



Navigating the Complexities of Expunging Records for Immigrant Clients

Arrest and conviction records create barriers to employment, housing, and other basic needs and services. For immigrant clients, a record may be even more damaging, as it can lead to immigration detention, mandatory deportation, and permanent lifetime banishment.

Filing some types of record-clearing petitions on behalf of immigrant clients may pose immigration risks while providing limited benefits. Other record-clearing mechanisms can actually help clients obtain crucial immigration relief. This guide examines how advocates can assess the risks and rewards for non-citizens seeking to clear their records, and offers strategies for protecting these clients.



Contacts:

Seth P. Lyons
Staff Attorney
slyons@clsphila.org

Sharon M. Dietrich
Litigation Director
sdietrich@clsphila.org

September 1, 2017

Millions of people in the United States, including non-citizens, suffer from the collateral consequences of having a criminal record. Even old, minor convictions or arrests not resulting in conviction can make finding a job or housing difficult. Record clearing through expungement, sealing, pardons, vacatur, habeas, or other mechanisms can be effective tools for relieving these barriers. **However, the recent changes in immigration enforcement priorities make it crucial for advocates to understand the risks and rewards of clearing criminal records for non-citizen clients.**¹ Filing expungement petitions on behalf of non-citizens may complicate immigration proceedings by eliminating required documentation, and advocates should at least consider whether filing a petition or bringing a client to court will risk contact with immigration authorities.

As described below, any arrest or contact with the criminal justice system—even without a conviction—could lead to detention and removal of undocumented immigrants. Criminal records can also make documented immigrants (like green card holders) deportable, even for old and minor convictions. For example, any “aggravated felony” conviction—which is defined by federal law and need not be classified as a felony under state law—can subject non-citizens to removal and bar them from certain kinds of immigration relief, like cancellation of removal, voluntary departure, and asylum. Vaguely defined “crimes of moral turpitude,” domestic violence offenses, drug convictions, and even some non-conviction records can also put non-citizens at risk.

On the other side of the scale, the benefits of clearing an immigrant’s record largely depend on that person’s immigration status and the type of record-clearing mechanism available. **Importantly, standard expungement petitions rarely help with immigration-related issues**, like applications for citizenship/naturalization, green cards, or other visas, or with re-entering the country. However, some forms of post-conviction relief that attack the validity of the underlying conviction can provide crucial immigration-related benefits (see below).

Furthermore, the effectiveness of record clearing on employment, housing, and other collateral consequences may depend on the client’s immigration status. For example, although they may help some immigrant clients overcome barriers to employment, expungements do not necessarily benefit undocumented workers whose immigration status generally prevents them from working in jobs that conduct criminal background

This guide uses “expungement” as a general term to refer to standard record-clearing petitions that do not attack the validity of a criminal conviction, but simply erase or seal the criminal record information. Different states use different terms for these procedures, including sealing, expunction, erasure, shielding, etc., and these remedies may function somewhat differently.

checks anyway. With some exceptions,² **the immigration risks of filing a standard expungement petition likely outweigh the benefits for most undocumented clients.**

In general, the risks and benefits of record clearing **may hinge on whether the client is a U.S. citizen, an undocumented immigrant** (sometimes referred to as unauthorized or illegal), **or a documented immigrant** (which includes Lawful Permanent Residents/green card holders, asylees, refugees, and visa-holders).

Status	<i>U.S. Citizen</i>	<i>Documented</i>	<i>Undocumented</i>
Risks	Low to none	Low to high	Medium to high
Benefits for collateral consequences	High	High	Low to none
Benefits for immigration issues	n/a	Low to high	Low to high

The following steps are intended to provide a basic overview of the issues advocates need to consider when deciding whether expungement is appropriate for an individual client. **Because immigration enforcement priorities are constantly changing, however, it is highly recommended that advocates continue to consult with local immigration experts even after doing a risk assessment based on the information below.**

Can record-clearing help with immigration issues?

