

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:	)	
	)	
Douglas L. Reece, D.O.,	)	DATE: February 24, 1994
	)	
Petitioner,	)	
	)	
- v -	)	Docket No. C-94-023
	)	Decision No. CR305
	)	
The Inspector General.	)	
_____	)	

DECISION ON REMAND

Petitioner requested a hearing on a January 12, 1993 determination by the Inspector General (I.G.) to exclude him from participation in the Medicare and State health care programs<sup>1</sup> for five years pursuant to section 1128(a)(1) of the Social Security Act (Act). On August 12, 1993, I issued a decision in which I granted the I.G.'s motion for summary disposition and affirmed the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid programs for five years. Douglas L. Reece, D.O., DAB CR280 (1993). I found that the I.G. had the authority to exclude Petitioner under section 1128(a)(1) of the Act because the undisputed material facts established that he was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. I further found that Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for five years is the minimum period mandated by federal law. In addition, I concluded that the five year

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<sup>1</sup> "State health care program" is defined by section 1128(h) of the Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

exclusion did not violate the United States Constitution's prohibition against double jeopardy.

Petitioner appealed my decision to an appellate panel of the Departmental Appeals Board (DAB). On November 15, 1993, the appellate panel issued its decision. The appellate panel affirmed my decision in part and remanded it in part for further consideration.

The appellate panel noted that Petitioner raised three interrelated exceptions to my decision. Petitioner asserted that he had not been "convicted" as that term is defined by section 1128(i) of the Act. Petitioner disputed my findings that he had pled guilty in State court and that the State court had accepted the plea and determined that the evidence substantiated Petitioner's guilt. Additionally, based on United States v. Halper, 490 U.S. 435 (1989), Petitioner asserted that the five year exclusion did not bear a rational relationship to the goal of compensating the government for its loss and thus violated the United States Constitution's prohibition against double jeopardy. Finally, given these alleged errors, Petitioner asserted that I erred in granting the I.G.'s motion for summary disposition because there existed questions of fact which necessitated a hearing. Petitioner therefore argued that the Board should either remand this case to me for a hearing or reverse my decision based on the facts alleged by Petitioner. Petitioner did not take exception to my finding that the criminal offense in question was related to the delivery of an item or service under the Medicaid program.

The appellate panel agreed with my conclusion that Petitioner's five year exclusion did not violate the constitutional ban on double jeopardy. However, the appellate panel stated that my decision was ambiguous in its treatment of the issue of whether Petitioner was convicted.

The I.G. contended that Petitioner was convicted as that term is defined by sections 1128(i)(2), (3), or (4) of the Act. Petitioner disputed the I.G.'s contentions. The appellate panel asserted that my decision provided specific Findings of Fact and Conclusion of Law (FFCLs) only on the issue of whether Petitioner was convicted as defined by section 1128(i)(3) of the Act. The appellate panel stated that, in focusing the analysis in this manner, my decision was ambiguous regarding the additional bases for exclusion offered by the I.G. -- that Petitioner was convicted within the meaning of sections 1128(i)(2) and (4) of the Act. The appellate

panel stated that even with regard to my discussion on the applicability of section 1128(i)(3) of the Act, my analysis did not fully consider all the arguments before me. The appellate panel remanded this case to me so that I can clarify my decision concerning whether Petitioner was convicted within the meaning of section 1128(i)(2), (3), or (4).

The appellate panel concluded also that, in view of the need for additional clarification of my decision, the issue of whether summary disposition of this case was appropriate was not ripe for the appellate panel's consideration. The appellate panel reserved judgment on the issue of whether summary disposition was appropriate pending my decision on remand.

On remand, by letter dated November 17, 1993, I offered the parties the opportunity to submit supplemental briefs. Neither party filed a brief.

I have considered the issues before me on remand and I conclude that, based on the undisputed material facts in the record of this case, Petitioner was convicted of a criminal offense within the meaning of sections 1128(i)(2), (3), and (4) of the Act. As I found in my August 12, 1993 decision, the undisputed material facts establish that the criminal offense which formed the basis of Petitioner's conviction was related to the delivery of an item or service under the Texas Medicaid Program within the meaning of section 1128(a)(1) of the Act. Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and his five year exclusion is the minimum period mandated by federal law. There are no genuine issues of material fact which would require the submission of evidence at an in-person hearing and the I.G. is entitled to summary disposition in this proceeding.

#### ISSUES

The issues to be decided on remand are:

1. Whether Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(2) of the Act.
2. Whether Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act.

