

THE INA'S DISTORTED DEFINITION OF "CONVICTION"



What is a conviction?

Criminal convictions often carry immigration consequences, including mandatory detention and deportation. A conviction is when a criminal court or jury decides that a person is guilty of a crime or a person pleads guilty to having committed a crime. A conviction is not final until a person has had the opportunity to appeal. Each state has its own criminal laws and its own court system; many criminal dispositions that are not acquittals—such as diversion programs or other alternatives to conviction—do not count as convictions in state criminal systems. But in the immigration context, “conviction” is defined much more broadly than in the criminal context.

The INA's distorted definition of “conviction”

Sometimes something that would not count as a conviction according to state law does count as a conviction under the immigration laws and can still lead to deportation or other immigration consequences. **The Immigration and Nationality Act (the INA) defines “conviction” as:**

a formal judgment of guilt of the [noncitizen] entered by a court or, if adjudication of guilt has been withheld, where-

- (i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] 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 [noncitizen]'s liberty to be imposed.

This definition is much broader than the standard meaning of the term “conviction”: it includes circumstances where “adjudication of guilt has been withheld” or where a person “admitted sufficient facts to warrant a finding of guilt,” even if no state or federal court has entered an actual conviction. A person could therefore have a “conviction” for immigration purposes even if they do not have a conviction under state criminal law.

The current definition of “conviction” stems from the Illegal Immigration and Immigrant Responsibility Act of 1996, or IIRIRA. Congress passed IIRIRA, an extremely punitive law that triggered the current mass deportation system, during the era of both parties’ racist “tough on crime” policies. Prior to IIRIRA, criminal court judges could issue “judicial recommendations against deportation” or JRADs, in order to prevent a conviction from leading to deportation. IIRIRA took away that form of discretionary relief, and significantly expanded the definition of “conviction” for immigration purposes.

State diversion programs are often still “convictions” for immigration purposes

Many states offer alternatives to conviction where a person enters a guilty plea that can later be withdrawn if the person meets certain requirements, such as completion of a treatment program or classes (that is, the court withholds an adjudication of guilt). It is common for such alternative programs to require a person to accept responsibility before the person can qualify (that is, they must admit sufficient facts to warrant a finding of guilt). Most states also have ways for people to remove convictions from their record - often known as expungements - or other ways to undo convictions if a person shows rehabilitation.

Convictions carry many consequences beyond a jail sentence or fine, not only for immigrants, but for everyone. States use these diversion and expungement tools to grant access to more rehabilitative programs based in the community and to let people move on with their lives once they have completed them. Contrary to the intention of those state laws, these expunged, deferred, or withheld judgments *still count as convictions* for immigration purposes. That is, a state which prosecuted an immigrant for a crime might later decide, based on the immigrant’s good conduct, that the crime should not count against the immigrant. And yet, the immigrant could still face deportation based on their acceptance of responsibility.

The INA also defines “term of imprisonment” to include sentences people never served

Many states impose “suspended sentences.” When a person receives a suspended sentence, that person does not go to jail or prison. Instead, that person has to complete probation (a supervisory program in which the person cannot engage in a list of certain behaviors and must sometimes also attend classes or pay fees) or comply with some other form of supervision. Some states impose suspended sentences automatically for all sentences that would otherwise just be to probation or a diversionary program.

Many immigration consequences depend on the “term of imprisonment” a court orders an immigrant to serve. Currently, the INA includes suspended sentences in this definition. That means

that a person who never served a single day in jail could still be deported based on a sentence that the state court suspended.

Congress must amend the INA definitions of conviction and term of imprisonment

The INA's current definition of conviction deprives immigrants of access to criminal justice reforms and rehabilitation programs, and deprives states of the discretion to fully undo a conviction the state itself pursued. Even when states want to get rid of an immigrant's convictions for the express purpose of avoiding immigration consequences, that conviction will still count.

