

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 15 / December 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.

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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.

SAVE THE DATE:

January 28th, 2022 at 12:30PM

A FREE TWO-HOUR CLE

with ethics credit, hosted by the WNYRIAC and the Erie County Assigned Counsel Panel

“The Consequences to Noncitizens of Criminal Pleas and Family Court Dispositions”

HELPFUL CASE LAW

A June 2021 case may be helpful to noncitizens who face temporary orders of protection, since a *finding* (NOTE: not necessarily a conviction) that an OP has been violated is a deportable offense. In *Crawford v. Ally*, 197 A.D. 27 (1st Dept. 2021), the court found that “[I]n order to issue a temporary OP, and thereby deprive a defendant of significant liberty and property interests, there must be an articulated reasonable basis for its issuance. While consideration of whether the defendant poses a ‘danger of intimidation or injury’ to the complainant (see *People v. Forman*, 145 Misc 2d

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WNY Regional Immigration Assistance Center

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



IDENTIFYING AND REPRESENTING HUMAN TRAFFICKING SURVIVORS

By Abbey Brown, Legal Assistant, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.*

Human trafficking is a form of modern-day slavery in which individuals, including both U.S. citizens and noncitizens, are threatened or coerced into forced labor. Trafficked persons may enter the criminal justice system not as complainants, but as defendants in a criminal case. On October 14th, 2021, the WNYRIAC and the New York State Defender's Association (NYSDA) hosted a virtual CLE in which speakers discussed how to identify and represent human trafficking survivors. The program's distinguished presenters highlighted many significant factors to take into consideration while representing these defendants.

Amy Fleischauer, Director of Survivor Support Services at the International Institute of Buffalo (IIB), focused largely on how attorneys can understand the impact of trauma on survivors of human trafficking and utilize a trauma-informed lens to understand what survivors go through. This approach sets a solid foundation that will allow attorneys to effectively accommodate clients who have been traumatized by human trafficking and other adverse life experiences. Trauma can stem from a variety of sources, including: physical, sexual, or emotional abuse or neglect; threats of harm; witnessing violence; grief, loss, or abandonment by a loved one; natural or manmade disasters; interpersonal, generational, or domestic violence; and/or being subject to coercive control.

Alicia Tabliago, the Resource Coordinator for the Buffalo Human Trafficking Intervention Hub Court (Buffalo HTC), discussed her court and explored how to avoid re-traumatizing human trafficking survivors. The Buffalo HTC is one of two Human Trafficking Intervention Courts (HTICs) located in the 7th and 8th judicial districts, and the Buffalo HTC's

Survivors are most commonly charged with prostitution, gang-related offenses, financial crimes, theft, benefits fraud, drug-related offenses, loitering, and promoting prison contraband. Criminal offenses committed by human trafficking victims are potentially forced labor.

mission is to prevent further victimization of defendants who are engaged in commercial sex work as a result of force, duress, or coercion. This program directly helps survivors and at-risk individuals create and develop sustainable, healthy behaviors, and a new life path through the combined efforts of many different services. For example, a large percentage of clients who are referred to this court have a substance use disorder and/or mental health diagnoses, so the centralized nature of the court allows survivors to be quickly connected to the appropriate re-

sources, such as substance use and mental health providers, rape crisis centers, specialized NGOs, DV advocates, disability funds, and more. Tabliago emphasized that the Buffalo HTC is a nontraditional treatment court that aims to avoid sanctions and/or jail time for its clients and takes a trauma-informed, short-term approach so that clients are not re-victimized or re-traumatized. Furthermore, defendants have the ability to participate in the HTC without an admission of guilt, which is of particular importance to noncitizen clients who generally face immigration consequences resulting from the entry of any initial guilty plea.

Both Fleischauer and Tabliago discussed the telltale signs that defendants may have been trafficked. Most survivors are reluctant to disclose experiences of abuse or to identify traffickers for fear of retribution, and noncitizens also fear deportation, making identifying survivors of trafficking a difficult task. Fleischauer said that defense counsel may notice: the defendant's lack of personal safety, isolation, homelessness, poverty, migration or relocation, substance use, mental illness, learning or developmental disabilities, childhood sexual abuse, and lack of social support. Tabliago added that victims of trafficking are unlikely to self-identify as such. Moreover, Fleischauer explained that survivors may feel fear, powerlessness, anger, or pain, which may, in turn, lead to acts that may be deemed "unlawful" or behaviors that may be viewed as "uncooperative" through the eyes of attorneys.