3. Whether Petitioner was convicted of a criminal offense within the meaning of section of 1128(i)(4) of the Act.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

My August 12, 1993 decision was based on 14 FFCLs set forth at pages 2 - 3 of the decision. I amend the FFCLs I made in my August 12, 1993 decision to add the following new FFCLs:

15. The Texas court found that Petitioner was guilty of the offense charged against him, Tampering with Government Records. FFCL 7.

16. The court deferred entry of a formal adjudication of guilt. FFCL 8.

17. Petitioner participated in a deferred adjudication program where judgment of conviction has been withheld. FFCL 8, 16.

18. Petitioner was convicted within the meaning of section 1128(i)(2) of the Act. FFCL 15.

19. Petitioner was convicted within the meaning of section 1128(i)(4) of the Act. FFCL 17.<sup>2</sup>

#### DISCUSSION

The undisputed facts establish that, on June 14, 1990, a grand jury in Lubbock, Texas, charged Petitioner with the felony offense of Tampering with Government Records. FFCL 2. The grand jury charged that, on or about November 25, 1988, Petitioner intentionally and knowingly made a false claim for reimbursement by Medicaid for providing an "office visit" to an individual when, in fact, Petitioner knew that the individual had not had an office visit. FFCL 3. On May 5, 1992, Petitioner pled guilty to the charge contained in the indictment in the 237th District Court of Lubbock County, Texas. FFCL 6. The court determined that the evidence "substantiates the Defendant's guilt for the offense charged against him to-

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<sup>2</sup> Based on the content of these FFCLs, they would logically not be placed at the end of the FFCLs already in place. However, in order to avoid the confusion of renumbering the FFCLs, I have decided to add them to the end of the FFCLs which already exist.

wit: Tampering with Government Records, a third-degree felony committed on November 25, 1988." FFCL 7. The court declared that the "best interest of society and the defendant" would be served by deferring further proceedings without entering an adjudication of guilt. FFCL 8. The court placed Petitioner on probation for a period of ten years and ordered him to pay a fine in the amount of \$5000 and to pay restitution and costs. FFCL 9.

Petitioner's exclusion was based on sections 1128(a)(1) of the Act. Section 1128(a)(1) of the Act mandates exclusion from Medicare and Medicaid programs for any individual or entity "convicted of a criminal offense related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) establishes that "[i]n the case of an exclusion under subsection (a), the minimum period of exclusion shall not be less than five years . . ."

The threshold question in every case under section 1128(a) is whether the individual or entity was convicted as that term is defined under the Act. Petitioner asserts that he was not convicted of a criminal offense. Therefore, according to Petitioner, there exists no authority for the I.G. to impose and direct an exclusion against him. This is a legal issue involving questions of interpretation and application of law to the undisputed material facts. Summary disposition is therefore an appropriate mechanism for deciding this issue. John W. Foderick, M.D., DAB CR43 (1989), aff'd DAB 1125 (1990).

The term "convicted" is defined at section 1128(i) of the Act. It is clear from the statutory language at section 1128(i) that Congress intended that its definition of conviction encompass a wide range of situations. Section 1128(i) establishes four alternative definitions of the term "convicted." An individual or entity need only be convicted under one of the four definitions in section 1128(i) to establish that the individual or entity was convicted of a criminal offense within the meaning of the Act. Pursuant to this statutory section, an individual or entity is considered to have been convicted of a criminal offense:

- (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

(2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court; or

(4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Petitioner contends that none of the four statutory definitions of convicted apply to this case. The I.G. contends that Petitioner was convicted within the meaning of three of the four definitions: 1128(i)(2), (3), and (4). The I.G. does not contend that Petitioner was convicted within the meaning of section 1128(i)(1). Thus, the parties dispute the issues of whether: (1) the court made a finding of guilt against Petitioner within the meaning of section 1128(i)(2); (2) the court accepted Petitioner's guilty plea within the meaning of section 1128(i)(3); and (3) the disposition of Petitioner's plea constitutes a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld within the meaning of section 1128(i)(4).

Section 1128(i) defines conviction in the context of the federal exclusion law. It is evident from the face of the statute and its legislative history that a principal goal of the exclusion law is to protect the integrity of federally-funded health care programs and the welfare of the programs' beneficiaries and recipients. The exclusion law is intended to protect program funds and beneficiaries and recipients from providers who have demonstrated by their conduct that they pose a threat to the integrity of such funds, or to the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682. In light of the strong government interest in ensuring that federally-funded health programs and their beneficiaries and recipients be protected against untrustworthy providers, I conclude that Congress intends that the term "convicted" should be broadly construed.

