WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 14 / November 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.

Important New Case Law

In *People v. Terrero*, 2021 NY Slip Op 05733 (App. Div. 2nd Dept.), the Second Department unfortunately upheld the lower court's decision to deny a vacatur motion to a noncitizen defendant who alleged that he had not been advised by defense counsel of the grounds of *inadmissibility* that would apply to him if he pled guilty to criminal possession of a controlled substance in the third degree. The court found that the record revealed that defense counsel had informed the defendant that pleading guilty would result in his deportation, in accord with *Padilla v. Kentucky*, but held that counsel was not obligated to advise the noncitizen of the grounds of inadmissibility. Curiously, the court further reasoned that inadmissibility is not a direct or deportation consequence of pleading guilty. This was an important case in which the six Regional Immigration Assistance Centers of New York submitted an amicus in support of the noncitizen defendant, though the court did not grant us leave to submit the brief. We are obviously disappointed with the outcome.

NEW CASE LAW CONT'D ON PAGES 3 & 4

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.

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WHEN ARE THERE IMMIGRATION CONSEQUENCES TO A CRIME WITHOUT A CONVICTION?

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

Admitting certain criminal acts might lead to inadmissibility, or have other consequences under immigration law, regardless of whether or not there is a prosecution of or conviction for the offense. A few grounds of *inadmissibility* which may be discovered during an inquiry at a border port-of-entry when a noncitizen attempts to lawfully enter the U.S., fall into this category. They include admitting to the commission of a crime involving moral turpitude (CMT) and admitting to a controlled substances offense, both pursuant to Immigration and Nationality Act (INA) § 212(a)(2)(A). The specific language for these two types of charges provides that a noncitizen "who admits having committed, or who admits committing acts which constitute the essential elements of" a CMT or a controlled substances offense is inadmissible. An admission to money laundering or to certain prostitution offenses falls into this category pursuant to INA § 212(a)(2)(D) and (I).

In addition, if a consular official or other adjudications officer, a Border Patrol agent, or a border inspection officer, no comma knows or has "reason to believe" that a noncitizen is involved in controlled substances *trafficking,* then the noncitizen is inadmissible to the U.S. INA § 212(a)(2)(C). However, this knowledge must be contemporaneous to the noncitizen's application for admission. *Matter of Casillas-Topete*, 25 I&N Dec. 317, 321 (BIA 2010). Similarly, noncitizens may be deemed inadmissible if there is "reason to believe" they are a "drug abuser." INA Section 212(a)(1)(A)(iv).

WHAT CONSTITUTES AN ADMISSION TO A CRIMINAL OFFENSE?

Despite these concerns, there are limitations on what constitutes an admission by a noncitizen that would result in inadmissibility. The Board of Immigration Appeals (BIA) has set forth the following requirements: 1) the conduct admitted to must be a crime under the laws of the jurisdiction where it occurred; 2) the noncitizen must admit to facts which include each "essential element" of the offense in the jurisdiction where the crime occurred; 3) in order for an admission to be valid, the noncitizen must be provided with an understandable definition and the essential elements of the offense; and 4) the admission must be voluntary and unequivocal. *See Matter of K*, 7 I & N Dec. 594 (BIA 1957); *Matter of J*, 2 I & N Dec. 285 (BIA 1945); *See also* U.S. Department of State, 9 FAM 40.21(a) Note 5.1 (09-24-2009).

The relevant case law is very dated, but still precedential, and requires that the criteria for extracting an admission be carefully followed in such a way that it does not usurp one's right against self-incrimination under the Fifth Amendment, while recognizing that noncitizens always have the burden of proving their admissibility. *Matter of K, supra* at 597. However, an adverse inference may be drawn if the noncitizen remains silent. *Matter of Guevara,* 20 I&N Dec. 238 (BIA 1990). The following actions should be taken by an immigration officer to legally justify that an admission has been made:

> "If a consular official, immigration adjudications officer, Border Patrol agent, or border inspection officer, knows or has 'reason to believe' that a noncitizen is involved in controlled substances trafficking, then the noncitizen is inadmissible to the U.S. Similarly, noncitizens may be deemed inadmissible if there is 'reason to believe' they are a 'drug abuser.'"

