Record-Clearing for Immigrants

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Do you need post-conviction relief?: Two Questions

1. Is it even a conviction?

2. Is the conviction causing, or could the conviction cause, some adverse immigration consequence?

✓ Use Cal chart! Research!

www.ilrc.org/chart
Is it even a conviction?

A formal judgment of guilt entered by a court or

If adjudication has been withheld:

- If defendant pleads guilty, nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND

- The judge has ordered some form of punishment, penalty, or restraint on the immigrant’s liberty to be imposed.

8 U.S.C. § 1101(a)(48)

<table>
<thead>
<tr>
<th>California Disposition</th>
<th>Federal Immigration Law</th>
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<tbody>
<tr>
<td>Conviction is on appeal (unless appeal wins)</td>
<td>Yes, is a conviction. Planes v. Holder, 652 F.3d 991 (9th Cir. 2011)</td>
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<tr>
<td>Expungement (1203.4), withdrawal of plea per DEJ, Prop 36</td>
<td>Yes, are convictions. Except: DACA, Lujan.</td>
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## Is it Causing a Problem: Grounds of Inadmissibility and Deportability

<table>
<thead>
<tr>
<th>Inadmissibility (8 USC 1182)</th>
<th>Deportability (8 USC 1227)</th>
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<tbody>
<tr>
<td>One crime involving moral turpitude (but see Petty Offense Exception)</td>
<td>Crimes involving moral turpitude (two or more, or 1 within 5 year admission if potential 1 yr sent)</td>
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<tr>
<td>Controlled Substance Offense (including current drug abuser, admission of drug offenses, DHS has reason to believe trafficked in drugs)</td>
<td>Controlled Substance Offense (except a single offense of simple possession of 30g or less of MJ, includes drug abuse since conviction)</td>
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<td>Engaged in prostitution</td>
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<td>Conviction of two or more offenses + aggregate sentence of 5 years or more</td>
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<tr>
<td>Current alcoholic</td>
<td>Firearms offenses</td>
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<td></td>
<td>Domestic violence offenses (including viol. of prot. Order)</td>
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<tr>
<td></td>
<td>Aggravated felonies</td>
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<tr>
<td></td>
<td>Inadmissible at last entry.</td>
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Vacating a Conviction or Sentence for Cause

General rule: Convictions vacated for the sole stated purpose of avoiding immigration consequences will not solve the immigration problem!

**Must vacate based on legal invalidity.**


*However:* Immigration-related defects, like ineffective assistance of counsel for failure to advise of immigration consequences, are sufficient.
Types of Post-Conviction Relief

- Rehabilitative Relief
  - Expungement
  - Sealing

- Sentence modification
  - Felony reduction
  - 365 → 364

- Vacatur for Cause
  - Habeas
  - Coram nobis
Pardons

➢ Eliminates certain ground of deportability (Aggravated felony and CIMT)

➢ But does NOT cure:

✓ Other deportation grounds, e.g., drugs
✓ Grounds of inadmissibility
How Criminal Records Are Funneled to DHS

DHS

FBI

States (e.g. DOJ)

Local LEAs

Courts
How Criminal Records Are Funneled to DHS

- DHS
- FBI
- States (e.g. DOJ)
  - Local LEAs
  - Courts
How Criminal Records Are Funneled to DHS

Interstate Identification Index (III)
• One of the FBI’s main systems for exchanging state criminal records
• All states participate in III

National Fingerprint File (NFF)
• States participating in the III are either:
  • NFF States (23 states)
  • Non-NFF States (28 states)
National Fingerprint File (NFF)

- Designed to reduce duplicate records
- When querying for criminal records through the III, the query points to either the state’s own repository of records (NFF states) or the FBI’s copy of the records (Non-NFF states)
How Criminal Records Are Funneled to DHS

National Crime Prevention and Privacy Compact (Compact)

- Law that establishes procedures for how criminal history data in the III is exchanged for noncriminal justice purposes
- States have to ratify the Compact as one of the requirements for noncriminal justice purposes
- Noncriminal justice purposes includes immigration and naturalization
Secure Communities

• When someone is booked into jail, fingerprints are automatically sent to the FBI
• ICE is automatically alerted if fingerprints match those in DHS system
• ICE then can look at immigration history and criminal records through the III to decide whether to take action on an individual
How Does ICE Have Access

Taking Action

• Can ask state or local law enforcement to either:
  • Hold the person beyond their time served
  • Transfer the person directly to ICE
  • Notify ICE of their release date and time
How Does ICE Have Access

Example

- Robbie was caught crossing the border in 1994. His fingerprints were collected by CBP before being removed. Robbie then re-enters unlawfully and has stayed in the United States ever since. He is convicted of a marijuana offense in 1998 but served his time.

- He is arrested by the local police department and his fingerprints are taken. Because there is a fingerprint match, ICE searches the III and finds the marijuana conviction and now ask the police to help them by letting them know when Robbie is being released.
Importance of Expungements

States have control over what happens to their records

- When passing expungement or sealing laws, it is important to ensure that they are also reflected correctly in FBI’s systems
- This is especially true for Non-NFF states who have to send copies to the FBI
Prosecutorial Discretion

• The ability to choose to refrain from arresting or deporting immigrants

• Biden administration released a memo to use its discretion to prioritize arrests for persons who they find are:
  • National Security
  • Public Safety
  • Border Security
Prosecutorial Discretion

- The state of Texas sued and a federal court prevented ICE from using these specific guidelines
- Currently at the U.S. Supreme Court
- Even without these guidelines, ICE still has prosecutorial discretion
PRACTICE TIPS: FACTORS TO CONSIDER

1) Purpose of record-clearing (immigration issues or traditional collateral consequences?)

2) Immigration status

3) The type of record-clearing mechanism
ADDRESSING COLLATERAL CONSEQUENCES FOR NON-CITIZENS

Effectiveness of rehabilitative record-clearing for addressing barriers to housing, employment, etc. may depend on client’s immigration status

- **Documented immigrants** → benefits of record-clearing are basically the same as for US Citizens
- **Undocumented immigrants** → less clear
  - For most jobs that conduct background checks, lack of work authorization will be more of a barrier to employment than their criminal record
ADDITIONAL CONSIDERATIONS WITH IMMIGRANT RECORD-CLEARING

➢ General (low) risk of filing petitions on behalf of immigrant clients or bringing them to court
  ▪ No evidence that filing a record-clearing petition has ever triggered immigration enforcement action

➢ Record-clearing could complicate immigration proceedings/relief
  ▪ Does record-clearing tool eliminate court documents?
  ▪ Could record-clearing bar future vacatur?
  ▪ Still required to disclose expunged records
BEST PRACTICES – BEFORE FILING

1) Screen for citizenship status?

2) Advise client that clearing a criminal record—even a conviction—will likely not help with immigration issues

3) Discuss client’s goals for clearing record → address an immigration issue or traditional collateral consequences?
BEST PRACTICES – BEFORE FILING

4) Assess possible immigration concerns
   • *Does the client have an active bench warrant?*
   • *Has the client been previously removed?*
   • *What is the current immigration enforcement practice in your area (especially in courts)?*

5) Weigh risks with benefits. If there are any serious concerns, consider consulting with an immigration attorney *before filing*
BEST PRACTICES – FILING & COURT PROCEDURES

1) Consider using your organization’s address on the petition

2) Make sure your client has obtained certified dispositions BEFORE THE PETITION IS GRANTED

3) If possible, don’t bring your client to court