I will now discuss in turn the applicability to this case of the three alternative definitions of the term "convicted" which are in dispute in this case under

sections 1128(i)(2), (3), and (4) of the Act. Consistent with the legislative goal to protect the Medicare and Medicaid programs from untrustworthy providers, I will give a broad reading to the language contained in section 1128(i), and I will apply any exceptions to section 1128(i) narrowly.

I. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(2) of the Act.

The record shows that Petitioner appeared before a State court judge and pled guilty to the charge contained in the indictment. I.G. Ex. 1. Petitioner further requested the consent of the judge to waive his right of a trial by jury, and the judge gave his consent for Petitioner to waive his right of trial by jury. At that point, the Order for Deferred Adjudication states that Petitioner:

proceeded to trial before the Court, who having heard and considered the pleadings and evidence offered, the Court finds that it substantiates [Petitioner's] guilt for the offense charged against him to wit: Tampering with Government Records . . . (Emphasis added.)

I.G. Ex. 1 at 1.

The language in this document is clear on its face. It states that after Petitioner waived his right to trial before a jury, he proceeded to trial before a judge. The judge considered the pleadings and evidence and explicitly made a finding that the evidence substantiated Petitioner's guilt for the offense charged. Pursuant to section 1128(i)(2), an individual or entity is considered to be convicted of a criminal offense when "there has been a finding of guilt against the individual or entity by a Federal, State, or local court." The language in the Order for Deferred Adjudication shows that a judge in a State court considered the evidence against Petitioner and specifically found that the evidence substantiated his guilt. This falls squarely within the definition of conviction at section 1128(i)(2).

Petitioner states that the State court disposed of Petitioner's criminal charge under Article 42.12 of the Texas Code of Criminal Procedure, Sec. 5(a). Petitioner's opposition to summary judgment at 10. That section provides in relevant part that:

the Court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence and

finding that it substantiates the Defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the Defendant on probation. (Emphasis added.)

Under this section, a judicial finding of guilt is a necessary condition that must be met before a court can defer further proceedings and place a Defendant on probation. In this case, the court deferred further proceedings and placed Petitioner on probation. Since the court indisputably disposed of Petitioner's criminal charge under this provision, Petitioner had to have been found guilty for the court to defer further proceedings and place him on probation. The court would not have had the authority to defer further proceedings and impose probation under this section without a finding of guilt against Petitioner.

Support for this reasoning is found in the case Leon Brown, M.D., DAB CR83 (1990). In that case, Dr. Brown was charged with Medicaid fraud. Pursuant to a plea agreement, Dr. Brown agreed to have his case submitted to court upon the statement of facts. The State court judge reviewed the statement of facts and specifically found that they were sufficient to find Dr. Brown guilty of the charge. The State court judge then stated that he decided to stay any finding of guilt against Dr. Brown and the judge indicated that entry of judgment had been stayed. Dr. Brown was then placed on probation and assessed restitution.

Based on these facts, the administrative law judge found that there was a finding of guilt against Petitioner by a State court within the meaning of section 1128(i)(2) of the Act. The administrative law judge reasoned:

This is not an unreasonable conclusion in light of the fact that the state court specifically stated that the facts were sufficient to find Petitioner guilty, and would not have had the authority to impose probation or any other type of sanction against Petitioner without such a finding of guilt.

Brown, DAB CR83, at 7. An appellate panel of the Departmental Appeals Board reviewed this decision, and agreed with the administrative law judge's reasoning. Leon Brown, DAB 1208 (1990).

Petitioner argues that the State court did not make a finding of guilt against Petitioner within the meaning of section 1128(i)(2) because the State court deferred further proceedings without entering an adjudication of guilt. The language of section 1128(i)(2) is plain and

without qualifying terms or conditions. Under that section, conviction is defined to include the circumstances where there has been a finding of guilt by a court. In this case, the statutory definition of finding of guilt was met when the State court, after reviewing the evidence before it, found that the evidence substantiated Petitioner's guilt. This finding of guilt precisely conforms to the criteria of section 1128(i)(2). Thus, even though the record of the court proceedings show that a finding of guilt in the sense of an entry of a formal adjudication of guilt had been deferred, Petitioner nevertheless had to have been found guilty for the court to defer adjudication of guilt and impose probation.

II. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act.

