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Expungement for Undocumented Immigrants

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Undocumented immigrants face the same day-to-day difficulties from criminal convictions on their record, and expungement can provide the second chance to them that clears their record as is available to everyone. However, undocumented immigrants may be deterred from pursuing such relief, questioning if such relief is equally and fully available to them.

Expungement provides a court-ordered sealing of a person's criminal record, including all such records held by government agencies. Expungement of a criminal record is an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of sealing the record and burdening the court and public authorities to issue, enforce, and monitor an expungement order.

Undocumented immigrants may question if they will be able to meet this burden. Prior clients have raised concern if their undocumented status will be used against them in making any determination regarding the character and activities of the client. Judicial officers have also raised the specter that undocumented immigrants may not be able to meet their burden of proof of yielding a sufficient benefit to the petitioner under the belief that an expungement cannot help their employment prospects due to their undocumented status.

Experience and caselaw has shown that these concerns should not prevent these undocumented immigrants from pursuing the same opportunity for a clean slate as available to everyone else.



The immigration status of a defendant is not relevant to the proceedings in most expungement proceedings. Any such inquiry of that status should be objected to by counsel as irrelevant and potentially unduly prejudicial to the proceedings. However, some cases come to the Court with the defendant's immigration status already known by the Court. In such instances it is important to ensure the Court is educated on the legal intricacies of their status and potential effect on the expungement proceedings.

Undocumented residency in the United States is not a criminal violation nor does it constitute a criminal act. See *Arizona v. United States*, 567 U.S. ____ (No. 11-182) (2012). The issue of legal residency is a civil issue for Immigration Courts. Inquiry into such status is not indicative of other criminal violations that may weigh in the consideration of petitioner's expungement request, and a Court's view that such status would be a negative reflection on their character should be opposed as unsupported.

As noted, the petitioner carries the burden to prove sufficient benefit commensurate with the disadvantages of expungement. Employment eligibility and increased employment opportunities are weighty and frequently cited benefits to justify expungement. Judicial officers have previously referenced that such benefit is not available to undocumented immigrants as engaging in employment would be an illegal act for them in the United States.

Minnesota Courts have recognized the opportunity and at times obligation of unauthorized individuals to work in this country. See *Zaldivar v. Rodriguez*, 819 N.W.2d 187 (Minn. App. 2012). In *Zaldivar*, the Court upheld a contempt order against the obligor in a child support case for failing to pay child support, even though he was not authorized to work in the United States. See *Id.* The Court reasoned, "[a]n unauthorized alien who works in the United States without authorization may be subject to criminal prosecution only if he or she knowingly uses forged, counterfeit, altered, or falsely-made documents to obtain employment. 8 U.S.C. Section 1324c(a)(1)-(3) (2006); 18 U.S.C. Section 1546 (a), (b) (2006). Thus, as a practical matter, an unauthorized alien can work in the United States without risk of criminal punishment, even if such employment is inconsistent with an employer's

restrictions under federal immigration law." *Zaldivar*, 819 N.W.2d at 193. Therefore, petitioner can reasonably argue that seeking increased employment opportunities are a compelling basis to request expungement, as recognizing such would not be expressly supporting illegal action.

Undocumented petitioners should also stress any alternative bases of substantial benefits for an expungement in order to better meet their burden. These could include benefits such as housing opportunities, opportunities to engage with their children's school activities, or volunteering opportunities. Another potential basis related to employment is the potential benefit a petitioner may receive in establishing and running a business. United States law does not specifically prohibit undocumented immigrants from owning and running a business. Expungement may benefit the successful operation of a business by clearing a petitioner's record for potential customer inquiry, provide for better insurance options for the petitioner or their business, or open up the opportunity for licensing for specific business activities.

Undocumented immigrants share the need for a clean slate as all others, and their status should not deter them from seeking out the potential benefits. However, undocumented immigrants should consult an immigration attorney about the potential effects an expungement could have on future immigration applications. In any event, a petitioner should retain multiple copies of their criminal proceedings as such records may not be available after the expungement.