

Practice Pointer:
The Illinois Cannabis Regulation and Tax Act and its Effect on Immigration
*By Lindsay Fullerton**

On June 25, 2019, Illinois Governor J.B. Pritzker signed into law the *Cannabis Regulation and Tax Act*, HB 1438 (“Illinois Cannabis Act”), which goes into effect on January 1, 2020. The Illinois Cannabis Act legalizes possession of certain amounts of cannabis by adults, forms a regulatory system for the sale of cannabis, and creates social equity programs.¹ Additionally, the Illinois Cannabis Act intends to create criminal justice reforms for those with certain cannabis-related convictions. This Practice Pointer focuses on the immigration consequences of the Illinois Cannabis Act’s provisions.

Future Possession & Sale of Cannabis

Although certain use, possession, and sale of cannabis will be legal in Illinois, it is still not legal under federal law. Possessing or selling cannabis can make a noncitizen inadmissible, deportable, or ineligible for certain benefits, including naturalization.² In April 2019, U.S. Citizenship and Immigration Services (“USCIS”) pointedly issued a Policy Alert confirming that a “violation of federal controlled substance law, including for marijuana, established by a conviction or admission, is generally a bar to establishing GMC [good moral character] for naturalization even where the conduct would not be a violation of state law.”³ Because other practice pointers have thoroughly addressed inadmissibility and deportability issues, they will not be discussed here.⁴

Expunging, Vacating, and Pardoning past Cannabis Convictions

The Illinois Cannabis Act creates a system to expunge, pardon, or vacate certain cannabis convictions, as summarized below:

<i>Automatic Expungement</i> 20 ILCS 2630/5.2(i)(1)	Illinois will automatically expunge arrests not leading to a conviction for possession and manufacture or possession with
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¹ The term “cannabis” includes marijuana, hashish, and other parts of the cannabis plant. 720 ILCS 550/3(a). The full text of the Illinois Cannabis Act is available at the Illinois General Assembly Website: <http://ilga.gov/legislation/publicacts/101/101-0027.htm>. The State of Illinois has also issued a summary of the Illinois Cannabis Act, available at https://www2.illinois.gov/HISNews/20242-Summary_of_HB_1438_The_Cannabis_Regulation_and_Tax_Act.pdf.

² Attorneys should work with their clients to make sure they understand the consequences of possessing cannabis, selling cannabis, and working in the cannabis industry. They should also make it clear that immigration officials have begun scrutinizing social media posts, and that officials have reviewed additional data on person cell phones and computers at border points of entry.

³ USCIS, Department of Homeland Security, Policy Alert, Controlled Substance-Related Activity and Good Moral Character Determinations, PA-2019-02, April 19, 2019 available at <https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf>.

⁴ See, e.g., AILA Practice Pointer, Admissibility and the Changing Landscape of Legal Marijuana, AILA Doc. No. 18113033; Immigrant Legal Resource Center, Practice Advisory, Immigration Risks of Legalized Marijuana, AILA Doc. No. 18032103, available at https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf.

	intent to deliver for up to 30 grams, as long as the arrest was not associated with violent crime or a certain penalty enhancement. ⁵
<i>Expungement authorized by Governor's Pardons</i> 20 ILCS 2630/5.2(i)(2)	The Governor will grant pardons authorizing expungement for convictions for possession and manufacture or possession with intent to deliver for up to 30 grams, as long as the conviction is not associated with a violent crime or certain penalty enhancement. Illinois will affirmatively identify these convictions for clemency.
<i>Motions to Vacate and Expunge</i> 20 ILCS 2630/5.2(i)(3)	An individual can file a motion with Illinois courts to vacate and expunge convictions for up to 500 grams of cannabis, including convictions associated with violent crimes.