In my August 12, 1993 decision I explicitly found that Petitioner was convicted within the meaning of section 1128(i)(2) of the Act. FFCL 11. In this decision on remand, I make the same finding.

Under section 1128(i)(2), an individual or entity is convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court." The event described by section 1128(i)(3) as constituting a conviction is the acceptance of a plea. The term "accept" is not specifically defined in section 1128(i)(3). However, it is well settled law that a plea is accepted within the meaning of section 1128(i)(3) whenever a party offers a plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal matter. Robert W. Emfinger, R.Ph., DAB CR92 (1990).

The facts in this case indicate clearly that the court consented to receive Petitioner's plea as an element of an arrangement to dispose of a criminal complaint against him. The records of the criminal proceedings before the State court show that Petitioner was charged with a criminal offense. I.G. Ex. 2. Petitioner appeared in open court and unambiguously admitted his guilt in order to dispose of the criminal charges against him. The court took care to determine that the proffered guilty plea was acceptable as a basis for disposing of the criminal charges. The court determined that the plea was voluntary and informed. In addition, the court considered the evidence related to the criminal charges and made an affirmative determination that there was a sufficient legal basis for the guilty plea. Once the

court determined that the guilty plea was acceptable as a basis for disposing of the criminal charges, the court placed Petitioner on probation and ordered him to pay a fine plus restitution and costs. In addition, the court deferred entering an adjudication of guilt and ordered that, upon the successful completion of Petitioner's probation, Petitioner "shall be discharged and the proceeding against him shall be dismissed." I.G. Ex. 1.

Petitioner contends that the Texas court did not "accept" the plea of guilty, but instead deferred adjudication of Petitioner's guilt. Petitioner contends that when he completed probation the court could enter a finding of not guilty and dismiss the charges against him. Additionally, if he violated the terms of probation, the prosecuting authorities have the burden of proceeding with an adjudication of guilt. The trial court has the discretion to hold further proceedings on the issue of guilt before entering an adjudication of guilt. Therefore, Petitioner argued that the I.G. had not provided sufficient evidence to show that he had been convicted of a criminal offense or to show that his plea was a final conviction for purposes of section 1128(a)(1) and 1128(i) of the Act. Citing Cole v. State, 757 S.W.2d 864 (Tex. Ct. App. 1988) and McNew v. State, 608 S.W.2d 166 (Tex. Crim. App. 1978), Petitioner states that Texas law is clear in establishing the availability of further proceedings. Petitioner's opposition to summary judgment at 12 - 14; Petitioner's appellate brief at 7.

While it may be true, as Petitioner asserts, that, under Texas procedure, a trial court has the discretion to hold further proceedings on the issue of guilt before entering a formal adjudication of guilt, the case law cited by Petitioner shows that a probationer is not entitled to a hearing on the issue of guilt if he violates the terms of his probation. In McNew, the appellant argued that, under the Texas deferred adjudication procedure, a probationer who violates the terms of probation is entitled to two separate hearings. First, a hearing should be held limited solely to a determination by the trial court of whether the court should proceed to enter an adjudication of guilt, and then a second hearing should be held in which guilt is determined. The court in McNew stated that while Texas procedure requires a hearing limited to a determination of whether the trial court should proceed to enter an adjudication of guilt, there is no requirement to hold a second hearing to determine guilt. The court in McNew reasoned that, since the Texas deferred adjudication law:

requires that a trial judge hear evidence which "substantiates the defendant's guilt" before he can defer further proceedings without entering an adjudication of guilt, we see no reason that once a hearing is held on whether the trial judge should proceed with an adjudication of guilt, the trial judge cannot immediately continue with " . . . all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation, and defendant's appeal . . . as if the adjudication of guilt had not been deferred."

608 S.W.2d at 173 - 174. Thus, under McNew, if a trial court determines that a probationer has violated the terms of his probation, the trial court may immediately proceed to enter an adjudication of guilt and impose punishment based on the guilty plea. The trial court is not required to review the question of guilt.

Moreover, while the Texas court cases cited by Petitioner support the conclusion that Petitioner was not convicted under Texas law, they do not address the question of whether he was convicted within the meaning of the federal exclusion law. In McNew, the Texas Court of Criminal Appeals held that, under Texas law, a conviction "always involves an adjudication of guilt." The Texas Court of Criminal Appeals went on to say that, since the procedures under the Texas deferred adjudication statute do not involve an adjudication of guilt until after probation is revoked, "it is clear that a trial judge's action in deferring the proceedings without entering an adjudication of guilt is not a 'conviction'." 608 S.W.2d at 172.

