WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter | Issue 12 / September 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.

FYI

⇒ The Immigrant Defense Project (IDP), the RIAC for NYC, has a very good alert for clients who are permanent residents with criminal convictions who seek to naturalize. They must understand that if they do not consult a lawyer before naturalizing, they may face removal instead of becoming a U.S. citizen. Please distribute the hand-out to these clients. It is also available in Spanish.

- *Alert in English*
- *Alert in Spanish*

⇒ In his last week in office, Governor Cuomo pardoned five immigrant New Yorkers who faced deportation because of past criminal convictions. For more information on efforts to obtain pardons for noncitizens convicted of deportable offenses, *see here* and read about pardons at the IDP website *here*.

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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.

MY CLIENT DIDN'T COMPLETE THE OFFENSE:

INCHOATE CRIMES --- IS AN "ATTEMPT" IS A SAFE PLEA?

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

The simple answer is no, as a rule an "attempt" is not a safe plea for a noncitizen. While certain inchoate crimes, such as attempts pursuant to PL § 110.00, may be attractive to the criminal defense attorney because they lower the offense level of the conviction, these are not beneficial for immigration purposes, despite common belief. Indeed, under immigration law, most inchoate crimes have the same immigration consequences as the object crime and, as such, may trigger removal proceedings for the noncitizen defendant. *Bronsztejn v. INS*, 526 F.2d 1290 (2d Cir. 1972).

In some instances, there exists specific language in the Immigration and Nationality Act (INA) that references inchoate crimes as affecting admissibility or deportability. These include *attempt* to commit a controlled substances offense or aggravated felony, or to commit a crime of moral turpitude; *attempt* to possess or distribute a firearm; *conspiracy* to commit a controlled substances offense, or to commit a crime of moral turpitude; and *conspiracy* to possess or distribute a firearm. Likewise, an attempt to commit an aggravated felony is an aggravated felony. However, even in the absence of such specific provisions, the Board of Immigration Appeals (BIA) has made it clear that most inchoate offenses have the same consequences as the object crime, as has the Court of Appeals for the Second Circuit. "[A] defendant is guilty not of generic conspiracy, but of conspiracy to murder; not of generic attempt, but of attempt to kidnap; not of generic solicitation, but of solicitation to sell drugs." *Mizrahi v. Gonzales*, 492 F. 3d 15, 161 (2d Cir. 2007); *see also Matter of Al Sabsabi,* 28 I&N Dec. 269 (BIA 2021); *Matter of Nemis*, 28 I&N Dec. 250 (BIA 2021); *Matter of Vo*, 25 I&N Dec. 426 (BIA 2011). This may also include a conspiracy offense where the object crime constitutes an immigration aggravated felony, such as one involving fraud or deceit when the loss to the complainant is greater than $10,000. *Matter of S-I-K-,* 24 I&N Dec. 324 (BIA 2007).

While certain inchoate crimes, such as attempts, may be attractive to the criminal defense attorney because they lower the offense level of the conviction, these are not beneficial for immigration purposes. Under immigration law, most inchoate crimes have the same immigration consequences as the object crime and, as such, may trigger removal proceedings for the noncitizen defendant.

In *Mizrahi v. Gonzales*, *supra*, Mr. Mizrahi was indicted together with fifteen other persons for conspiring to possess and distribute drugs. He pled guilty to misdemeanor criminal solicitation in the fourth degree pursuant to PL § 100.05(1). Mizrahi then traveled abroad briefly, and upon his return was deemed inadmissible to the U.S. on account of his conviction. The federal Circuit Court recognized that "a notable feature of the inchoate offenses is that the proscribed physical conduct-- the solicitation, the attempt, or the concerted endeavor— is never criminal in the abstract. Rather, criminality arises only when the inchoate conduct has the violation of some other law as its specifically intended objective… A second object statute is necessary to supply the critical *mens rea* element that makes inchoate conduct criminal." *Id.* at 161. It then reasoned that "the crime of conviction in this case, Mizrahi's solicitation of a drug sale, is defined under New York law by two statutes: N.Y. Penal Law § 100.05(1) and § 220.31. A defendant cannot be convicted of criminal solicitation at any degree level in New York merely upon proof that he importuned another person to engage in general wrongdoing… [And] an inchoate offense cannot be isolated from the object statute that defines the crime's specific intent." *Id.* at 162 (citing *Bronsztejn v. INS*, *supra* at 1292 (attempt crimes are tied to their criminal objectives and not classified as general offenses).

