WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

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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
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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 1.5 professional practice credits and .5 ethics credit, hosted by the WNYRIAC and the Erie County Assigned Counsel Panel

"The Consequences of Criminal Convictions and Family Law Findings on Noncitizens"

Email vkubiak@assigned.org to register

This CLE will introduce both the family law and criminal defense practitioner to their ethical obligations to advise their noncitizen clients of the implications on their immigration status of criminal pleas and adverse Family Court findings. We will also cover the various types of immigration status one may encounter, review the grounds of deportation from and inadmissibility to the US, and what it means to lack "good moral character," or face an adverse discretionary finding, due to unlawful activity when seeking immigration benefits.

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

STEERING CLEAR OF IMMIGRATION CONSEQUENCES: ADVISALS AT THE INTERSECTION OF VTL AND IMMIGRATION LAW

By Brian Whitney, Staff Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

Many vehicle and traffic law convictions have no direct immigration consequences. However, noncitizen clients can be deported or denied citizenship, relief from removal, immigration benefits, and reentry into the U.S. for breaking some rules of the road. Proceed with caution.

Convictions related to driving under the influence, in particular, carry a variety of potential consequences. For example, noncitizen clients should avoid VTL § 1192(2-a)(b), the Leandra's Law subdivision, which is deportable as a "crime against a child." In addition, a conviction for driving while ability impaired by drugs is potentially a controlled substance offense and could implicate a number of drug-related criminal immigration grounds. Defense counsel should plead to offenses which do not feature drugs as an element whenever possible and keep in mind that *marijuana remains a federally controlled substance*.

"Non-Leandra's Law" DWI or DWAI offenses are not "crimes involving moral turpitude" (CMTs), a type of immigration offense which can lead to inadmissibility, deportability, and mandatory detention, among other consequences. *See Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). However, the Board of Immigration Appeals ruled last year that a VTL § 511(3)(a)(i) conviction, driving under the influence of alcohol or drugs while knowing or having reason to know that the license is suspended due to a prior offense for drinking and driving, *is* a CMT. *Matter of Vucetic*, 28 I. & N. Dec. 276 (BIA 2021).

DWI and DWAI convictions, while not generally grounds of removal, can frustrate a noncitizen's eligibility for removal relief or immigration benefits. For example, naturalization and non-LPR cancellation of removal, a type of relief from removal in immigration court, both require "good moral character." *See Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019). Two or more DWI or DWAI convictions raise a presumption that noncitizens lack this requirement during statutory "lookback" periods, timeframes during which bad acts are under particular scrutiny (although not the only periods when such acts may be considered). Of particular concern to clients seeking humanitarian protection, regulations from the Trump administration, although currently stayed, make two DWI convictions or a single DWI conviction resulting in the harm of another person criminal bars to asylum.

"[T]he Board of Immigration Appeals ruled last year that a VTL § 511(3)(a)(i) conviction, driving under the influence of alcohol or drugs while knowing or having reason to know that the license is suspended due to a prior offense for drinking and driving, is a CMT. *Matter of Vucetic*, 28 I. & N. Dec. 276 (BIA 2021); *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999)."

Clients only present on a temporary visa should be advised that any *arrest* for a § 1192 offense allows consular officers to prudentially revoke a visa on the basis of a potential INA § 212(a)(1)(A) ineligibility for health-related inadmissibility grounds. This means these temporary visa holders cannot return to the U.S. after international travel without attending a new visa interview, producing the certified record of the proceeding, and undergoing a medical examination to show no alcohol/drug inadmissibility (unless, perhaps, the certificate of disposition shows dismissal or a finding of not guilty).

DWI and DWAI offenses are not the only VTL offenses which trigger immigration consequences. In fact, other VTL convictions may even be "crimes involving moral turpitude." For example, leaving the scene of an incident without reporting, § 600(2)(a) (personal injury), and leaving the scene of an incident involving death or serious physical injury, § 600(2)(c)(i) & (ii), could be CMTs. The likelihood that these offenses constitute a CMT increases if the conviction establishes that the defendant knew of the injury or the defendant left scene, rather than failing to give required information. Reckless driving, § 1212, might also have some CMT exposure.

Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA), two forms of temporary relief from deportation, have "significant misdemeanor" and "non-significant misdemeanor" bars to eligibility. A "significant misdemeanor" (including DWI/DWAI convictions) or three "non-significant misdemeanors" can render noncitizens ineligible for an initial grant or a periodic renewal of such status. (For more info on TPS, see July's newsletter). Although minor traffic offenses such as driving without a license are not considered "non-significant misdemeanors," an applicant's criminal history can be considered under totality of the circumstances as the basis for a discretionary denial.

Which drives at a final consideration: many immigration benefits and relief applications involve the exercise of discretion. Of course, § 1192 offenses can be considered in matters of discretion. However, even minor infractions and bad acts can potentially lead to a denial, depending on the circumstances of the case. Does your client have a pattern of suspensions, missed court appearances, and unpaid fines? Has your client made or can they make any efforts to cure these?

VTL offenses may be perceived to be minor relative to those in other areas of criminal defense, but their impact on noncitizen clients can be profound. Whenever you represent a client born outside the U.S., regardless of the charge, contact your *Padilla* advisors at the RIAC.

The author would like to thank RIAC Region 2's Sharon Ames, Esq. and Tina Hartwell, Esq., whose excellent newsletters covering VTL and DWI offenses were consulted in the writing of this article.

NEW CASE LAW

People v. Jones, ___AD3d___ (2d Dep't 2021)

PEQUE | REMITTAL

"The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st and 2nd degree assault. The Second Department held the appeal in abeyance. Due process required that a plea court apprise a defendant that, if he/she was not an American citizen, deportation might flow from a plea of guilty to a felony. *People v Peque*, 22 NY3d 168 [2013]. A defendant was ordinarily required to preserve the contention that, because of a *Peque* violation, the plea was invalid. However, preservation was not required where, as here, a defendant had no practical ability to object to an error that was clear on the record. While the court noted possible 'negative immigration consequences,' deportation was not mentioned, and the court's admonition was confusing. Thus, the defendant was entitled to a chance to move to vacate his plea. He would have to show a reasonable probability that, had the court properly advised him, he would not have pleaded guilty. Appellate Advocates (Paris DeYoung, of counsel) represented the appellant."

Find People v. Jones here

NEW PRACTICE ADVISORY

A new practice advisory provides criminal defense practitioners with an explanation of the new enforcement policies and what they can do to use DHS's guidance in defending their clients. It highlights the criminal defense implications and strategies for representing immigrant clients facing criminal charges.

Find it here: The Practice Advisory for Criminal Defense Attorneys