(1) The entire Q&A should be recorded for the purpose of creating a verbatim transcript for the record.
(2) The noncitizen should be under oath.
(3) The purposes of the interrogation should be clearly explained (i.e., to obtain an admission of committing the crime for inadmissibility purposes, or confession for criminal purposes) to ensure that the statements are voluntarily and freely made.
(4) The noncitizen should be given an adequate definition of the crime, including all essential elements, in terms that the noncitizen can understand, before the questioning begins.
(5) The noncitizen should be asked to admit each of the facts necessary to establish the essential elements of the crime.
(6) The admission of those facts must be is explicit, unequivocal, and unqualified.
(7) Ensure that (where an admission is taken independent of any other evidence), the admission is developed to the point where "there is no reasonable doubt that the alien committed the crime in question." FAM Note 5.11 to 22 CFR § 40.21 (a).*

*These procedural guidelines were excerpted from nortontooby.com/node/17172

THE RISK IN IMMIGRATION COURT

In my years of practice in removal defense, I never encountered a client who was charged as removable for simply admitting to a criminal offense. Perhaps more common and problematic is that an admission to a CMT or a controlled substances offense may arise during a removal proceeding before an immigration court and pretermit the noncitizen's eligibility for relief from deportation. An admission to such offenses may now potentially render a permanent resident (LPR) in removal proceedings ineligible for the generous waiver that is available to them (*See* WNYRIAC newsletter, January 2021). For example, in *Barton v. Barr*, 140 S.Ct 1442 (2020), the U.S. Supreme Court held that an admission to such a crime, in addition to a conviction for one, may stop the accrual of the seven years of continuous physical presence required to be statutorily eligible for this waiver against removal.

In a striking example of how this might play out, the Ninth Circuit Court of Appeals considered a matter in which an LPR was in removal proceedings on account of three convictions for CMTs. *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018). Although the noncitizen was not convicted of any of these CMTs within the first seven years of his admission to the U.S., he admitted on cross-examination to using cocaine during those first years. (The underlying facts surrounding a conviction, as well as any "bad acts," are always the subject of examination in cases for relief from deportation for crimes). The U.S. Supreme Court's *Barton* decision would abrogate a favorable ruling in this case, and would result in ineligibility for the waiver. In addition, such an admission, if not statutorily fatal, could be used to justify an unfavorable discretionary finding, another requirement in matters involving most immigration benefits.

It is also noteworthy that in *Urzua v. Gonzales*, 487 F.3d 742 (9th Cir. 2007), the Court clarified that an immigration judge need not comply with the requirements of *Matter of K* when it obtains admissions from a noncitizen after the pleading stage because the noncitizen is often questioned in the presence of his counsel. Thus, the Court implied that there are already enough safeguards in place.

ADMITTING TO DRUG USE

There are also cases where noncitizens seeking admission at the border, or applying for a visa at a U.S. consulate abroad or at a local immigration office, have been deemed inadmissible as "drug abusers," or inadmissible for having admitted to a controlled substances offense, due not only to their unfortunate statements, but also because of the findings made by the authorized physician responsible for affirming that an applicant for permanent residency is not inadmissible on public health grounds. While routine drug testing in such cases is not the norm, there is an instruction on the medical exam form which directs the physician to "evaluate the applicant's history, behavior and physical appearance when determining if drug screening should be performed." (*See* p. 3, form I-693, Report of Medical Exam and Vaccination Requirement).

In *Pazcoguin v. Radcliff*, 292 F.3d 1209 (9th Cir. 2002), the overseas immigrant visa applicant admitted to smoking marijuana over a three-year period to the psychiatrist conducting the required medical examination to determine wheth-

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More New Case Law

In *Chery v. Garland*, Nos. 18-1036, 18-1835(L) (2d Cir. 2021), the Second Circuit held that the defendants' *Alford* pleas to a Connecticut drug offense constituted controlled substance offenses and aggravated felony drug trafficking crimes, which barred one defendant from humanitarian protection and rendered the other deportable. This should serve as an important reminder to defense counsel that *Alford* pleas are convictions under immigration law.

In *People v. Soodoo*, 2021 NY Slip Op 21269 (N.Y. App. Term), the Second Department reversed and dismissed Nassau County District Court orders denying two motions to vacate convictions of unlawful possession of marijuana pursuant to CPL 440.10(1)(k), which creates a rebuttable presumption that defendant's guilty plea to a former marijuana-related offense was not entered knowingly, intelligently, and voluntarily. The Court reasoned that "[i]t is clear from the plain language […] that the legislature wanted to ensure that defendants facing immigration consequences could seek further vacatur of their convictions under a state statute that may be recognized for immigration purposes," observing that the defendant "meticulously" detailed and documented the impending deportation consequences resulting from each of his marijuana-related convictions.