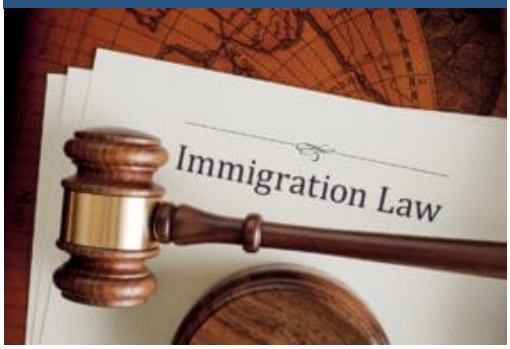
There are very few exceptions to the aforementioned general rule and they may be confusing. A potentially safe inchoate plea for a noncitizen is one to an "attempted reckless" conduct given the Court's finding in *Gill v. INS*,

420 F.3d 82 (2d Cir 2005) that such an offense is a legal impossibility. Despite this, New York courts may accept this plea. *See People v. Barker*, 221 A.D.2d 1018, (1995)(Though it is a nonexistent crime and a jury verdict convicting a defendant of such crime would be invalid, the negotiated plea was knowingly, intelligently and voluntarily made, and therefore, the court properly accepted the plea); and *People v. Guishard*, 15 A.D.3d 731; 789 N.Y.S.2d 332 (2005)("Although the crime of attempted assault in the first degree is a legal impossibility, a defendant may plead guilty to a nonexistent crime in satisfaction of an indictment charging a crime for which a greater penalty may be imposed").

In addition, both the Second Circuit and the BIA have held that the object crime is not relevant to analyzing a New York facilitation offense. In *U.S. v. Liranzo*, 944 F.2d 73 (2d 1991), the Circuit Court found that criminal facilitation, pursuant to PL § 115.00, involves conduct "in which the actor aids the commission of a crime with knowledge that he is doing so but without any specific intent to participate therein or to benefit therefrom." Unlike the crime of "aiding and abetting," criminal facilitation does not involve the intent to commit a narcotics offense, and therefore, should not serve as a controlled substances offense. *Id.* at 79; *see also Matter of Bautista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

⇒ On August 3, 2021, the Department of Homeland Security published the guidelines on Temporary Protected Status for Haitians, which has been extended through February 3, 2023. Information can be found *here*.

⇒ On August 5, President Biden announced Deferred Enforced Departure for certain residents of Hong Kong: *See here*. For more information on both forms of country-specific protection, see our July newsletter.



In the case of hindering, or "accessory after the fact" as it is also referred to, the BIA has found that, when applied to a controlled substances offense, hindering will not be deemed a drug offense if "it does not involve any planning and involvement in the principal drug-trafficking crime." *Matter of Bautista-Hernandez*, *supra* at 961. The Board reasoned that the act criminalized by the accessory after the fact statute under consideration, 18 U.S.C. § 3, "must, by its nature, take place subsequent to the completion of the underlying felony." *Id*. at 958. It further observed, "Courts have held that '(t)he gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime . . . The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal.'" *Id*. (citing *United States v. Barlow*, 470 F.2d 1245, 1252-53 [D.C. Cir. 1972]). On the other hand, in *Matter of Rivens,* 25 I&N Dec. 623 (BIA 2011), the Board held that a noncitizen convicted for accessory after the fact *had* been convicted of a crime involving moral turpitude because the object crime, making materially false statements, was a crime involving moral turpitude.

New York has no separate offense for aiding and abetting or accessory before the fact. Here, the person who intentionally aids another is charged the same as the principal under PL § 20.00. Under immigration law, unfortunately, this means that the noncitizen may be charged as removable for the whole scheme, even if their participation was limited to just one act. Therefore, such pleas should also be avoided for the noncitizen defendant.

Sorting through the statute and case law to determine which inchoate offense may not have an immigration consequence is a burdensome task for the criminal defense practitioner. Consequently, the rule should be that all such offenses have the same repercussion as the object crime, unless the RIAC advises you differently.

*The author wishes to acknowledge the Immigrant Defense Project's training material on this subject matter as it has been referred to in writing this article.