Effect on Immigration

This section explains how expunging, vacating, or pardoning a cannabis conviction through the Illinois Cannabis Act may affect a noncitizen's immigration case.⁶ Generally, a conviction vacated or expunged for the sole purpose of avoiding collateral immigration consequences or based on a rehabilitative statute is still a conviction for immigration purposes.⁷ However, a conviction vacated for a legal procedural or substantive defect is not a conviction for immigration purposes.⁸ For example, the Board of Immigration Appeals ("BIA") found that a conviction was no longer a conviction for immigration purposes after it was vacated under Ohio law due to the criminal court's failure to provide a statutory warning about immigration

⁵ The Illinois Cannabis Act defines "expungement" as to "physically destroy the records or return them to the petitioner and to obliterate the petitioner's name from any official index or public record, or both." 20 ILCS 2630/5.2(a)(1)(C). The Illinois Cannabis Act indicates that the "effect of an order of expungement shall be to restore the person to the status he or she occupied before the arrest, charge, or conviction." 20 ILCS 2630/5.2(i)(10).

⁶ A full background on convictions for immigration purposes is available through the Immigration Legal Resource Center: https://www.ilrc.org/sites/default/files/resources/definition_conviction_april_2019.pdf. The Immigration Legal Resource Center also has a full manual regarding post-conviction relief, with a particular focus on California law: <https://www.ilrc.org/sites/default/files/resources/pcr-manual-final.pdf>.

⁷ *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006); *see also Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), *vacated sub nom. Lujan Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that 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 record of guilt or conviction by operation of a state rehabilitative statute); *see also Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002) (holding that "except in the Ninth Circuit, a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction' for immigration purposes"). An example of a "rehabilitative" statute is 720 ILCS 570/410, which allows a first-time drug offender to plead guilty and then vacate the plea after successfully completing probation. Under a rehabilitative statute, the judge does not vacate the guilty plea due to a substantive error in the proceeding, but because the individual has demonstrated that she has rehabilitated. *See Matter of Roldan*, 22 I&N Dec. 512, 515-16 (BIA 1999) (describing state rehabilitative programs to mitigate the consequences of criminal convictions).

⁸ *Pickering*, 23 I&N Dec. at 624.

consequences.⁹ Likewise, in *Matter of Rodriguez-Ruiz*, the BIA found the following vacatur eliminated a conviction for immigration purposes: “the sentence of one (1) year probation are in all respects vacated, on the legal merits, as if said conviction had never occurred and the matter is restored to the docket for further proceedings.”¹⁰ The BIA reasoned that the vacating order of the state court was not pursuant to a state rehabilitative statute nor under an expungement statute, and therefore the analysis in *Matter of Roldan* was not applicable.¹¹ Note that in May 2019, the Attorney General certified a case to himself and invited amici briefs on “whether, and under what circumstances, judicial alteration of a criminal conviction or sentence—whether labeled ‘vacatur,’ ‘modification,’ ‘clarification,’ or some other term—should be taken into consideration in determining the immigration consequences of the conviction.”¹² We have yet to see how the Attorney General’s potential decision will affect the immigration consequences of post-conviction relief.

Any attorney representing a noncitizen that is in the process of having her cannabis conviction expunged or vacated pursuant to the Illinois Cannabis Act should attempt to include language in the order confirming that the expungement or vacatur is due to a “substantive legal defect” in the prior law, or is “on the merits.” If there are additional substantive or legal defects in the underlying proceedings, such as any due process violations, adding those defects to the motion to vacate will strengthen the argument that the conviction should no longer have immigration consequences. It is strongly advisable not to include language in an order or in the record of proceedings that the expungement or vacatur is rehabilitative or solely to avoid immigration consequences. A Chicago-based nonprofit, the National Immigrant Justice Center (“NIJC”), has a Defenders Initiative that responds to email inquiries from criminal defense attorneys that have questions regarding potential immigration consequences that their defendant clients may face.¹³