In *People v. Arana*, 2021 NY Slip Op 50951 (N.Y. App. Term), the defendant sought a sentence reduction to 179 days on a second degree menacing conviction, arguing that the sentence rendered him ineligible for relief from certain immigration consequences. However, because the sentence was fully served the Second Department declined to reduce it, notwithstanding "potential immigration consequences."

er he had a "personality disorder" which could bar his admission to the U.S. The doctor included the statement in a report that was reviewed by the U.S. consular official adjudicating the visa application and the applicant was found inadmissible as a drug abuser based upon the statement. The Court also found that the admission had been obtained in compliance with the legal requirements.

MARIJUANA: STATE LAW VS. FEDERAL LAW

Despite the seemingly strict criteria that must be followed by an immigration officer to elicit a legally viable admission to a controlled substances offense, noncitizens should be equally wary of a "drug abuser" finding at a border port-of-entry. Marijuana remains a federally controlled substance, and noncitizens should be particularly careful about speaking openly about their marijuana use, even when its use is prescribed by a doctor. The Immigrant Defense Project, the New York City RIAC, created a helpful community FAQ to help noncitizens understand the implications of marijuana use under immigration law, now that it's use is legal in the State. *See here*. The warnings include being careful about admitting the use of marijuana (or any drug) on social media because Customs and Border Protection agents are known to google an applicant in secondary inspection at the border to ascertain relevant facts about them. As such, statements or photos about marijuana related activity should not be made public. Additionally, it is not advisable to speak about marijuana use with immigration agents without first consulting an attorney. A noncitizen should also avoid carrying a medical marijuana card regularly, especially when crossing international borders. Even applying for such a card may pose a problem for the noncitizen.

Worryingly, immigration lawyers from states where marijuana use is now lawful report that applicants for permanent residence are being questioned by adjudicators from Citizenship and Immigration Services, the benefits branch of the Department of Homeland Security, about any recreational marijuana use. There is also a question on the application for permanent residence that simply asks whether an applicant has ever *violated* (or attempted to violate) any controlled substances law.

The case of the musician Neil Young, as reported by the *New York Times* in 2019, is another example of how marijuana use affects immigration benefits. Young, a Canadian citizen, readily admitted to past marijuana and other drug use, and a related arrest, in his memoirs. Consequently, he was concerned that he would be deemed to lack the requisite "good moral character" when he sought to naturalize. *See here*.

For the aforementioned reasons, criminal defense and family court counsel should be certain that no admissions are made on the record to criminal activity that is not the subject of a plea that has been approved by a RIAC. Moreover, unless they are acting on the advice of counsel, our clients should also be urged, while being honest in responding to questions, not to speak freely about criminal activity with immigration authorities in general.

U.S. Supreme Court Grants Cert in Important Immigration Case

In *Abdulla v. Garland,* Summary Dispositions 20-1492 (October 18, 2021), the U.S. Supreme Court granted certiorari in a case involving a man with a claim to U.S. citizenship who was deported to Yemen. The case was remanded to the Third Circuit Court of Appeals after a brief supporting certiorari was filed by the Acting Solicitor General for the United States. The complex issue is one we regularly see at the WNYRIAC: Whether the Yemen-born lawful permanent resident, Abdulmalik Abdulla, automatically derived citizenship when his father naturalized while he was under 18 years of age, pursuant to former 8 U.S.C. § 1432(a), given that the father naturalized before, rather than after, allegedly separating from Abdulla's mother. Abdulla had been placed into deportation proceedings after two federal fraud convictions**.** Thus**,** the issue of whether he was a citizen was a critical one. The Third Circuit had found that there was no derivation. In his brief, the Acting Solicitor General argued that it was appropriate to allow the Third Circuit to determine whether Board of Immigration Appeals precedent on the issue warrants deference in this case.

NEW ICE ENFORCEMENT PRIORITIES

The Government has issued a new enforcement priorities memo which can be found *here*. Second to noncitizens who pose national security threats, those who pose a threat to public safety are a removal priority. The relevant language from the memo is:

"A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal. Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances. There can be aggravating factors that militate in favor of enforcement action.

Such factors can include, for example:

- the gravity of the offense of conviction and the sentence imposed;
- the nature and degree of harm caused by the criminal offense;
- the sophistication of the criminal offense;
- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record."