WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 11 / August 2021**

What You Need to Know for Your Noncitizen Client

If your noncitizen client is facing criminal charges or adverse findings in Family Court...

Please contact the WNY Regional Immigration Assistance Center. We provide legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York.

Buffalo Office
Sophie Feal
290 Main Street
Buffalo, NY 14202
716.853.9555 ext. 269
sfeal@legalaidbuffalo.org

Canandaigua Office
Brian Whitney
3010 County Complex Dr.
Canandaigua, NY 14424
585.919.2776
bwhitney@legalaidbuffalo.org

ALLEGANY COUNTY ACP ATTORNEYS NEEDED

If you are willing to travel to Allegany County, the ACP there needs you. There is some flexibility to pay travel and mileage for out-of-county attorneys if they take criminal assignments.

Please contact Joe Miller, Assigned Counsel Administrator, at (585) 808-5100 or acassignedcounsel@gmail.com

NEW MEMO FROM I.C.E.

Immigration and Customs Enforcement issued a memo on July 1st instructing its field offices to ensure that pregnant, nursing and postpartum noncitizens are clearly identified when subject to arrest and detention. The goal is to make certain that, if detained, these women are monitored and housed where their care can be managed properly. The memo also makes clear that such noncitizens should not be arrested or detained if they are charged solely with a civil immigration violation of the law. *See here*

CASE LAW

Brathwaite v. Garland, No. 20-27 (2d Cir. 2021)

In an important case for New York noncitizen defendants, the Second Circuit Court of Appeals reversed a decision of the Board of Immigration Appeals which had found that a New York Appellate Division's order granting a noncitizen's motion to file a late appeal pursuant to CPL § 460.30 was "legally insufficient" to establish that the conviction was not final for immigration purposes. Therefore, held the Board, removal proceedings could commence against the noncitizen despite the favorable ruling by the Appellate Division.

The case arose at the Federal Detention Facility in Batavia, and while the noncitizen was in removal proceedings, the Appellate Division "deem[ed] the moving papers as a timely filed notice of appeal." Nonetheless, the immigration judge, and then the Board, accepted the Government's argument that, when the noncitizen was placed in removal proceedings, the time to file an appeal of the conviction had lapsed, and there was no evidence, as required by Board precedent, that the Appellate Division's grant of the late appeal motion was based on the *merits* of the appeal. The Board found that the noncitizen had not "perfected" an appeal "relating to the issue of guilt or innocence, or concerning a substantive defect in the criminal proceedings," and had not otherwise "show[n] what argument he was pursuing" on appeal.

The federal circuit court rejected the Board's reasoning. It opined that a motion for a late notice of appeal pursuant to CPL § 460.3 (1) may be filed within one year and thirty days of the criminal judgment, and that "such late filings are a matter of course in

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SEX OFFENSES ENCOMPASS SEVERAL GROUNDS OF REMOVAL

By Sophie Feal, Supervising Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

Convictions for sex crimes potentially invoke several grounds of removal from the United States and are particularly challenging because alternative pleas that are "safe" from removal are difficult to find. However, pleas with less severe immigration implications might be crafted, especially for a lawful permanent resident ("green card holder"). In addition, the Adam Walsh Act contains immigration provisions that affect the ability of U.S. citizens convicted of certain sex-related crimes to apply for foreign-born family members or a fiancé(e) to immigrate to the United States.

RAPE AND SEXUAL ABUSE OF A MINOR ARE AGGRAVATED FELONIES

Rape and sexual abuse of a minor are both aggravated felony grounds of deportation regardless of the sentence imposed, as defined by Immigration and Nationality Act (INA) § 101(a)(43) and pursuant to INA § 237(a)(2)(A)(iii). Aggravated felony convictions should be avoided, if possible. Aggravated felonies are offenses that subject noncitizens to mandatory (bond-ineligible) detention during the pendency of removal proceedings, disqualify them from virtually all relief from removal, and may permanently bar them from returning to the U.S. after a deportation.

