . . [b]ut it is otherwise where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act . . . ."). It is difficult, if not impossible, to fashion a compelling argument that application of the plain language in section 101(a)(48)(A) will lead to absurd results. *See Matter of Cardenas Abreu*, *supra*, at 803-809 (concurring opinion). It is reasonable to conclude that Congress wanted a criminal alien subject to removal proceedings as soon as he was convicted, even if the conviction was not final.

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[1] In *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009), we stated that we did not need to resolve the finality issue because "the case before us involves a late-reinstated appeal, not a direct appeal." The Court of Appeals for the Second Circuit, in an unpublished decision, disagreed with our characterization of a late-reinstated appeal and remanded the case. *Abreu v. Holder*, 378 Fed. Appx. 59 (2d Cir. 2010). The case subsequently became moot because the respondent's conviction was affirmed.

The dissent, like the petitioner in *Planes*, relies on case law that predates the enactment of section 101(a)(48) to support a different interpretation.[2] There is no dispute that before IIRIRA the Board and the courts required a conviction to be final in order to commence deportation proceedings. *See e.g., Pino v. Landon*, 349 U.S. 901 (1955); *Matter of Ozkok*, 19 I&N Dec. 546 (1988). The dissent makes a cogent argument that Congress, in the various committee reports that make up the legislative history surrounding this provision, did not state its intent to overturn prior Board precedent on this issue, whereas Congress made very clear in the legislative history that it wanted a different result when it came to so called deferred adjudications of guilt. The problem with this argument is that it jumps over the plain language of the statute and finds ambiguity in the legislative history or lack thereof. In so doing it elevates committee reports above the text of the statute.

In *Planes* the Court also noted, and rejected, that its interpretation "would lead to unfair results because an alien could be 'convicted' and removed from the United States even when an appeal as of right was pending" and the Board would lack jurisdiction to reopen his case if the respondent obtained appellate relief after the period for filing a motion to reopen expired. *Planes*, 652 F.3d at 995-96. The Court rejected this argument because it noted that "[t]he Board regularly grants such requests when the alien's underlying conviction has been vacated due to a substantive or procedural defect in the original criminal proceedings, concluding that such a change in the facts constitutes 'exceptional circumstances' justifying further review of the alien's case." *Id.*

The dissent also points out that it would be appropriate in this case to invoke *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and apply a different interpretation of section 101(a)(48) than the Courts of Appeals. We disagree. *Brand X* is reserved for those cases where the statutory language is ambiguous. We find, however, as have several courts of appeals, that the statutory language is plain such that *Brand X* has no bearing on the matter. *See also matter of Cardenas-Abreau*, 24 I&N Dec. 795, 803-09 (BIA 2009) (concurring opinion setting forth detailed reasons for rejecting the dissent's arguments).

For all of the foregoing reasons, we conclude that section 101(a)(48)(A) of the Act does not require the waiver or exhaustion of direct appeals. Nevertheless, our decision does not preclude the Department of Homeland Security from exercising its prosecutorial discretion and delaying the initiation of proceedings until a conviction is final.

The respondent raises several other issues in summary fashion in his Notice of Appeal. These claims lack merit and so we discuss them only briefly. The first is whether proceedings were "initiated in accordance with section 239(a)(1) of the Act." Our review of the record indicates that DHS complied with all of the requirements of section 239(a)(1). The next issue is whether a "conviction for possessing marijuana with intent to distribute is a crime defined under the [Act]." Respondent's conviction is both a crime relating to a controlled substance under section 237(a)(2)(B)(i) and an aggravated felony under section 237(a)(2)(A)(iii). Respondent also contests

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[2] Moreover, contrary to the dissent, we regard the Ninth Circuit's decision as a clear holding (and not dicta) on the issue. The dissent points out that in *Planes v. Holder*, *supra*, the alien actually appealed only the sentence and not the merits of his conviction. While true, this was not the basis on which the Ninth Circuit elected to decide the case.

whether DHS met its burden of proof, and we conclude that DHS provided clear and convincing evidence for its charges. Finally, we reject the respondent's claim that DHS lacked personal jurisdiction over the respondent and thus lacked authority to place him in removal proceedings.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

File: A076 911 298 - Arlington, VA

Date: APR 23 2012

In re: SALLAHADIN BIRHAN

DISSENTING OPINION: Anne J. Greer, Board Member

I respectfully dissent. In my view, as elaborated on in the dissenting opinion in *Matter of Cardenas Abreu*, 24 I&N Dec. 795, 811-823 (BIA 2009), *vacated by Abreu v. Holder*, 378 Fed.Appx 59 (2d Cir. 2010), a conviction on direct appeal is not a "final conviction" for immigration purposes. I would therefore sustain the respondent's appeal.

