JULY 2021

UTAH "CLEAN SLATE" AND IMMIGRANTS

Background about HB 431:

On May 1, 2020, Utah's automated "Clean Slate" law, HB 431, went into effect, requiring the state to identify and automatically expunge certain old criminal records—non-convictions, charges, and certain misdemeanor convictions—for qualifying individuals who have remained crime free for a set period of time.[1] The automated record clearance will begin late summer 2021.

Utah and Immigrants:

Roughly 10% of Utah's population is foreign born and 10% of all American citizen Utah residents have a parent born outside of the United States.

Immigration Consequences of Criminal Convictions:

As the United States Supreme Court noted in *Padilla v. Kentucky, 559 U.S. 356, 364* (2010) "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Even minor, long ago convictions can present outsized immigration consequences for noncitizens, barring some lawful permanent residents ("greencard holders") from obtaining citizenship, prohibiting undocumented immigrants from securing forms of immigration relief, and causing some residents to be detained and removed.

IMMIGRATION CONSEQUENCES OF UTAH'S "CLEAN SLATE" RECORD CLEARANCE

Vacaturs and Clean Slate:

The general rule is that vacaturs matter, expungements do not. Generally, convictions can still make immigrants inadmissible and removable, even if those convictions have been "expunged." The only way to completely eliminate the immigration consequences of a conviction is by vacating it based on a ground of "legal or procedural invalidity." See *Matter of Pickering, 23 I&N Dec. 621* (BIA 2003).

Fortunately, Section 77-40-110 of Utah's Clean Slate law permits courts to exercise jurisdiction over an expunged conviction to determine if the conviction was legally valid. Therefore, the fact that the conviction was expunged will not prevent a noncitizen defendant from bringing a later post-conviction motion or petition to vacate the expunged conviction for cause and in such a way that will be recognized by immigration courts.

When Expungements Could Help:

Notwithstanding the above general rule, there are some instances when an expungement can help a noncitizen.

1. Expungements and DACA. An expungement will eliminate a conviction as an absolute bar to Deferred Action for Childhood Arrivals (DACA), the relief for people brought to the U.S. as children. For example, though a misdemeanor driving under the influence conviction will be a "significant misdemeanor,"[2] barring DACA, if that conviction is expunged, the expunged DUI will no longer be an automatic bar. The conviction still may be considered as a negative factor in the discretionary decision of whether to grant DACA, though practitioners report that DACA applications and renewals have been granted when an expungement has been granted. *For more information about DACA see: http://www.ilrc.org/daca.*

1. Waiting periods are 5-7 years, depending on the level of the offense (Class C is 5 years, Class B is 6 years, and Class A drug possession offenses are 7 years). See Utah Code 77-40-102 (5)(a).

2. See, USCIS DACA FAQs, Q.68, available at: https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions

2. Expungements and Utah Driving Privilege Card. The Utah Driving Privilege Card ("DPC") is a special driver's license available to undocumented individuals who are residents of Utah. It allows the holder to drive legally and obtain auto insurance. It requires applicants to submit their fingerprints to the State for a background check. The results of these background checks and other information kept by the Utah Driver's License Division are available to immigration authorities (ICE) and may result in immigration enforcement actions. Any criminal convictions in Utah that have been expunged would no longer show up on these background checks.

3. Expungements in the Ninth Circuit. Second, in immigration proceedings in the Ninth Circuit only, legal expungements will eliminate all immigration consequences of certain minor drug possession convictions that occurred on or before July 14, 2011. See *Nunez-Reyes v. Holder, 646 F.3d 684* (9th Cir. 2011), *Lujan-Armendariz v. INS, 222 F.3d 72 8* (9th Cir. 2000). Though Utah is in the Tenth Circuit, defendants with Utah expungements who live in or move to the Ninth Circuit can take advantage of the Ninth Circuit law. For further discussion see, ILRC, "What Qualifies as a Conviction for Immigration Purposes?," available at: *https://www.ilrc.org/what-qualifies-conviction-immigration-purposes.*

4. Immigration Enforcement. Though there is not a great deal of transparency into how Immigration and Customs Enforcement (ICE) chooses whom to target for an enforcement action, ICE does indicate that it searches entries in the FBI criminal database and cross checks those entries against fingerprints that may be on file from an immigration proceeding. A Utah expungement, deleting the offense from state databases, should also have the effect of making it unavailable to other law enforcement. This could make it less likely for ICE actions to be triggered against someone on the basis of an expunged Utah conviction because the record would not immediately appear in ICE background checks.