In *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017), the Board of Immigration Appeals (BIA), after a lengthy evaluation of the evolution of the legal definition of "rape," found that rape, an aggravated felony pursuant to INA § 101(a)(43)(A), refers to an offense that encompasses some form of sexual act that is committed under certain prohibitive conditions, including incapacity to consent to the sexual act. It further reasoned that the consensus among States is that rape entails not only acts of vaginal, anal, and oral intercourse, but also digital and mechanical penetration of the vagina or anus. The Board added that lack of consent means that a "victim's mental condition rendered [them] incapable of giving effective or meaningful consent." *Id*. at 156. Consequently, under New York law, a conviction for PL § 130.20 would be an aggravated felony, as well as rape 1st - 3rd and PL §§ 130.40 and 130.50. In *Kondjoua v. Barr*, 961 F3d 83 (2d Cir. 2020), the Second Circuit Court of Appeals made clear that a sexual offense which included as an element the use or threatened use of violent force would also be deemed a "crime of violence" aggravated felony as defined by 18 U.S.C. § 16(a).

> Rape and sexual abuse of a minor are deportable aggravated felonies under U.S. immigration law, as well as crimes of moral turpitude ("CMT"). The fact that such offenses are also deemed crimes involving moral turpitude is important to note because CMT convictions also render noncitizens inadmissible to the U.S.

Some of these provisions also encompass sexual abuse of a minor grounds of removal. The Second Circuit has further held that a conviction under PL § 110-130.45, for attempted oral or anal sexual conduct with a person under the age of fifteen constitutes sexual abuse of a minor. *Acevedo v. Barr*, 943 F3d 619 (2d Cir. 2019). Additionally, the Court has determined that PL § 130.65.03, sexual abuse in the first degree, which requires that the complainant be under age eleven and the perpetrator's conduct to be "for the purpose of gratifying sexual desire," constitutes an aggravated felony sexual abuse of a minor. *Rodriguez v. Barr*, No 18-1070 (2d Cir. 2020). The BIA has held that "indecency with a child" under Texas law also constitutes sexual abuse of a minor, and specified that such offenses were not limited to facts involving physical contact. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (1999).

While rape and sexual abuse of a minor are aggravated felonies, as well as crimes of moral turpitude, some offenses, such as PL § 130.52, forcible touching, and § 130.55, sexual abuse 3rd, may not be aggravated felonies, though they will be crimes involving moral turpitude (CMT). While CMTs have less serious consequences under immigration law than aggravated felonies (*see* WNYRIAC January 2021 newsletter, "Preserving the Best Defense Against Removal"), the fact that such offenses are also deemed CMTs is important to note because CMT convictions also render noncitizens inadmissible to the U.S. under INA § 212(a)(2)(A)(i). Recently, the BIA held that sexual solicitation of a minor in violation of the Maryland Criminal Law, with the intent to engage in an unlawful sexual offense, is categorically a CMT. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020).

CRIMES OF DOMESTIC VIOLENCE AND AGAINST A CHILD ARE DEPORTABLE OFFENSES

In addition to being deemed an aggravated felony sexual abuse of a minor and a CMT, a sex offense involving a minor may also be a "crime against a child" under immigration law. A conviction for one such offense is sufficient to render a noncitizen deportable under INA § 237(a)(2)(E). The BIA interprets these offenses broadly to mean any offense involving the intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Indeed, in *Matter of Mendez-Osorio*, 26 I&N Dec. 703 (BIA 2016), for example, the BIA held that a New York State endangering the welfare of a child offense is a crime against a child because it requires *knowingly* acting in a manner likely to be injurious to the physical, mental, or moral welfare of a child. *See also Matthews v. Barr*, 927 F3d 606 (2d Cir. 2019).

Charges involving child pornography might not be considered deportable sexual abuse of a minor aggravated felonies, but they are definitely "crimes against children" under immigration law. The BIA has held that an offense that involves acts which induce a child to engage in pornography or other sexually implicit conduct, or otherwise exploits children, falls within this ground of removal. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

Similarly, if a sexual abuse charge involves a spouse, ex-spouse, intimate partner or former intimate partner, it may also be deemed a crime of domestic violence ground of deportation. This also renders a noncitizen removable for simply one such conviction. INA § 237(a)(2)(E).