Attorneys assisting noncitizens in immigration cases should demonstrate that the vacatur or expungement is substantive or “on the merits,” rather than for the purpose of removing collateral consequences or because of rehabilitation.¹⁴ Legislative history of the Illinois Cannabis Act may support this argument.¹⁵ Practitioners can argue that the *Pickering* analysis regarding substantive

⁹ *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006); see also *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001) (finding that a conviction was vacated pursuant to the Illinois Post Conviction Hearing Act due to constitutional violations in the underlying criminal proceedings, and thus was not a conviction for immigration purposes); *Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005) (finding a vacated conviction was based on a defect in the underlying criminal proceedings and therefore is not a conviction for immigration purposes).

¹⁰ *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).

¹¹ See *supra* note 6.

¹² *Matter of Thomas*, 27 I&N Dec. 556 (AG 2019).

¹³ You can send NIJC’s Defenders Initiative a message at the following website:

<https://www.immigrantjustice.org/resources/defendersinitiative>

¹⁴ For example, a vacatur would be based on “rehabilitation” if it is due to the criminal defendant’s good behavior and compliance with probation.

¹⁵ Legislative history is available at the Illinois General Assembly website:

<http://www.ilga.gov/senate/transcripts/default.asp>. The law was sponsored by Sen. Heather Steans (Chicago) and Rep. Kelly Cassidy (Chicago). Steans’ website includes a page regarding the Illinois Cannabis Act, including referring to “restorative justice.” “Steans passes legislation to legalized adult-use cannabis in Illinois,” available at <http://www.senatorsteans.com/adult-use-cannabis/404-steans-passes-legislation-to-legalize-adult-use-cannabis-in-illinois>, archived at <https://web.archive.org/web/20190726160111/http://www.senatorsteans.com/adult-use-cannabis>. Steans also quotes Illinois State Senator Toi Hutchison (Chicago Heights) as stating “It is important that the policy changes we enact reflect the needs of the people who have been *unfairly incarcerated* over the years. . . .”

or procedural defects should extend to expungements, not just vacatur, because the vehicle for invalidating the conviction is not as relevant as the reason for invalidating it.¹⁶

Moreover, practitioners can argue that the Illinois state-wide decriminalization, including pardons, expungements, and vacatur, demonstrates that the State of Illinois has found that the conduct never should have been criminalized in the first place. It is an open question whether this constitutes a vacatur or expungement due to a substantive legal defect, but practitioners may argue that these expungements and vacatur are not because of a defendant's rehabilitation or "good behavior" post-conviction. Rather, it is a state-wide change based on an error in prior policy.¹⁷

The American Immigration Lawyers Association ("AILA") and partners recently submitted an *amicus* brief arguing that Connecticut's legislative decriminalization, accompanied by a provision for expungement or destruction of records of pre-existing convictions for acts made non-criminal, should be recognized for immigration purposes as eliminating the effect of such previous convictions.¹⁸ The Illinois Cannabis Act provides an affirmative duty for the State of Illinois to identify convictions that are eligible for pardon and expungement, for U.S. citizens and noncitizens alike, demonstrating that the expungements are not based on rehabilitation or solely to avoid immigration consequences. Practitioners can argue that immigration adjudicators

If we are going to move in a positive direction, it is absolutely vital that we learn from our past and do our best to try and remedy the lingering effects our antiquated and harmful policies have had on neighborhoods and communities across the state." "New study offers several policy options in legalizing adult-use cannabis" available at <http://www.senatorsteans.com/adult-use-cannabis/399-new-study-offers-several-policy-options-in-legalizing-adult-use-cannabis>, archived at <https://web.archive.org/web/20190822163023/http://www.senatorsteans.com/adult-use-cannabis/399-new-study-offers-several-policy-options-in-legalizing-adult-use-cannabis>. In discussing the need to decriminalize adult use of cannabis, Rep. Cassidy's website indicates that "The war on drugs has had a disproportionately negative effect on communities of color," demonstrating that the expungements and vacatur are based on a prior substantive error in policy.