Andrea Sevene, Rochester Human Trafficking Intervention Court (Rochester HTC) Coordinator, echoed the overarching dialogue around trauma-informed practice and centralized services in her presentation. The Rochester HTC provides survivors with intensive case management, peer support specialists, immediate connections to behavioral health services, assistance with housing, and much more. Sevene stressed the importance of being connected with the appropriate individualized, trauma-oriented resources, and noted that the HTICs cultivate safe environments for survivors by listening to them and validating their experiences, building trust, explaining available support, and *giving clients a choice*. This approach allows survivors to reclaim the agency they lost to traffickers or to other traumatic experiences.

CASE LAW CONT'D

The Rochester HTC is a “post-plea” court, which is critical for defense counsel to bear in mind, because a conviction under immigration law attaches upon the initial plea of guilty and imposition of some restraint on liberty. INA § 101(a)(48)(A). Only in rare circumstances does the initial plea cease to be the conviction under immigration law for the purposes of determining immigration consequences. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Therefore, any criminal immigration consequences of the plea should be fully explored *before* any plea is entered to participate in this court.

Mary Armistead, Staff Attorney at the Legal Aid Project in Albany, explained the federal definition of “severe form of trafficking in persons” pursuant to 22 U.S.C § 7102(9), which is broken down into elements consisting of “ends,” “means,” and “process.” “Ends” involve: labor/services, involuntary servitude, debt bondage, slavery, or a commercial sex acts. The “means” element may be satisfied by proof of force, fraud, or coercion. Coercion is broadly defined to include a threat of serious harm (be it physical, psychological, financial or reputational), physical restraint against a person, or any “scheme, plan or pattern” intended to cause a person to believe that a failure to act would result in physical restraint or serious harm, including reputational harm or the abuse or threatened abuse of the legal process. Finally, the “process” element includes: inducing, recruiting, harboring, moving, obtaining, or providing. Where a minor is obtained for a commercial sex act, the “means” need not be established.

Understanding these elements also helps to debunk myths and assumptions about human trafficking. One common assumption is that human trafficking is often thought of as only violent crimes or sex crimes, which is not always the case. Human trafficking can also be labor trafficking and “nonviolent.” Traffickers use psychological means to coerce their victims, like tricking, defrauding, manipulating or threatening (Read more on trafficking myths [here](#)). Armistead also stressed the importance of the survivor’s background. The specific means through which someone is trafficked may be particular to their individual circumstances. Traffickers often know exactly what means to use to force their victims into compliance, such as knowledge about their victim’s past, family, and culture.

The aforementioned federal definition of human trafficking is also the basis for certain humanitarian protection under immigration law. Armistead highlighted a type of protection directly aimed at assisting noncitizen survivors of human trafficking called “T” nonimmigrant status, among other types of humanitarian protections. The “T visa” provides up to four years of temporary status to qualifying immigrant victims, allows certain derivative family members to gain status, and provides work authorization incident to its grant. “T visa” applicants must be victims of a “severe form of trafficking in persons” and be physically present “on account of” such trafficking. INA § 101(a)(15) (T). Applicants must comply with any reasonable request for assistance in an investigation or prosecution of such trafficking, unless they are 18 years old or younger or unable to cooperate due to physical or mental trauma. *Id.* Finally, these applicants must prove they

115, 125 [Crim Ct. New York Co. 1989]) is one factor, there are other factors that should be considered as well. The Criminal Procedure Law enumerates a non-exhaustive list of factors that a court ‘shall consider’ when determining whether to order the defendant in a family offense case ‘to stay away from the home, school, business or place of employment of the family or household member or of any designated witness’ (CPL § 530.12[1][a]).” Therefore, the judge was compelled to hold an evidentiary hearing concerning the appropriateness and scope of a temporary OP.

In a troubling decision from the Second Department, *People v. Arellano Venegas*, __A.D.__ (2d Dept., Oct. 27, 2021), the court held that a noncitizen defendant’s contention that the court failed to advise her to the consequences of a plea was without merit, despite the lack of specificity in the warning. The court reasoned that, “[h]ere, the record demonstrates that the County Court fulfilled its obligation under *People v. Peque* by advising the defendant that the ‘plea of guilty will subject you to deportation,’ and that ‘neither your attorney, nor I, nor anyone else can guarantee that you will not be deported’ as result of the plea of guilty (see *People v. Peque*, 22 N.Y.3d 168, 197 [2013]; *People v. Alexander*, 159 A.D.3d 1019, 1019 [2nd Dep’t 2018]).”