In most states, record-clearing petitions simply erase criminal record information—often relating to non-convictions—or seal it from public view. These standard record-clearing tools rarely provide any benefit for immigration purposes. First, with very few exceptions, expunged convictions still count as convictions for immigration purposes. Second, Immigration and Customs Enforcement (ICE) maintains its own records that are unaffected by state-level expungements. **The main exception to this rule is for Deferred Action for Childhood arrival (DACA) applicants**, for whom expunging certain convictions may remove specific bars to eligibility.³

However, some states have record-clearing mechanisms that allow the petitioner to challenge the underlying validity of a conviction, or otherwise mitigate its immigration consequences. Common examples include pardons, habeas petitions, and vacatur. In California, for example, people can petition the court for a sentence modification—even long after the sentence has been imposed—to downgrade the offense from a felony to a misdemeanor or reduce a sentence from 1 year to 364 days.⁴ **This post-conviction relief can actually eliminate immigration consequences for convictions that previously triggered removability.**

Expungement advocates should consult with local immigration attorneys to see if your state’s record-clearing laws can protect clients from adverse immigration consequences!

Expunging Records for Immigrant Clients

Before Filing a Petition

- 1. Explain that expunging a criminal record likely will not help with immigration consequences, even though it may carry other, non-immigration benefits.**

Immigration and Customs Enforcement (ICE) maintains its own database of arrest records that is unaffected by standard record clearing tools, like expungement and sealing. Moreover, except for some drug offenses in the Ninth Circuit, expunging a conviction record does not eliminate the immigration consequences of that conviction. Thus, with the limited exception of some DACA applicants, expunging your client's criminal record will not make them less likely to be deported or more likely to be eligible for permanent residency, citizenship, or any other immigration relief. In fact, as discussed below, clearing a non-citizen's record could create unintended problems for immigration purposes.

- 2. Assess the risk of filing a petition by reviewing the following questions:**

a) Does your client have an active bench warrant?

If so, filing a petition or bringing your client to court could result in their arrest, and potentially trigger removal proceedings. Have your client consult with a criminal defense and immigration attorney about how to deal with the bench warrant.

b) Has your client been previously removed?

Re-entering the United States after a being deported can not only bar someone from certain types of immigration relief, it can lead to criminal prosecution and imprisonment. If your client has been removed before, consult with an immigration attorney before filing a petition.

c) Has your client ever had a protection from abuse (PFA) order entered against them?

Criminal convictions are not the only legal proceedings that can make someone removable. Violations of protective orders can also lead to deportation. If your client has violated a protective order, there may be increased risk with bringing them to court.

3. Explain the potential risks of filing an expungement petition and help weigh these risks with the collateral consequences (barriers to employment, housing, etc.) that your client is facing.

Because of the uncertainty surrounding new ICE tactics, many advocates fear that simply filing a petition on behalf of an immigrant client could somehow alert ICE to that client's presence. Fortunately, as of the publication of this guide, we have not yet heard of a situation where filing an expungement petition triggered removal proceedings. In fact, ICE likely already knows about their record, and filing an expungement petition is not likely to affect ICE's awareness of this record one way or the other. That said, expungement petitions are public records, and it is at least worth investigating whether your local court has a policy of sharing information with immigration authorities before you file.

Moreover, in some jurisdictions, if the petition is granted, your client's criminal record will be completely destroyed. However, immigration authorities will still have a record of the initial arrest, and your client will often have the burden of proving what happened in their criminal case when applying for immigration relief, citizenship, etc. Thus, before the record is cleared, your client must obtain certified copies of their criminal record and keep them in a safe place. Make sure the certified copies include the disposition of the charges! Without a certified copy, your client may not be able to prove to immigration authorities that their arrest did not result in conviction for a removable offense, and their application for immigration relief, including naturalization, could be delayed or denied.

4. If your client has any convictions on their record, or if there are any red flags for immigration problems (e.g. undocumented client, previous removal or contact with ICE, PFAs, or bench warrants), consult with an immigration attorney before filing.

Because undocumented workers are not legally permitted to work anyway, criminal background checks rarely create the same barriers to employment that they do for authorized workers. With the exception of some occupational licensing applications,⁵ expungement does not generally provide a great benefit to undocumented workers. The immigration risks, however, are more pronounced, so advocates should usually consult with an immigration attorney before filing a petition on behalf of an undocumented client.