In its statutory definition of conviction, the INA explicitly includes some criminal court processes that states would not count as convictions. And the Board of Immigration Appeals ("BIA") has made that definition even broader, especially in:

- *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), which held that undoing a conviction solely for rehabilitative purposes or to avoid immigration consequences will not void the conviction for immigration
- *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) and *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002), which held that most deferred entries of judgment still count as convictions
- *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) and *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005), which held that state actions that expunge, dismiss, cancel, vacate, discharge, or otherwise remove convictions for rehabilitative purposes do not void them for immigration purposes
- *Matter of Suh*, 23 I&N Dec. 626 (BIA 2003), which limited the effect of pardons to the grounds of deportability specified in the INA; the effect is that a pardon will not undo a drug conviction and several other grounds of deportability for immigration purposes
- *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995), which held that suspended sentences count as imposed sentences for immigration purposes
- *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008), which held that a court requiring a defendant to pay court costs counts as a "punishment" and therefore a conviction for immigration purposes

These decisions deprive immigrants of the second chance that any other person would get, and that states want to give.

What Should Be Done?



The Attorney General must reverse the harmful BIA decisions. The Attorney General can correct the distortions of overly punitive BIA and AG decisions and restore a definition of conviction that respects states' efforts to provide rehabilitative relief.



Congress must pass the New Way Forward Act. Congress must amend the definition of conviction; the New Way Forward Act already contains a provision that would prevent the injustices that Claudia and Eddie (stories follow) suffered.



Congress must amend the INA definition of conviction to:

- Exclude any “adjudication or judgment of guilt that has been dismissed, expunged, sealed, deferred, annulled, invalidated, withheld, or vacated, or where a court has issued a judicial recommendation against removal, or an order of probation without entry of judgment or any similar disposition.”
- Clarify that *all pardons* nullify convictions for immigration purposes. This language would allow immigrants to benefit from criminal justice reform and have their rehabilitation recognized, and would give state criminal courts the ability to prevent convictions from leading to deportations.

People Harmed by the Distorted Definition of Convictions

CLAUDIA

Criminal Justice Reform Relief (California Prop 64)

Claudia is a longtime Lawful Permanent Resident (LPR) who lives in Orange County, California. She's a survivor of domestic abuse who struggled with drug use, but who then turned her life around. Claudia is a mother and grandmother, has been sober for nearly 5 years, and currently works as an essential worker caretaker. She fought her case pro se for years at the Adelanto Detention Facility, eventually making her way to the Ninth Circuit, where she found pro bono counsel. The Ninth Circuit unfortunately [concluded](#) that her 2014 conviction for a violation of Cal HSC 11359 (possession of marijuana for sale) was an aggravated felony despite her having received “rehabilitative” relief under California Proposition 64 (Prop 64), which redesignated her conviction as a misdemeanor. While Claudia received

While Claudia received other relief through the efforts of multiple attorneys, had the relief Claudia received under Prop 64 been recognized under federal immigration law... she might not have had to stay detained at Adelanto for over a year and a half.

other relief through the efforts of multiple attorneys, had the relief Claudia received under Prop 64 been recognized under federal immigration law, she would have been allowed to apply for cancellation of removal at the outset and might not have had to stay detained at Adelanto for over a year and a half.

EDDIE

Expungement

Eddie is a father, grandfather, and longtime LPR who has lived in the United States for approximately 40 years. In 1981, at the age of 3, Eddie came to the US from El Salvador. As a teenager, he began to struggle with depression and turned to drug use. He also had a daughter at the age of 16. In July 1996 at the age of 18, he attempted to commit suicide by setting himself on fire. This attempt failed and he was charged with the felony offense of arson. Eddie pled guilty to one count of arson (California Penal Code section 451(d)) and was sentenced to a period in county jail and one year in drug treatment.

Almost eleven years after his conviction, Eddie was detained by Immigration and Customs Enforcement (ICE) and placed in removal proceedings. He spent seven years in immigration

Eddie's arson conviction was expunged in 2019. However, because that expungement does not count for immigration purposes, Eddie is still fighting his removal today.

detention fighting his case and was released on bond in April 2014. Eddie's arson conviction was expunged in 2019. However, because that expungement does not count for immigration purposes, Eddie is still fighting his removal today. His arson conviction is considered an "aggravated felony" under federal immigration law and he is currently deportable and ineligible for any form of relief.

Today, Eddie works as a car technician in San Bernardino, California. His daughter, now 26 years old, is a nurse and has a family of her own—Eddie's grandchildren, whom he visits often. Eddie also now has two young sons, one biological and one who is the son of his fiancée. Eddie is also furthering his knowledge and expertise by taking online classes in mechanics. He recently graduated from Universal Technical Institute and received his Associate's Degree, and is considering further education to advance in the field of engineering.