In *People v. Artwell*, 2021 NY Slip Op 21294 (App. Term. 2nd Dep’t) the court denied a noncitizen’s *Peque* claim. Because the defendant signed an appellate risk acknowledgment provided to her by her attorney and was made aware of the existence of a detainer, the court “found it unlikely that discussions regarding possible immigration consequences [...] had not taken place between defendant and her attorney prior to her guilty plea.” It therefore ruled that the defendant had not established a “reasonable probability” that she would have rejected the plea had the court warned of the possibility of deportation, as due process compels pursuant to *People v. Peque*, 22 N.Y.3d 168 (2013).

would suffer “extreme hardship involving unusual and severe harm upon removal.” *Id.*

“T visa” applicants are subject to the same rules of inadmissibility as all other noncitizens. However, there are generous waivers to inadmissibility available to “T visa” applicants for inadmissibility grounds. Under INA § 212(d)(3), “T visa” applicants may waive grounds of inadmissibility based on national interest. Perhaps most useful for survivors who are also criminal defendants, grounds of inadmissibility may be waived that are “caused by or incident to the trafficking.” INA § 212(d)(13). Defense counsel should also speak to a RIAC attorney before contacting law enforcement or the district attorney about trafficking cases, because immigration considerations may be negotiated as part of any resolution.

The final presenter, Leigh Latimer, Supervising Attorney with the Legal Aid Society in New York City, provided statistics on survivors of human trafficking arrests and criminal convictions. She revealed that 90.8% of survivors report being arrested or convicted of a crime, and 41.6% are arrested as minors. 40% of survivors have been arrested nine times or more, and over 50% of survivors believed that their arrests/convictions were directly related to their trafficking experience. Survivors are most commonly charged with prostitution, gang-related offenses, financial crimes, theft, benefits fraud, drug-related offenses, loitering, and promoting prison contraband. Criminal offenses committed by human trafficking victims are potentially forced labor.

Latimer also presented on vacatur, pursuant to CPL § 440.10(1)(i), as a vehicle for record relief, which is granted for certain prostitution-related convictions that result from trafficking, as defined under federal New York Law. For many survivors, vacatur is analogous to exoneration and is liberating, resulting in clean background checks, alleviating the fear of being discovered, eliminating stigma, and demonstrating to survivors that they are believed. For noncitizens, vacating a conviction can sometimes mitigate harm. However, it remains unclear under immigration law whether a vacatur under § 440.10(1)(i) is rehabilitative vs. substantively or procedurally defective. Unfortunately, rehabilitative vacatures leave the original conviction intact for immigration purposes, with any attending immigration consequences. See *Pickering, supra*. Therefore, where vacatur is sought, an attorney should focus their argument in favor of the vacatur on the defect in the underlying conviction and request that the judge sign such an order with the phrase “on the merits.” Additionally, where vacatur is possible based on another substantive or procedural defect, defense counsel should explore that ground as post-conviction relief.

Criminal defense is an important opportunity to screen for survivors of human trafficking. Be familiar with the red flags that indicate human trafficking, use a trauma-informed approach to representation, and refer the individual to the appropriate resources. Noncitizen clients, although not representative of all human trafficking victims, are often particularly vulnerable. Those who represent noncitizens should carefully screen their clients’ immigration statuses, criminal charges, and be on the lookout for possible victimization, working closely with RIAC advisors. Not only is this crucial for your clients’ safety, but it could reveal that your client is eligible for certain immigration benefits or relief.

A special thank you to presenters Amy Fleischauer, LMSW, Alicia Tabliago, MPH, Andrea Sevene, Psy. M., Mary Armistead, Esq., and Leigh Latimer, Esq.

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NEW MEMO FROM THE DEPARTMENT OF HOMELAND SECURITY

In an October 27th memo, the Department of Homeland Security set forth guidelines for exercising restraint in its enforcement operations in what it deemed “protected areas.” These include, among others: all levels of schools and places where children gather; centers of worship; funerals or cemeteries; locations where an emergency response is required; or a hospital or health care center. The memo states that the “fundamental question is whether our enforcement action would restrain people from accessing the protected area to receive essential services or engage in essential activities. It further states that “the foundational principle of this guidance is that, to the fullest extent possible, we should not take an enforcement action in or near a protected area.” The phrase “to the fullest extent possible” recognizes that there might be “limited circumstances under which an enforcement action needs to be taken in or near a protected area.” The “limited circumstances” are set forth in the memo. Please remember that in New York, Immigration and Customs Enforcement is prohibited from arresting noncitizens in or near courthouses as well, as discussed in our June 2021 newsletter.

See the memo [here](#)