It has long been recognized that deportation, although civil in nature, is "enmeshed" with criminal law. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010). In light of this close relationship, an alien is entitled to certain protections during criminal proceedings. *Id.* at 1486. This Board's longstanding precedent, extending from the Supreme Court's holding in *Pino v. Landon*, 349 U.S. 901 (1955), has been to require the exhaustion or waiver of an alien's right of direct appeal prior to recognizing a conviction as "final" for immigration purposes. *See Matter of Cardenas Abreu, supra.* at 814. I presume Congressional awareness of this precedent, and believe that it was Congress's intent to preserve the ability of an immigrant to pursue an appeal as a right before removability arises. *Id.*

I find it significant that in setting forth the statutory definition for "conviction" contained in IIRIRA, Congress relied on our prior interpretation to define the term by retaining the entire definition for a conviction under *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), except for the third prong of the portion that applied when judgment is withheld. I conclude that, in omitting the third prong of the *Ozkok* approach to deferred adjudications, Congress did not intend to supersede our prior requirement that a conviction must otherwise be final for immigration purposes. The legislative history of the IIRIRA accompanying the adoption of the definition of a "conviction" gave no indication of an intent to disturb the principle that an alien must waive or exhaust his direct appeal rights to have a final conviction. *See Matter of Punu*, 22 I&N Dec. 224, 227 (discussing the legislative history of the term "conviction" in section 101(a)(48)(A) of the Act). Rather, it reflects Congressional intent to "make it easier to remove criminal aliens, regardless of specific procedures in States *for deferred adjudication.*" *Id.* (Quoting H.R. Rep. No. 104-879 (1997), 1997 WL 9288 at *295 (emphasis added).

The legislative history reflects congressional intent to address the inconsistent treatment for deferred adjudications in *Ozkok*, but contains no mention of a fundamental shift with respect to our established precedent concerning direct appeals.[1] Similarly, the statute and legislative history are

[1] Board Member Pauley's concurrence in *Matter of Cardenas Abreu* is correct in recognizing that the continued presence of a finality requirement elsewhere in the Act and implementing regulations (continued...)

silent with respect to the significance of post conviction vacaturs or expungements, which we have construed in a series of cases. *See, e.g., Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (holding that convictions vacated or expunged for rehabilitative purposes continue to serve as convictions for immigration purposes); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (holding that convictions vacated on the basis of a procedural or legal defect in the underlying criminal proceedings do not remain convictions for immigration purposes.)

The record reflects that the respondent's criminal conviction is on direct appeal to the District of Columbia Court of Appeals. The United States Courts of Appeals that have addressed the definition of conviction contained in section 101(a)(43)(A) of the Act have not been presented with the situation before us: an alien who has a direct appeal pending from a trial court's finding of guilt. In *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011), which the majority opinion cites for its persuasive value, the United States Court of Appeals for the Ninth Circuit addressed a situation in which the alien entered a guilty plea and did not appeal his conviction. Rather, he appealed the sentence imposed. *Id.* A review of decisions cited in *Planes* regarding finality reveals that none address the issue presented here, i.e., a direct appeal of a criminal conviction. *Id.* at 996-97. *See Puello v. Bureau of Citizenship and Immigration Services,* 511 F.3d 324, 332 (2d Cir. 2007) (discussing the effective *date* of conviction for immigration purposes); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (discussing whether a state deferred adjudication constitutes a conviction); *Montenegro v. Ashcroft*, 355 F. 3d 1035, 1037 (7th Cir. 2004) (noting that the alien's petitions for relief had been denied); *United States v. Saenz-Gomez*, 472 F.3d 791, 792 (10th Cir. 2007) (stating that the alien's conviction had already been affirmed on direct appeal); *see also Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001) (concluding that the alien's right of appeal did not stem from the entry of a formal judgment of guilt, but rather from a state deferred adjudication).

Under these circumstances, I believe that it is appropriate for the Board to lend its interpretation to what I perceive to be an ambiguity in the statute in terms of silence. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *see also Abreu v. Holder*, *supra.* (remanding to this Board for our interpretation in the first instance on the question of whether ambiguity exists in section 101(a)(48)(A) of the Act with regard to finality). For the reasons set forth here and in my dissenting opinion in *Matter of Cardenas Abreu*, *supra*, I

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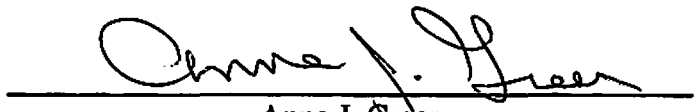
[1] (...continued)
cuts both ways, as it is generally presumed that Congress acts intentionally where certain language is present in one portion of a statute, yet excluded from another. *See Matter of Cardenas Abreu*, 25 I&N Dec. at 807-809 (concurring opinion); *but see Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) (discussing the difficulty in interpreting the term "admission" in the Act). However, I find it significant that the finality requirement has been preserved in the statute authorizing the expedited removal of an individual who was *not* lawfully admitted for permanent residence or who has such status on a conditional basis. *See* section 238(b)(2), (c)(3) of the Act, 8 U.S.C. § 1228(b)(2), (c)(3); 8 C.F.R. § 1238.1(b)(iii). I find the continued existence of a finality requirement in the expedited removal mechanism to be persuasive in considering the present context, where it must be shown by "clear and convincing evidence" that an admitted alien is removable as charged. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. 1229a(c)(3)(A).

would interpret the term "conviction," as defined in section 101(a)(48)(A) of the Act, as continuing to incorporate a finality requirement, and would sustain the respondent's appeal.



Anne J. Greer
Board Member