5.Proving that the Conviction Makes a Permanent Resident Deportable. When ICE seeks to deport a lawful permanent resident based on a conviction, it bears the burden of proving that the conviction is of a deportable offense.[3] If the statute under which the person was convicted sets out multiple offenses, including at least one that does not cause deportability, and if the expunged record is inaccessible to federal law enforcement, ICE may not be able to meet its burden of proving that the permanent resident's conviction was for a deportable offense.[4] At this time, however, permanent residents should not rely on this defense without getting expert advice. The defense can involve a complicated legal argument, and it may be that ICE will have other ways to access the person's sealed record. Therefore permanent residents should consider additional defense strategies. Immigrants who are not permanent residents should assume that this defense will not work for them.

HOW TO ADVICE NON-CITIZENS WHO HAVE RECEIVED EXPUNGEMENTS

Immigrants Must Affirmatively Disclose Expunged Convictions on any Application for an Immigration Benefit

Knowingly making a material false statement on an application form with intent to wrongly obtain an immigration benefit can be an absolute bar to future immigration relief[5] and also is a federal crime.

Most immigration benefits, including, for example, adjustment of status, naturalization, and U-visa applications, ask the question "have you ever been arrested?" Under Utah's Clean Slate law, Section 77-40-108(2) people who receive an expungement "may respond to any inquiry as though the arrest or conviction did not occur."

3. For further discussion of this analysis, see ILRC, Pereida v. Wilkinson (April 2021) at https://www.ilrc.org/pereida-v-wikinsson and-california-offenses and ILRC, How to Use the Categorical Approach Now (November 2019, update forthcoming) at https://www.ilrc.org/how-use-categorical-approach-now .

4. Utah Code 77-40-109 governs the release of expunged records under Utah law. This provision provides that the Department of Public Safety must release records to "federal authorities," upon request "only as required by federal law."

5. The person could be found inadmissible under INA § 212(a)(6)(C)(i), 8 USC § 1182(a)(6)(C)(i).

However, this is not true under federal immigration law. Immigrants who apply for a federal immigration benefit or relief from removal must disclose their complete and accurate criminal history, including offenses that have been expunged. Even when the expungement helps, as with a DACA applicant who has received an expungement for an otherwise disqualifying offense, the fact of the arrest must be disclosed. Once the arrest is disclosed, this will lead to other questions about the conduct and conviction, questions that might not arise if the person had marked "no" to the question.

In many contexts, failure to provide requested information about an immigrant's criminal history has led to discretionary denials of the requested immigration benefit. United States Citizenship and Immigration Services (USCIS) has said it will continue the "extreme vetting" of applicants for benefits such as naturalization. Even though the expunged conviction may not appear on the FBI biometrics submitted along with an application, there is still an affirmative duty to disclose an expunged conviction.

A Pro Se Applicant May Make a Mistake:

Questions on immigration forms that ask if the person has been arrested or convicted may be quite confusing to people whose records were expunged under Utah's Clean Slate law. Without advice, a pro se applicant for benefits reasonably could believe that they were legally permitted to state that they were not arrested or convicted. If a pro se applicant is charged with committing fraud by failing to disclose an expunged conviction, they may have a defense in that they did not intend to commit the fraud, and they relied on the plain language of the state law

This disconnect points to the need for federal immigration reform that better aligns federal immigration laws with state punishments. A number of immigration bills pending before Congress present this reform.

Secure a Copy of the Fully Expunged Criminal Record

Because an applicant for an immigration benefit will still need to disclose the underlying disposition, before applying for any benefit, the immigrant or their attorney should access the full and complete copy of the person's criminal history, including any automatically expunged records, as outlined below:

As a result of Utah's Clean Slate law, automatically expunged records will no longer appear in Utah's XChange database and they will be removed from an individual's Utah criminal history. However, Utah Code Section 77-40-110 allows an individual who receives an automatic expungement to view and obtain a copy of their own records. This is done by filing a records request using this form.

Under the statute, the Department of Public Safety must respond to the person's request within 10 days. If an expunged record is found, individuals will be responsible for copy and mailing costs. Those fees include $5 for up to 10 pages, and $25 for up to 50 pages

Misdemeanor and felony level conviction records that do not qualify for automatic expungement will continue to appear in Utah's XChange database. An individual also has a statutory right of access to their own criminal history. Individuals can request a copy of their full criminal history here.