FAILING TO REGISTER AS A SEX OFFENDER MAY BE A DEPORTABLE OFFENSE

Failing to register as a sex offender in violation of 18 U.S.C. § 2250 is a ground of deportation pursuant to INA § 237(a)(2)(A)(v). The case law regarding an equivalent state offense appears to vary. In *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008), the 9th Circuit held that a Nevada conviction for failure to register as a sex offender did not constitute a CMT because the offense is a strict liability offense without any intent requirement. In *Mohamed v. Holder*, 769 F3d 885 (4th Cir. 2014), the Fourth Circuit Court of Appeals also found that the failure to register was not a CMT because it is a regulatory or administrative provision which merely requires the registration of a particular class of people. Such regulatory offenses implicate no moral value other than the duty to obey the law. However, these decisions are contrary to *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (BIA 2007), wherein a California conviction of willful failure to register by a sex offender, *who had been previously apprised of the obligation to register,* was deemed a crime involving moral turpitude. Since there is no precedent in the Second Circuit, New York criminal defense attorneys should remain wary of a SORA violation conviction, given the Board's precedential decision and no word from our Circuit Court.

PROSTITUTION IS A GROUND OF INADMISSIBILITY AND A CRIME OF MORAL TURPITUDE

Prostitution offenses are grounds of inadmissibility if a noncitizen is coming to the U.S. (1) "solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status;" or if the noncitizen seeking admission "(2) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution." INA § 212 (a)(2)(D). Note that no conviction is necessary to invoke this provision, though past convictions for related crimes may serve as an indication of future intent. However, in *Matter of Gonzalez-Zoquipan*, 24 I&N Dec. 549 (BIA 2008), the Board found, after reviewing the history of this ground of inadmissibility, that the second subdivision does not cover acts of solicitation of prostitution on one's own behalf. Even if it did, the California statute under consideration

in this case criminalizes isolated acts that do not necessarily involve sexual intercourse. Therefore, it encompasses conduct broader than that included in the State Department's (which issues visas for admission to the United States) regulatory definition of prostitution, which is "engaging in promiscuous sexual intercourse for hire." 22 C.F.R. § 40.24 (b).

Prostitution has repeatedly been deemed a CMT. On June 1, 1951, the former Immigration and Naturalization Service Central Office published a precedential decision, *Matter of W-,* 4 I&N Dec. 401 (C.O. 1951), in which it held that a violation of a city ordinance relating to prostitution was a crime involving moral turpitude. Despite the age of the decision, it has been recognized by both the Board and several Federal Circuit Courts as good law. For example, *Matter of W-* was affirmed in *Matter of Ortega-Lopez,* 27 I&N Dec. 382, 390-91 (BIA 2018); *see also Reyes v. Lynch,* 835 F.3d 556, 560 (6th Cir. 2016). In *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012), a California misdemeanor conviction of disorderly conduct (soliciting an act of prostitution) was deemed categorically a crime involving moral turpitude, whether or not the defendant is the prostitute or the customer.

PROMOTING PROSTITUTION MIGHT BE AN AGGRAVTED FELONY

In the case of a noncitizen convicted of promoting prostitution under PL § 230.25(1), the Second Circuit held that her offense did not constitute an aggravated felony ground of removal pursuant to INA § 101(a)(43)(K), which states, among other acts, that a noncitizen is deportable for an offense relating to "the owning, controlling, managing, or supervising of a prostitution business." The Court reasoned that the offense was not an aggravated felony because New York law defined prostitution more broadly than federal law did by punishing conduct that did not involve a "prostitution business." *Prus v. Holder*, 660 F3d 144 (2d Cir. 2011). The State offense "encompasses accepting payment for sexual acts beyond the 'sexual intercourse' that is the exclusive subject of the immigration-law definition." *Id.* at 147.

On the other hand, when considering a similar offense under Wisconsin law, the Board found that it was indeed an aggravated felony under INA § 101(a)(43)(K) and criticized the *Prus v. Holder* decision. The Wisconsin statute provided that "[w]hoever intentionally keeps a place of prostitution" is guilty of a felony. A place of prostitution was defined as "any place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact for anything of value." *Matter of Ding*, 27 I&N Dec. 295, 296 (BIA 2018). The BIA's rationale was that for purposes of INA § 101(a)(43)(K)(i), the term "prostitution" is not limited to offenses involving sexual intercourse, as is the ground of inadmissibility, but is defined as engaging in, or agreeing or offering to engage in, sexual conduct for anything of value. "Moreover, section 101(a)(43)(K)(i) does not proscribe merely engaging in prostitution. Rather, it reaches offenses of a commercial nature that 'relate[] to the owning, controlling, managing, or supervising of a prostitution business.'" *Id.* at 299.