McNew states that an individual is not convicted within the meaning of Texas law unless there is a formal adjudication of guilt. If there were no definition of the term "convicted" in the Act, then the issue of whether a conviction exists for State law purposes would be relevant. However, Congress has defined what the term "convicted" means for purposes of section 1128 of the Act. Section 1128 is a federal statute. It defines what constitutes a conviction independently from the definitions or interpretations applied by states. It is not relevant that an action might not constitute a conviction within the meaning of State law so long as the action meets the federal definition of conviction.

Petitioner relies also on Cole v. State. In describing the factual background of the case, the Texas Court of

Appeals stated that the trial court withheld judgment under the Texas deferred adjudication statute and that the trial court accepted the Defendant's guilty plea during a hearing on the State's motion to proceed to adjudication of guilt after Defendant violated his terms of probation. This case supports the proposition that, under Texas law, a guilty plea is not accepted until there is a formal adjudication of guilt. That may be so under Texas law, but it is not relevant. The issue before me is not whether the Texas court accepted Petitioner's guilty plea within the meaning of Texas law. Instead, the issue before me is whether the Texas court accepted the guilty plea within the meaning of section 1128(i)(3) of the Act.

I disagree with Petitioner's contention that the Texas court's determination to defer entering an adjudication of guilt meant that the court did not accept Petitioner's guilty plea within the meaning of section 1128(i)(3). Petitioner offered a guilty plea in order to dispose of the criminal charges against him. After taking care to determine that the guilty plea was an acceptable basis to dispose of the criminal charges in the context of that particular case, the court then disposed of the matter by placing Petitioner on probation and ordering that the proceeding be dismissed upon successful completion of the probation. If Petitioner violates the terms of his probation, the court may proceed immediately to enter an adjudication of guilt and impose a sentence based on the guilty plea. Petitioner offered a guilty plea in exchange for a term of probation and the opportunity to have the charges dismissed upon successful completion of his probation. That transaction amounts to acceptance of a guilty plea within the meaning of section 1128(i)(3).

The statutory definition of acceptance was met when Petitioner offered to plead guilty and the court placed Petitioner on probation based on its acceptance of the guilty plea. The language of section 1128(i)(2) is plain and without qualifying terms. There is no language in that section which states or suggests that the definition of conviction is qualified or limited by judicial actions taken subsequent to acceptance of the plea. Jerry L. Edmonson, DAB CR59 (1989); Charles E. Zamora, M.D., DAB CR 22, aff'd DAB 1104 (1989). The fact that the court deferred entering a formal adjudication of guilt and agreed to dismiss the criminal charges against Petitioner, conditioned on his satisfying the terms of his probation, is not relevant. Similarly, the fact that the court may proceed to enter an adjudication of guilt in the event that Petitioner violates the terms of probation is not relevant. In addition, the fact that

the court has the discretion to reconsider the issue of guilt does not derogate from my conclusion that the court accepted Petitioner's guilty plea within the meaning of section 1128(i)(3).

Petitioner's reliance on the United States District Court's decision in Travers v. Sullivan, 791 F. Supp. 1471 (E.D. Wash. 1992), is misplaced. Travers involved a nolo contendere plea before a Utah court, and the issue in Travers was whether this plea was accepted within the meaning of section 1128(i)(3). The court in Travers applied the same definition of the term "accept" which I apply in this case: a plea is accepted within the meaning of section 1128(i)(3) when a court consents to receive it as an element of an arrangement to dispose of a pending criminal complaint. In applying this definition to the facts before it, the court in Travers found that as, a matter of law, the plea in question was never accepted. The court in Travers based this conclusion on the fact that the Utah court expressly took the plea under advisement.

I read the Travers court's finding regarding the applicability of section 1128(i)(3) narrowly. I construe Travers to stand for the proposition that a plea is not accepted within the meaning of section 1128(i)(3) in the limited circumstances where a court expressly takes a plea under advisement. In the instant case, the Texas court did not expressly take the plea under advisement. To the contrary, the Texas court received it, considered evidence related to it, and made an explicit finding that there was a legal basis for the plea. I recognize that the Texas court deferred entering an adjudication of guilt in this case, but I do not find that this is tantamount to expressly taking the plea under advisement. Nor do I conclude that Travers stands for the proposition that a plea is not accepted within the meaning of section 1128(i)(3) in every instance where there is the possibility of future proceedings.

III. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Act.

