

Roy-Couvillon.Alix

From: Gillies.Tracey
Sent: September 25, 2017 8:40 AM
To: Immigration Representatives / Représentants immigration (IRCC)
Subject: FW: Arizona "set aside" equivalence to record suspension - REP-2017-1419 - due 13-Sep-17
Attachments: Set Aside_Arizona.pdf

Approved response provided by IRG:

Thank you for sending us your question.

Arizona – Set Aside Conviction pursuant to Title 13-907

As you may be aware, the Saini test represents the essential elements required to equate a foreign pardon to a Canadian record suspension “pardon”.

The second part of the Saini test compares the aim, content and effect of the Arizona law to that of Canada’s record suspension.

Title 13, section 907 of the Arizona Penal Code, reads as follows:

Setting aside judgment of convicted person on discharge; application; release from disabilities; exceptions

- A. Except as provided in subsection D of this section, every person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge.
- B. The convicted person or, if authorized in writing, the convicted person's attorney or probation officer may apply to set aside the judgment.
- C. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction except those imposed by [...]

In Arizona, one may apply to have their conviction “set aside” upon fulfillment of the conditions of probation or sentence and discharge by the court. This is intended to release the individual from all penalties and disabilities resulting from the conviction. As set out in the aforementioned legal opinion, this is similar to the aim of Canada’s record suspension as both laws do not effectively erase the conviction but rather seek to ensure that the conviction no longer reflects adversely on an applicant’s character.

The legislation is very brief in content as it does not provide details concerning the application process and eligibility provisions beyond the completion of the sentence, but the wording does imply that the decision to grant the application is discretionary as in Canada. The recent changes to Canadian legislation allow for further similarities as certain offences deem an individual ineligible for conviction relief in both jurisdictions. However, there is no designated conviction-free period as there is in Canada where the prescription period is 5 or 10 years of good behaviour depending on the offence. There is also no indication that the Arizona courts can revoke a set aside if the individual is convicted of a subsequent

offence, they are no longer of good standing or, the application contained false statements; this discretion is available to the National Parole Board which can revoke a record suspension on any of the aforementioned grounds.

What is significantly different between the two laws is the effect as the Canadian legislation strictly limits access to the record of conviction (removes it from CPIC, etc.) whereas, in Arizona, the charge and conviction remain fully accessible to anyone searching an individual's record where wording is added to indicate the conviction was set aside. A conviction that has been set aside may still be used to deny certain kinds of employment (if the job relates to the conviction), permits, certificates, licenses and can also be used in future criminal cases. In addition, the legislation does not permit the offender to deny the conviction if asked on a job application. This differs from Canadian legislation as suspended records that are in the custody of federal agencies are kept separate and apart from one's primary criminal record and information pertaining to such records will not be disclosed without the specific approval of the Minister of Public Safety. In addition, the CRA states that no employment application form, within the federal authority, may ask any question that would reveal a suspended record.

I will, however, note that solely for sexual offences listed in the schedule 1 to the CRA, information regarding ones criminal record will be available in certain circumstances regardless of the suspension. Consequently, one's suspended record may be disclosed only if that person wishes to work with children or vulnerable persons, and this is with the individual's written consent for disclosure.

A record suspension does not ensure that either municipal or provincial agencies will not disclose the record as the CRA applies only to records kept at the federal level. However, many provincial and municipal agencies will cooperate by restricting the disclosure of the records once they are notified of the suspension.

Given these difference, I find the aim, content and effect of the foreign legislation to be too dissimilar to a Canadian record suspension to be deemed equivalent. As such, the essential requirements provided by the Saini test have not been satisfied for us to recognize the set aside.

We trust that this information will be useful to you.

Tracey

From: Sharun.Gregory
Sent: August-23-17 9:57 AM
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Cc: IPG Visitors Unit Admin / Admin Unite des Visiteurs OPI (IRCC) <IRCC.IPGVisitorsUnitAdmin-AdminUnitesVisiteursOPI.IRCC@cic.gc.ca>
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Hi Tracey, This one came back....can you action please?

Thanks,

Gregory Sharun

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