ADAM WALSH ACT AND IMMIGRATION

In 2006, Congress passed the Adam Walsh Act, a law which seeks to prevent sex offenders from abusing children. The law has implications under U.S. immigration law. INA § 204(a)(1)(A)(viii)(I) prohibits a U.S. citizen or permanent resident who has been convicted of a "specified offense against a minor" from having a family-based immigrant visa petition approved on behalf of a relative. The only very limited exception is for those who can prove they pose "no risk." It is important to note that this applies to all family-based petitions, *regardless* of whether the petition beneficiary is a minor or not. As well, a U.S. citizen is prohibited from obtaining a fiancé(e) visa for a foreign-born national if they have a relevant conviction. The list of specified offenses is long and includes, among others: kidnapping; false imprisonment; solicitation to engage in sexual conduct including prostitution; video voyeurism; possession, production, or distribution of child pornography; or "any conduct that by its nature is a sex offense against a minor." *See* 42 U.S.C. § 16911(7)...

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"Sex Crimes" (cont'd)

The Board of Immigration Appeals decided three precedential Adam Walsh cases in 2014. One held that the law was retroactive. *Matter of Jackson and Erandio*, 26 I&N Dec. 314 (BIA 2014). In a second, the citizen petitioner had a New Jersey conviction for endangering the welfare of children and sought to bring his wife to the U.S., but was disqualified. *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2014). Finally, the BIA held that it had no jurisdiction to adjudicate an exception to the law in a case where a permanent resident convicted of sexual abuse charges in Oregon, filed for his wife to immigrate. Consequently, the Board would not review the standard of proof for the waiver that requires a showing that a petitioner poses "no risk" to the person they seek to bring to the U.S. *Matter of Aceijas-Quiroz*, 26 I&N Dec. 294 (BIA 2014). Clearly, those who believe the Act may affect them should consult with an immigration attorney before starting the immigrant visa application process.

While virtually all criminal convictions have potential consequences for the noncitizen defendant, sex crimes are a particular challenge given that they may involve several grounds of removal. Moreover, given their nature, they are not easily disposed of with non-sex crime pleas, especially the more serious offenses. It is always important to consult the RIAC when your noncitizen client faces criminal charges to ascertain the specific immigration implications of a plea and to, hopefully, reduce the impact on the client's status.

FYI

The Immigrant Defense Project (IDP) has a new resource for non-citizen clients who are or will be serving time in the Department of Corrections and Community Supervision (DOCCS). The "ICE Knows that You're In DOCCS. What Happens Next?" guide was created as a resource for non-citizens.

See here https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Knows-That-Youre-In-DOCCS.pdf

WNY Regional Immigration Assistance Center

A partnership between the Ontario County Public Defender's Office and the Legal Aid Bureau of Buffalo, Inc.

LEGAL AID BUREAU of Buffalo, Inc.

Ontario County NEW YORK

***"Brathwaite v. Garland"* (cont'd)**

New York… [Therefore] courts treat appeals taken by written notice of appeal and those taken by a granted § 460.30 motion as identical." The Circuit Court further recognized that meeting the requirement imposed by the Board of Immigration Appeals at the notice of appeal stage "creates significant practical problems. Most notably, the criminal appeals process in New York proceeds at a different pace than federal removal proceedings. It can take considerable time for appellate counsel to be appointed for an indigent defendant. And even when appellate counsel is appointed, counsel's ability to identify substantive defects turns on another frequently delayed process: the production of the criminal court record, which can take anywhere from two months to two years." Ultimately, the Second Circuit held that the Board's decision amounted to "an unreasonable and arbitrary interpretation" of the law.

We are funded by the New York State Office of Indigent Legal Services (ILS) to assist mandated representatives in their representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. There is no fee for our service.

Please consider also contacting us if you need assistance interviewing your client to determine their immigration status or communicating immigration consequences; or if you would like us to intercede with the DA or the judge to explain immigration consequences. We speak Spanish and French.