

advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes.

Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008)

We are mindful of the fact that the respondent entered his plea to a charge that clearly identified his victim as a child. The language of that charge may well have been significant because the Supreme Court has explained that “the details of a generically limited charging document” are generally sufficient “in any sort of case” to establish “whether the plea had ‘necessarily’ rested on the fact identifying the [offense] as generic.” *Shepard v. United States*, *supra*, at 21. Yet as all parties recognize, we are precluded from relying on the original charge because, after these proceedings commenced, the State prosecutor removed all traces of the victim’s juvenile status from the amended information and then interposed the expurgated, back-dated charge into the conviction record.

Matter of Cardenas-Abreu, 24 I&N Dec. 795 (BIA 2009)

A pending late-reinstated appeal of a criminal conviction, filed pursuant to section 460.30 of the New York Criminal Procedure Law, does not undermine the finality of the conviction for purposes of the immigration laws.

Herrera-Inirio v. INS, 208 F.3d 299, 306 (1st Cir. 2000),

tate rehabilitative programs that have the effect of vacating a conviction other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case have no bearing in determining whether an alien is to be considered “convicted” under section 1101(a)(48)(A).

Pinho v. Gonzales, 432 F.3d 193, 195 (3d Cir. 2005)

Approving the Board’s distinction between “convictions vacated for rehabilitative purposes and those vacated because of underlying defects in the criminal proceedings”

Zaitona v. INS, 9 F.3d 432, 436-37 (6th Cir. 1993),

A district court order vacating a federal conviction would not be recognized for immigration purposes where the sole reason for the order was to enter

an otherwise untimely judicial recommendation against deportation in order to prevent the alien’s deportation.

Beltran-Leon v. INS, 134 F.3d 1379, 1380-81 (9th Cir. 1998)

A vacated conviction remains a conviction for deportation purposes where the state court’s action, pursuant to a writ of *audita querela*, was undertaken “solely in order to prevent deportation and the subsequent hardship to [the alien] and his family”

Cardozo-Tlaseca v. Gonzales, 460 F. 3d 1102 (9<sup>th</sup> Cir. 2006)

Conviction vacated for any procedural or substantive defect has been eliminated for immigration purposes, and cannot trigger removal, whereas conviction vacated for equitable, rehabilitative, or immigration purposes unrelated to the merits of the conviction remains.

Gill v. Ashcroft, 335 F.3d 574 (7<sup>th</sup> Cir. 2003)

Every Court that has considered the subject believes that 1101(a)(48)(A) governs the handling of repeat offenders and that expungements (or restorations of civil rights) under state law do not negate a ‘conviction’ for purposes of immigration law.

Ramirez-Castro v INS, 287 F.3d 1172 (9<sup>th</sup> Cir.2002)

For immigration purposes, a person continues to stand convicted of an offense notwithstanding a later expungement under a state’s rehabilitative statute.

Ramirez-Altamirano v. Mukasey, 563F. 3d 800, (9<sup>th</sup> Cir 2009)

An expunged state conviction for possession of paraphernalia under Health and Safety Code 11364(a), a state rehabilitative law, eliminates this class of conviction for all immigration purposes. Following Cardenas-Uriarte v. INS, 227 F. 3d 1131 (9<sup>th</sup> Cir. 200)

Estrada v. Holder, 560 F. 3d 1039 (9<sup>th</sup> Cir. 2009)

A noncitizen whose state conviction for possession of paraphernalia was expunged under state law, but who violated the terms of his probation before expungement was granted, would not have been eligible for relief under the Federal First Offender Act 18 U.S.C. 3607(a), since the FFOA limits relief to cases where “the person has not violated a condition of his probation,” and the state expungement therefore did not eliminate the conviction for immigration purposes.



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ARE EFFECTIVE  
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CONSEQUENCES**

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# TYPES OF ORDERS THAT ARE EFFECTIVE TO ELIMINATE IMMIGRATION CONSEQUENCES

An order that attempts to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute is not valid to eliminate Immigration consequences. Only orders that are based on procedural or substantive defect in the underlying criminal proceedings are effective to eliminate the Immigration consequences.

Therefore, expungements (or restorations of civil rights) under state law do not negate a ‘conviction’ for purposes of immigration law (in some states or federal districts this may not be the case, consult an attorney).

Because a statutory violation effectively eliminates the immigration consequences of a conviction, even if the violation is related to a failure to inform the defendant of the immigration consequences of the conviction, any **CONSTITUTIONAL VIOLATIONS** will automatically also be sufficient. e.g.,

### 1. Ineffective Assistance of Counsel by Providing Affirmative Misadvice Concerning Immigration Consequences.

*The prevailing federal rule holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving affirmative misadvice concerning the immigration consequences of the plea, so long as the error is prejudicial*

### 2. Failure to Advise

*Some States, including Florida, hold that ineffective counsel includes a failure to*

*advise concerning the immigration consequences. Convictions vacated on this ground no longer exist for immigration purposes.*

### 3. Failure to Investigate and Propose Less Harmful Disposition

*This is a traditional ineffective assistance since defense counsel has always had the responsibility to attempt to reduce the length of the potential or actual sentence, which is a direct penal, not a collateral consequence. The Supreme Court in Glover v United States, 531, U.S. 198 (2001), held that a sentence even one day shorter is sufficient to constitute prejudice from ineffective assistance of counsel.*

### BACKGROUND

Section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2000), defines the term “conviction” with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where-

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

*NOTE: A noncitizen who has pre-trial diversion (no plea entered) does not have a conviction for immigration purposes*

### Matter of Roldan, 22 I&N Dec. 512 (BIA 1999)

Under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other re-

cord of guilt or conviction by operation of a state rehabilitative statute.

### Matter of Pickering, 23 I&N Dec. 621 (BIA 2003)

If a court vacates an alien’s conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.

### Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000)

A conviction vacated on the merits pursuant to Article 440 of the New York Criminal Procedure Law does not constitute a conviction for immigration purposes within the meaning of the statute.

### Matter of Marroquin-Garcia, 23 I&N Dec. 705 (A.G. 2005)

The federal definition of “conviction” at section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2000), encompasses convictions, other than those involving first-time simple possession of narcotics, that have been vacated or set aside pursuant to an expungement statute for reasons that do not go to the legal propriety of the original judgment, and that continue to impose some restraints or penalties upon the defendant’s liberty

an alien whose firearms conviction was expunged pursuant to section 1203.4 of the California Penal Code has been “convicted” for immigration purposes

### Matter of Adamiak, 23 I&N Dec. 878 (BIA 2006)

A conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to



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