

MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

We the People of the United States, in order to insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to our Posterity, do ordain and establish this Constitution for the United States of America.

Article 1.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year in each State shall have ^{at least} one Representative, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Year, and the Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such Enumeration, the States then existing shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen for the Term of six Years, and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen, the Executive Authority of the State in which they shall have happened shall issue Writs of Election to fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote thereon, unless he shall also be the President of the United States.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. And no Person shall be convicted without the Concurrence of two thirds of the Members present.

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.