Certain convictions can also make someone removable even if they have legal status, including permanent residency (a green card). These include, but are not limited to, aggravated felonies, drug offenses, some domestic violence offenses, crimes involving moral turpitude, and firearms offenses. The crimes



that make someone removable are defined by federal statutes or case law, and do not necessarily depend on how states classify these offenses. For example, even a state misdemeanor conviction could meet the federal definition of an aggravated felony, while a state felony could have no immigration consequences. Because removable offenses differ from state to state, it is essential to consult with a local expert on criminal immigration law (sometimes referred to as “cimmigration”) when issues arise.

5. Investigate your local court’s policies on sharing information with immigration authorities.

Make sure you understand if and how the court collaborates with immigration authorities. In some jurisdictions, courts may have policies against sharing immigration status information with ICE, while in other areas information sharing may be common practice. In fact, there have been increased reports of ICE showing up at courthouses to detain non-citizens over the past several months. While most of these incidents have been directly related to criminal proceedings, expungement petitions are usually filed in criminal court, and ICE has reportedly shown up at other types of proceedings as well.

Filing & Court Procedures

1. If local rules permit, consider using your organization’s address on the expungement petition.

If ICE is monitoring court filings, using a “care of” address instead of your client’s home address could keep ICE from finding out where your client lives.

2. Make sure your client has obtained certified copies before the expungement petition is granted.

In some states, the criminal record will be destroyed almost immediately after the petition is granted, so there may not be time to obtain a certified copy after the hearing. If you file on paper only, this could be shortly after you send your paperwork to the court.

3. If possible, consider advising your client to not come to the hearing.

As discussed above, there is always some risk in bringing an immigrant client to court, especially criminal court. In Philadelphia, for example, an

expungement petition is first reviewed by a trial commissioner, and is granted if the District Attorney's office does not object. Because there is no opportunity for the client to testify at this stage, there is no reason to risk bringing the client to court.

Even if the client can testify, make sure to re-evaluate the questions above to determine whether the benefits of bringing the client to court outweigh the potential immigration risks.

Navigating the complexities of representing immigrant clients in the record-clearing context can often be difficult and time-staking. Some record-clearing mechanisms can keep clients from being deported, while others could potentially put them at risk of removal or block them from obtaining important immigration benefits. The importance of thoroughly evaluating the risks and benefits of expungement in these cases has never been more important, and advocates must do their best to guide their clients through this tricky analysis.

¹ On January 25, 2017, President Donald Trump signed an executive order entitled “Enhancing Public Safety in the Interior of the United States.” Among other things, the executive order expanded immigration enforcement priorities to include people who have “been convicted of any criminal offense,” people charged with, but not yet convicted of, any crime, and anyone who has “committed acts that constitute a chargeable criminal offense.”¹ Although these enforcement priorities do not alter the grounds of removability—the statutorily defined rules that dictate which crimes will render immigrants deportable and bar non-citizens from obtaining certain immigration relief—the changes drastically increase the risks for immigrants with criminal records. Exec. Order No. 13768, 82 Fed. Reg. 8799 (January 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

² For example, occupational licensing agencies in California cannot consider immigration status but can evaluate criminal records in licensing decisions. Cal. SB 1159 (2014). For more information, see Educators for Fair Consideration, *Career License Opportunities for ALL!*, http://www.e4fc.org/images/CareerLicense_Final.pdf.

³ In addition, standard expungements of first time drug possession convictions that occurred before July 14, 2011 in every state within the 9th Circuit can also eliminate the conviction for immigration purposes. See *Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options*, Californians for Safety and Justice (2016), 35, <https://www.ilrc.org/sites/default/files/resources/csj-immigrationtoolkit-final-online.pdf>.

⁴ For more information on Proposition 47 and other California record-clearing mechanisms that can provide immigration relief, see *Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options*, Californians for Safety and Justice (2016), <https://www.ilrc.org/sites/default/files/resources/csj-immigrationtoolkit-final-online.pdf>.

⁵ See S.B. 1159, 2013–2014 Leg. (Cal. 2014). See also Educators for Fair Consideration, *Career License Opportunities for ALL!*, http://www.e4fc.org/images/CareerLicense_Final.pdf.