



**Committee for Public Counsel Services
Immigration Impact Unit**

6 Pleasant Street, 6th floor, Malden, MA 02148

Tel: 781-338-0825 – Fax: 781-338-0829

iiu@publiccounsel.net

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Practice Advisory on the Sufficiency of Post-Conviction Motions

Matter of Azrag, 28 I&N Dec. 784 (BIA 2024)

March 29, 2024

I. Introduction

On February 23, 2024, the Board of Immigration Appeals (“BIA”) issued a decision in [*Matter of Azrag, 28 I&N Dec. 784 \(BIA 2024\)*](#). Within, the BIA held that where a state court order granting a motion to vacate a conviction does not indicate the reason for the vacatur and there was no independent evidence of a substantive or procedural defect, the conviction remains valid for immigration purposes.

II. Background

For many noncitizens with prior criminal convictions, an effective way to avoid deportation or other immigration consequences is to vacate their prior criminal convictions. However, the BIA has held that if a vacatur is granted to avoid immigration consequences or on account of rehabilitation, then the vacatur is insufficient and the conviction will stand for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006)). For a vacatur to be recognized for immigration purposes, a noncitizen bears the burden to prove that a vacatur was on account of a procedural or substantive defect. *Id.* Where a state court’s order is not clear, extrinsic evidence may be sufficient to establish whether a vacatur was premised on a procedural or substantive defect. *Id.* at 625.

III. The *Azrag* Decision

The *Azrag* decision arises from a motion to vacate based on ineffective assistance of counsel. The motion sought to withdraw prior pleas to theft charges and alleged that the noncitizen received ineffective assistance of counsel. However, the motion was unaccompanied by affidavits or other evidence of ineffective assistance of counsel and did not assert any specific constitutional, statutory, or procedural grounds. After post-conviction counsel conferred with the prosecution, the parties agreed that the noncitizen should be allowed to withdraw his pleas and the judge agreed, again without stating specific grounds. After the conviction was vacated, the

noncitizen filed a motion to reopen and terminate his removal proceedings in immigration court, which would have restored his status to that of a lawful permanent resident (“LPR” or “green card holder”) if successful.

The BIA denied the noncitizen’s motion to reopen and terminate, holding that the vacatur was invalid and the conviction stood for immigration purposes. The BIA noted that the burden was on the noncitizen to prove that a substantive or procedural defect was the reason for the vacatur. The state court’s order only stated that the court had reviewed the file and noted the agreement of the parties when granting the motion to vacate. The BIA explained that the motion to vacate was unaccompanied by any evidence showing that trial counsel was constitutionally ineffective, and further expounded that statements of counsel within the motion were not evidence. The vagueness of the state court judge’s order and the absence of extrinsic evidence resulted in the noncitizen falling short of his burden.

IV. Practice Tips

Where counsel is seeking post-conviction relief for immigration purposes, the record must be clear that there was a procedural or substantive defect in the underlying criminal proceedings, and such defect was the reason for the vacatur. The most effective way of doing so is to ensure that the state court order explicitly states that the vacatur is granted on account of ineffective assistance of counsel or other relevant constitutional, statutory, or procedural defect(s). The motion to vacate should always be accompanied by extrinsic evidence such as affidavits that establish that there was a defect in the underlying criminal proceedings and should not rely on immigration hardship or rehabilitation as the foundation of vacatur. Motions granted on account of agreement of the parties or merely due to a review of statements of counsel within the motion will be deemed insufficient in immigration court. If a state court judge’s order omits the reason for vacatur, then consider filing a motion for an amended order, asking the judge to clarify and identify the procedural or substantive defect underlying the vacatur.

Note that ineffective assistance of counsel claims based on the failure to provide immigration advice (aka *Padilla* motions) are based on a constitutional defect under the Sixth Amendment or art. 12 and so are considered valid vacatur in immigration court if the constitutional grounds are asserted. This is distinguishable from cases where a court vacates a conviction due to sympathy for the noncitizen or to avoid hardship.