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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADRIANA DURAN-NUNEZ Plaintiff-Appellant, v. MERRICK GARLAND, Defendant-Appellee.	No. 21-70908 Agency No. A201-152-324 MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted December 7, 2022
Phoenix, Arizona

Before: WARDLAW and BUMATAY, Circuit Judges, and ZOUHARY,** District Judge.
Concurrence by Judge BUMATAY.

Petitioner Adriana Duran-Nunez, a native of Mexico, last entered the United States unlawfully in 2003. She came to the attention of immigration authorities in February 2011 because of an altercation with her common-law husband. She was

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

arrested for domestic violence in violation of Ariz. Stat. §§ 13-1203(A)(1), 13-3601. She agreed to a diversion program under Ariz. Stat. § 11-361 requiring her, among other conditions, to attend anger-management classes. She successfully met the conditions, and her case was dismissed with prejudice in June 2011.

This incident led to her removal proceeding in September 2017. She sought cancellation of removal or, alternatively, voluntary departure. The Immigration Judge (IJ) found her convicted of a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E), rendering her statutorily ineligible for cancellation of removal under Section 240A(b)(1)(C) of the Immigration and Nationality Act (INA). The IJ denied her application for cancellation of removal and granted her voluntary departure.

This case comes before this panel after several unsuccessful appeals. Duran-Nunez now requests a remand to allow the Board of Immigration Appeals (BIA) to reconsider her claims for cancellation of removal, and ineffective assistance of counsel before an IJ. We are sympathetic to Duran-Nunez—a mother of four United States citizens—with no other criminal history in the twenty years she has been in this country. However, she fails to meet her required burden.

We have jurisdiction under 8 U.S.C. § 1252(a) and review *de novo*: (1) whether the BIA applied the proper legal standard in determining whether a state pre-plea agreement is a conviction for immigration purposes; and (2) due-process claims based on ineffective assistance of counsel. *See Cordoba v. Holder*, 726 F.3d

1106, 1113 (9th Cir. 2013); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011).

1. Noncitizens seeking to cancel a lawful removal order bear the burden of showing they have not been convicted of a disqualifying offense. *Pereida v. Wilkinson*, 141 S. Ct. 754, 761 (2021). They cannot carry that burden when the record is ambiguous. *Id.* Duran-Nunez argues the BIA overlooked the absence of a guilty plea agreement when it found that a "conviction" exists for immigration purposes. Under the INA:

> (A) 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)-(B).

The Government asserts the definition is satisfied because Duran-Nunez entered a plea of guilty as part of her deferred-prosecution agreement, pointing to the BIA's reliance on *In re Punu*, 22 I. & N. Dec. 224, 227–28 (BIA 1998). But this case is distinguishable from *Punu* because Duran-Nunez agreed to a deferred prosecution, not a deferred adjudication—a distinction with a difference. The deferred-adjudication agreement in *Punu* required the respondent to plead guilty or no contest. 22 I. & N. Dec. at 228 ("[T]he court may, **after** receiving a plea of guilty . . . defer further proceedings without entering an adjudication of guilt"). Duran-Nunez's deferred-prosecution agreement contains no such requirement.

The most recent BIA denial found the state-court documents indicate Duran-Nunez entered a guilty plea, but the record contains ambiguous, inconsistent evidence of any such plea. For example, the municipal-court docket reflects that Duran-Nunez "accepted [a] Rule 38 plea." *See* Ariz. R. Crim. P. 38.1(a) (2011). Inconsistent with the BIA's reading, a Rule 38 deferred prosecution would not be an option if a guilty plea had been entered. Further, the "Plea:" field is blank throughout the municipal record, suggesting the court never entered a guilty plea. The BIA and the Government point to one paragraph in the agreement to argue a guilty plea was entered: "if the Defendant does not successfully complete the above-stated conditions, then the Court shall accept the guilty plea."

But there is more. The statutory requirement of a "conviction" may be met another way: admission of sufficient facts to warrant a finding of guilt. The BIA cites to the IJ order and municipal-court docket, finding guilt because she "appeared before a judge, the charge was discussed, resolution was reached, and she was ordered to attend anger management courses, . . . or she would have a conviction." Under the BIA's analysis, most, if not all, deferred-prosecution agreements would satisfy this "conviction" requirement. We have found it "rational to believe that someone who was arrested [], charged, and then sent to a diversion program in lieu of prosecution had in fact committed [the] offense." *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026 (9th Cir. 2007) (determining that a prior offense where defendant entered a diversion program with no guilty plea disqualified defendant from certain removal protections). Because deferred-prosecution agreements have not been held per se "convictions," the Board reviewing Duran-Nunez's appeal improperly made this leap. *See In re Mohamed*, 27 I. & N. Dec. 92 (BIA 2017) (finding a deferred prosecution-agreement similar to Duran-Nunez's was brought within the definition of a conviction because of respondent's sworn admission of guilt to every element of the charged crime).

However, the BIA ultimately came to the right conclusion. In *Pereida*, the Supreme Court examined a cancellation-of-removal case where the state-court record was ambiguous on whether petitioner was convicted of violating a subsection of the criminal statute. 141 S. Ct. 754. The Court held noncitizens bear the burden of establishing they are entitled to relief. *Id.* at 761. As such, any ambiguity in the conviction record works against Duran-Nunez. *See Marinelarena v. Garland*, 6 F.4th 975, 978 (9th Cir. 2021).

The burden was on Duran-Nunez to show she was not convicted of a disqualifying crime. The IJ concluded Duran-Nunez "failed in that burden by her own testimony [and] with supporting documents from the court." Her own sworn testimony was:

> [S]he had an argument with her partner, . . . and she slapped him. He called the police, the police arrived, she was taken to jail, and was charged a misdemeanor, domestic violence . . . . She [] appeared in court and spoke with the judge. The judge imposed upon her a requirement that she attend anger-management classes.

With this record, the IJ found Duran-Nunez admitted to the act leading to her assault charge. She offers no evidence that her admission does not amount to admission of sufficient facts to warrant a finding of guilt. Duran-Nunez argues she cannot be expected to prove a negative, but her legal hurdles do not exist in a vacuum and are not arbitrarily imposed upon her. She was charged with a disqualifying crime, at which point the burden flipped to her to prove eligibility to remain in the United States. *See Pereida v. Wilkinson*, 141 S. Ct. at 761. The absence of any evidence proving her eligibility for cancellation of removal—let alone clear evidence—results in her failing to meet her burden, and the Government prevails.

2. Duran-Nunez next argues ineffective assistance of counsel. Duran-Nunez must prove counsel's conduct in the removal proceeding was "egregious" and caused "substantial prejudice." *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022). Duran-Nunez cannot show substantial prejudice. A non-citizen seeking reopening bears the "heavy burden" of showing that, if removal proceedings were reopened, "the new evidence offered would likely change the result in the case." *In*

re S-Y-G, 24 I. & N. Dec. 247, 251 (BIA 2007) (*citing In re Coelho*, 20 I. & N. Dec. 464, 473 (BIA 1992)). Although her former counsel failed to place the municipal-court docket in evidence, as stated above, the docket fails to prove she did not admit to the underlying charge—and is confusing at best. At oral argument, Duran-Nunez's current counsel confirmed no other documents exist to supplement the record. With nothing additional, the ambiguous record cannot be improved to support her requested relief and she cannot show prejudice.

PETITION DENIED.

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BUMATAY, Circuit Judge, concurring:

I concur in the judgment.