I conclude also that the disposition of Petitioner's criminal case constituted entry into a deferred adjudication program within the plain meaning of section 1128(i)(4) of the Act. Therefore, even if there had not been a finding of guilt by the court within the meaning of section 1128(i)(2) and even if a guilty plea had not been accepted within the meaning of 1128(i)(3), Petitioner's guilty plea would nonetheless constitute a conviction for purposes of section 1128.

As the appellate panel noted in its November 15, 1993 decision in this case, although the Travers court found that Travers was not convicted within the definition of section 1128(i)(3) because the court had not accepted Petitioner's plea of guilty, the court did find that Travers was convicted under section 1128(i)(4).

The language of section 1228(i)(4) is plain and without qualifying terms or conditions. It encompasses situations where an individual or entity has entered into a first offender, deferred adjudication, or other arrangement where judgment of conviction has been withheld. The undisputed facts in this case establish that Petitioner participated in a first offender or deferred adjudication program where judgment of conviction has been withheld.

The Order memorializing the disposition of Petitioner's criminal case is captioned "Order for Deferred Adjudication." The Order for Deferred Adjudication explicitly stated that the court was deferring further proceedings without entering an adjudication of guilt. The Order further stated that, upon successful completion of his probation, "the Defendant shall be discharged and the proceeding against him shall be dismissed." I.G. Ex. 1. On its face, the treatment of Petitioner by the Texas State court falls within the term "deferred adjudication, or other program where judgment of conviction has been withheld."

This conclusion is consistent not only with the plain meaning of section 1128(i)(4), but also with Congressional intent, as expressed through legislative history. The Congressional committee charged with drafting the 1986 amendments to the statute stated:

The principal criminal dispositions to which the exclusion remedy [currently] does not apply are the "first offender" or "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these

terms, the case is dismissed entirely without a judgment of conviction ever being entered.

These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program are not subject to exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. Rep. No. 727, 99th Cong., 2d Sess. 75 (1986), reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

The committee added:

With respect to convictions that are "expunged," the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reason other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

Id. The Congressional voice speaks unequivocally that Congress intended to exclude from Medicare and Medicaid programs those who entered into first offender or deferred adjudication programs. More importantly, the legislative history reveals Congress' strong desire to protect the Medicare and Medicaid programs from untrustworthy providers. I find that the arrangement entered into by Petitioner falls squarely within the kinds of arrangements which the committee responsible for drafting the law sought to include within the ambit of section 1128(i)(4).

Petitioner argues that the United States Court of Appeals decision in Martinez-Montoya v. I.N.S., 904 F. 2d 1018 (5th Cir. 1990), precluded a finding that he had been convicted under the definition of that term presented at section 1128(i)(4) of the Act. Martinez-Montoya involved an analysis of the Texas deferred adjudication statute in the context of the Immigration Reform and Control Act, 8 U.S.C. § 1255. Petitioner reads Martinez-Montoya to stand for the proposition that a defendant was not convicted when final adjudication of his case had been

deferred. Petitioner argued that it was improper for federal law to utilize two different standards for the same type of determinations. Petitioner appellate brief at 5 - 6.

In Martinez-Montoya, the Fifth Circuit held that the Immigration and Naturalization Service had improperly ignored its own precedents and regulations in not recognizing that Texas deferred adjudication determination was not a conviction for purposes of the immigration laws. As I stated in my August 12, 1993 decision, I find not relevant Petitioner's argument that in another area of federal law deferred adjudication is treated differently. In its November 15, 1993 decision, the appellate panel agreed that "Martinez-Montoya did not establish a definition of conviction for purposes of the federal exclusion statute." Douglas L. Reece, D.O., DAB 1448, at 6 (1993).

Congress defined conviction to include a deferred adjudication for purposes of exclusion under section 1128 of the Act. The legislative history of section 1128(i) demonstrates that Congress, being aware that persons who were involved in first offender or deferred adjudication programs under State law were not subject to exclusion, made a reasoned decision to change the law to protect the integrity of the Medicare and Medicaid programs. The Congressional mandate controls, and it is not within the authority of the administrative law judge to disregard or hold invalid federal statutes or regulations.

#### CONCLUSION

The I.G. has the authority to exclude Petitioner under section 1128(a)(1) of the Act because the undisputed material facts establish that he was convicted of a criminal offense related to the delivery or an item or service under the Medicare or Medicaid programs. Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and Petitioner's exclusion for five years is the minimum period mandated by federal law.

/s/

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Joseph K. Riotto  
Administrative Law Judge