¹⁶ See *Pinho v. Gonzales*, 432 F.3d 193, 206 n.15 (3d Cir. 2005) ("For our purposes here, we will treat the terms 'vacated' and 'expunged,' which appear variously in the BIA opinions, as synonymous. The salient procedural situation is one in which a conviction is voided or invalidated, 'dismiss[ed], cancel[ed] . . . discharge[d] or otherwise remove[d],'*Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001), whatever the label, and whatever the subsequent availability of the record of the conviction.").

¹⁷ But see *Prado v. Barr*, No. 17-72914 (9th Cir. May 10, 2019) available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/10/17-72914.pdf> (finding that a California marijuana conviction still has immigration consequences even after it was reduced to a misdemeanor under California's Proposition 64) ("We are not persuaded by Prado's attempt to characterize California's decision that its marijuana policy was flawed as proof of a "substantive" flaw in her conviction.")

¹⁸ AILA Doc. No. 19051534 includes the full *amicus* brief to the Third Circuit. This brief may provide useful arguments that a practitioner could make regarding the Illinois legalization, pardon, and expungement scheme. Connecticut's Attorney General also submitted an *amicus* brief available at <https://portal.ct.gov/AG/Press-Releases/2019-Press-Releases/AG-TONG-TO-DEFEND-PARDON-SYSTEM-IMMIGRANTS-RIGHTS-AT-ORAL-ARGUMENT-BEFORE-US-COURT-OF-APPEALS>. Similarly, The Immigrant Legal Resource Center submitted a brief to the BIA in August 2018 arguing that convictions vacated pursuant to California Penal Code § 1203.43 are not convictions for immigration purposes. This *amicus* brief could provide further arguments that a conviction pardoned, expunged, or vacated under the Illinois Cannabis Act is not a conviction for immigration purposes. https://www.ilrc.org/sites/default/files/resources/ilrc_amicus_cal_120343_vacatur-20181025.pdf

(either at the agency level or in immigration court) should give full faith and credit to the Illinois legislature's decision through the Illinois Cannabis Act.¹⁹

The Governor's pardons described by the Illinois Cannabis Act may also benefit a narrow subset of immigration cases. A noncitizen will not be deportable under INA § 237(a)(2)(A)(i), (ii), (iii), (iv) after receiving a "full and unconditional" pardon by the Governor.²⁰ This provision only applies to deportability charges for crimes involving moral turpitude ("CIMTs"), multiple criminal convictions, aggravated felonies, and high-speed flight. As such, a pardon would not likely prevent other immigration consequences, including deportability on controlled substance grounds.²¹ An attorney representing a noncitizen that seeks a pardon from the Governor should ensure that the pardon is "full and unconditional." For noncitizens that have a cannabis conviction that does not fall within the Illinois Cannabis Act's affirmative pardon and expungement provisions, it may be worth individually petitioning the Governor's office to issue a full and unconditional pardon. Note however, these pardons would likely only benefit a narrow subset of cases. Moreover, ICE has not honored full and unconditional pardons from Connecticut, though it has honored pardons from other states such as Georgia.²² Given the January 2020 effective date of the Illinois Cannabis Act, we have yet to see how ICE treats pardons under the Illinois Cannabis Act.

The Illinois Cannabis Act is a major milestone in seeking equity and restorative justice in Illinois. However, advocates must carefully analyze its impact on federal immigration law.

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¹⁹ See 28 U.S.C. § 1738 (statute regarding full faith and credit).

²⁰ INA § 237(a)(2)(A)(vi).

²¹ INA § 237(a)(2)(B); *Matter of Suh*, 23 I&N DEC. 626 (BIA 2003).

²² As reported by Connecticut Public Radio: https://www.wbur.org/news/2019/07/23/immigration-past-crimes-state-pardon-federal-hearing%20?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily.