CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

MATTER OF K- HAS BEEN OVERRULED RESULTING IN A DANGEROUS EROSION OF DUE PROCESS: WHY MATTER OF MENDEZ MALDONADO MUST BE OVERTURNED

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In *Matter of Mendez Maldonado*, the Board of Immigration Appeals (BIA) ruled that a Mexican native and citizen was ineligible for adjustment of status to permanent residence and was inadmissible because he admitted under oath to having possessed and used cocaine in Arizona, which constituted an admission of a crime relating to a controlled substance. The decision to find Mr. Maldonado inadmissible based on his admission of a controlled substance violation, without requiring a conviction or an explanation of the elements of the offense, changes how admission of the elements of a crime can affect admissibility and thus has potentially broad impact. Please review this practice advisory to prepare a client in light of the overruling of Matter of K- in Matter of Mendez Maldonado.

For nearly seventy years, *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), has served as a safeguard. Before a person could be found inadmissible based on an admission to a crime, that admission had to be knowing and informed. The applicant had to understand what the crime actually was, including its essential elements, before saying anything that could cost them permanent residence. In *Mendez Maldonado*, the Board of Immigration Appeals brushed that protection aside.

Mr. Maldonado, a native and citizen of Mexico, admitted under oath that he had possessed and used cocaine in Arizona. He was never convicted. On appeal, he argued that his admission was invalid because no one gave him a definition or the essential elements of the offense first, as *Matter of K-* requires.

The Board disagreed. It said that reading *Matter of K-* to require a precise legal definition before an admission "exceeds what is required under the plain language of the statute" and is "not necessary to ensure fairness in removal proceedings." As long as the admission is voluntary and the person receives a fair hearing, the Board held, there is no denial of due process.

There is no need for a conviction for a noncitizen to be found inadmissible. Admissibility turns on legal concepts that trained lawyers and judges debate. Whether conduct amounts to a "crime relating to a controlled substance" depends on statutory definitions, state law, and elements that a layperson cannot be expected to know. Asking an applicant to admit to "possession and use" is not the same as asking whether they understand what they are conceding as a matter of law. Without that understanding, an admission is not truly informed.

As no conviction is required, a few words in an interview or hearing, spoken by someone who may be unrepresented, nervous, and speaking through an interpreter, can end an adjustment application or visa petition. *Matter of K-* existed to make sure those words were not a trap. Calling the safeguard unnecessary because the proceeding was "fair" ignores that fairness depends on understanding.

The decision also has potentially broad reach. Its logic is not limited to cocaine or to Arizona. It changes how an admission of the elements of a crime can affect admissibility for any applicant who sits down before an officer or an immigration judge.

This decision should not stand. A court of appeals should be given the chance to examine whether the Board may discard the protection of *Matter of K-* and whether an admission made without any understanding of the offense's elements can satisfy the statute and due process. Reviewing courts have a duty to look closely at whether administrative shortcuts are consistent with the statutory text and with basic fairness.

The impact will not stop with applicants for adjustment of status or visas. It will also reach lawful permanent residents, who can be forced to admit to crimes under INA 212(a)(2). An LPR who travels abroad and returns may be questioned at the border about past conduct, and an admission obtained without any explanation of the elements of the offense can now be used to treat that person as inadmissible. With *Matter of K-* set aside, there is no longer a

safeguard ensuring that the LPR understands what is being admitted.

The Supreme Court's decision in *Blanche v. Lau* has in any event already degraded the rights of LPRs. The Court held that the government need not establish by clear and convincing evidence that an LPR is an applicant for admission before treating the person that way. In our blog on *Blanche v. Lau*, Kaitlyn Box and I explain how this allows the government to parole a returning LPR on suspicion, take the green card, wait for a conviction, and then "travel back in time" to meet its burden. We also address Justice Ginsburg's concern about the setting up of piepowder courts, in which an LPR's status may be decided on the spot without a review of a formal conviction. Combine *Blanche v. Lau* with *Matter of Mendez Maldonado*, and an LPR can be pulled into the inadmissibility framework on suspicion alone and then be found inadmissible on an uninformed admission. This is why a court of appeals must step in.