

# FAQ

## BEYOND ROLDAN & PICKERING



### WHAT IS THIS RESOURCE?

A sample brief for getting almost all post-conviction relief recognized in immigration proceedings by challenging key BIA precedents.[1]

### HOW IS POST-CONVICTION RELIEF RELEVANT TO IMMIGRATION PROCEEDINGS?

Past convictions can subject noncitizens to deportation, detention, and other negative immigration consequences. Post-conviction relief, by eliminating or modifying a past conviction, can eliminate immigration consequences caused by that conviction.[2] However, federal law has placed certain limits on the recognition of post-conviction relief in immigration proceedings.

### HOW DOES THIS RESOURCE HELP?

This resource challenges the federal limits on recognizing post-conviction relief in immigration proceedings. This resource argues that Congress has required immigration authorities to recognize almost all forms of post-conviction relief, and that the Board of Immigration Appeals has violated the INA by refusing to recognize various expunged and vacated convictions.

### IN WHAT KINDS OF CASES CAN THIS GUIDE BE HELPFUL?

REMOVAL PROCEEDINGS	Prior “conviction” triggering removability, inadmissibility or ineligibility for relief.
AFFIRMATIVE IMMIGRATION APPLICATIONS	Prior “conviction” triggering inadmissibility or ineligibility for relief (e.g., good moral character).
DEFENSE TO CRIMINAL CHARGES UNDER INA § 276/8 USC § 1326	Prior “conviction” was the basis for underlying removal order or is the basis for sentencing enhancement.
MANDATORY DETENTION UNDER INA § 236(c)	Prior “conviction” triggering basis for mandatory detention without bond.

[1] Please note that these suggested arguments are not a replacement for individual, case-specific legal advice. They are suggested for consideration in each individual case, and very likely as supplements to other arguments to challenge the immigration consequences of a prior offense, for example that a post-conviction action satisfies the BIA’s standard in *Pickering*.

[2] This resource concerns state court actions that, for any reason, eliminate the fact of a prior conviction (the conviction does not legally exist). State judicial post-conviction actions are referred to by many labels, such as vacatur or expungement. See, e.g., New York C.P.L. § 440.10 (vacatur); Cal. Penal Code § 1203.4 (expungement). See also Mich. Comp. Laws Ann. § 780.621 (motion to set aside conviction); Minn. Stat. Ann. § 638.02 (pardon extraordinary); Nev. Rev. Stat. § 176A.850 (honorable discharge from probation). The same term may refer to something different in various states.

# FAQ

## BEYOND ROLDAN & PICKERING



### WHAT ARE THE RELEVANT FEDERAL LAWS AND BIA DECISIONS REGARDING POST-CONVICTION RELIEF?

The two primary BIA precedents on this issue are *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (en banc), and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), which hold that expungements and certain vacatur of convictions are not effective for immigration purposes. The primary federal law is INA § 101(a)(48)(A), which provides a definition of the term “conviction” under immigration law. *Roldan* and *Pickering* interpret this term.

### WHAT DO THE PRECEDENTS IN ROLDAN AND PICKERING HOLD?

*Roldan* holds that the INA’s term “conviction” includes prior convictions that have been expunged by what the majority labeled “rehabilitative relief.” *Pickering* holds that the INA’s term “conviction” includes prior convictions that have been vacated, if deemed vacated solely “for reasons unrelated to the merits of the underlying criminal proceedings.” Together, the decisions create two different categories of post-conviction relief:

- Vacatur due to “procedural or substantive defects” in the underlying criminal proceeding; and
- Vacatur done for “rehabilitative” reasons or to alleviate “immigration hardships.”

### CAN ROLDAN AND PICKERING BE CHALLENGED AND REVERSED?

Yes, they are agency decisions subject to reversal by:

- **Federal circuit courts of appeals:** can overrule *Roldan* and *Pickering* as incorrect and unauthorized.[3]
- **U.S. Attorney General:** can certify to their office the legal question of the proper meaning and scope of the INA’s “conviction” definition, and reverse *Roldan* and *Pickering* as incorrect and unauthorized
- **BIA sitting en banc:** can reverse *Roldan* and *Pickering* as incorrect and unauthorized.

### WHY SHOULD ROLDAN AND PICKERING BE OVERRULED AND REVERSED?

These decisions are wrong and should be overruled and reversed because:

- The plain text does not include expunged or vacated convictions;
- The legislative history confirms that Congress intended to recognize post-conviction relief; and
- Tools of statutory construction--which the BIA did *not* consider or apply in *Roldan* or *Pickering*--further confirm that Congress intended to recognize post-conviction relief.

[3] While the *Roldan* and *Pickering* standards are the current law in all circuits because the circuits have offered deference to the BIA on this question, there are many viable justifications for the BIA or a federal court to reverse their positions.