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.

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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.

Addendum to the WNYRIAC 2020 Newsletter on Domestic Violence

Crimes of domestic violence (DV), covered in our November 2020 newsletter, are serious immigration offenses which involve a conviction for a "crime of violence" committed against an individual in a qualifying domestic relationship with the defendant. Many New York offenses are potentially DV crimes, and just one DV conviction is a deportable offense. However, a Supreme Court decision last year narrowed the range of crimes that are DV offenses (or "crime of violence" aggravated felonies) under immigration law.

In *Borden v. United States*, 593 US ___ (2021), the Court ruled that a reckless *mens rea* does not meet the definition of a "crime of violence" under the Armed Career Criminal Act (ACCA), which enhances penalties for criminals convicted of certain firearms offenses based on prior convictions. ACCA's "crime of violence" definition at 18 U.S.C. § 924(e)(2)(B)(i) is virtually identical to immigration law's under 18 U.S.C. § 16(a), diverging only in the latter's extension to force against property. Previously, SCOTUS held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), following the same reasoning, that negligent offenses were not "crimes of violence" under immigration law because that mental state does not satisfy the "critical aspect" of the definition: the "use…of physical force *against*" the person or property of another. *Id*. at 3 (emphasis added).

Borden's holding that "reckless" convictions do not satisfy ACCA's "crime of

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Drinking and Driving Offenses Lead to Visa Revocations

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

Those of you who have reached out to us for advice on the consequences of a DWI or DWAI-alcohol on a noncitizen's immigration status often represent lawful permanent residents (LPRs or "green card" holders). Consequently, we inform you that a guilty plea to one of these charges is not a removable offense so long as the charge does not involve a "Leandra's Law" violation, a controlled substance related DWAI, or a VTL § 511 charge related to a previous DWI conviction. We then warn you about the requirement that an applicant for naturalization requires "good moral character" should the green card holder seek to become a citizen in the following five years, and the impact such a conviction could have. (See newsletters of January 2022 on the consequences of VTL convictions and March 2021 on naturalization and "good moral character.")

However, if your client is not a permanent resident, but is here on a visa, there can be serious consequences to arrests for DWI and DWAI, which can derail the person's life.*

"[A] foreign national who is in the United States on a temporary, or "non-immigrant," visa, for example, will be subject to a visa revocation simply if they are *charged* with an offense involving alcohol consumption and driving. A person convicted of driving while under the influence of drugs is potentially deportable for a controlled substances offense."

As an example, a foreign national who is in the United States on a temporary, or "non-immigrant", visa is subject to a visa revocation simply if they are *charged* with an offense involving alcohol consumption and driving. The U.S. Department of State may prudentially revoke a visa when it receives information that a visa holder has been arrested for any crime that may result in visa ineligibility. On this basis, other arrests, such as those involving domestic violence, have also been known to be problematic. Foreign nationals might be here on student visas earning degrees, as tech and medical professionals working in fields where there are few American employees available, or receiving training in their field of study.

Regulations generally require notification of visa revocations whenever practicable. Just because visa holders with DWI/DWAI arrests or convictions do not receive notice does not mean revocations would not go into effect upon departure from the U.S. or during travel abroad. The letter (or email) that a non-immigrant visa holder might receive when arrested for a DWI or DWAI offense contains the following intimidating language from the U.S. Government:

"Dear _____,

This letter serves as official notification by the United States Consulate in _____ that your visa has been revoked pursuant to section 221(i) of the Immigration and Nationality Act, based on information that became available after the visa was issued. Your visa is no longer valid for application for entry into the United States. If you are currently in the United States, the revocation will take effect upon your departure.

Name of visa holder: _____

Date and place of birth: _____
Visa classification (symbol): _____
Date/place of visa issuance: _____

The intent of this letter is to inform you of this revocation, and to instruct you to surrender the visa for physical cancellation at the next practicable opportunity after departing the United States. You must not attempt to travel on the presumption that the visa is still valid. For physical cancellation in [country of citizenship], please mail your passport to the following address:

Consulate General of the United States of America
Consular Section – Visa Branch/FPU
[Address]

Further, if you choose to reapply for a visa, you may contact us through the Visa Information Service at: _____ to arrange an appointment for an interview.

Thank you for your attention to this matter.

Sincerely,
[Name]
Deputy Consular Chief"

Were your client to receive such a letter, the best advice would be to seek an immigration attorney with experience handling such cases. Non-profit agencies, who generally represent people for free, are unlikely to handle these matters, so the client will have to turn to the private bar, or if they are students, their university may have a well-versed international student office which can advise them.

When a visa has been revoked, and the client departs the United States, they will not be readmitted with the revoked visa because the visa is essentially the travel document which allows one to enter the U.S. lawfully. They will need to return to their native country and apply for a new visa, and during the processing of a new visa application, they are likely to be referred to

Addendum Cont'd

violence" definition means that neither do they satisfy the virtually identical immigration law requirement. In practical terms, "reckless" New York offenses such as third degree assault, sub 2, or second degree assault, sub 4, should no longer be deemed domestic violence offenses or "crime of violence" aggravated felonies under immigration law. However, *Borden* does not preclude mental states between recklessness and knowledge, and therefore "reckless" New York offenses which require "depraved indifference to human life" are likely not covered by the ruling. These include: first degree assault, sub 1; first degree reckless endangerment; and murder in the second degree, sub 2. Moreover, "reckless" offenses may still trigger immigration consequences and frustrate your clients' immigration goals on other bases.

NEW CASE LAW

In *People v. Amantelcatl*, __Misc. 3d__ (App. Term, 2d Dep't, 11th & 13th Dists. 2022), the court extended potential relief for a violation of *Peque*, requiring general judicial warnings of possible deportability under due process, to a violation-level offense. This is notable because *Peque* left unresolved whether such warnings apply outside felony-level offenses. Since the defendant had not demonstrated "a reasonable probability that with a warning he would have rejected the plea," the court held his appeal in abeyance and remitted the matter to afford the defendant an opportunity to move to vacate and meet that showing. The defendant had pleaded to disorderly conduct, which does not trigger criminal grounds of deportability or inadmissibility but in certain situations may have other immigration consequences.

In *People v. Ghedini*, __Misc. 3d__ (Sup. Ct. Suffolk Cnty. 2022), the defendant successfully reargued the decision granting his motion, pursuant to CPL 440.46-a, to vacate a 1982 conviction for criminal possession of marijuana in the

NEW CASE LAW CONT'D ON PAGE 4

a consular "Panel Physician" for a medical examination, so that the consular officer can determine whether they are inadmissible from entering the United States pursuant to a health-related ground such as substance abuse, and whether they present a danger to themselves or others, as specified in Immigration and Nationality Act § 212(a)(1).

Once the client leaves this country, it is difficult to estimate the length of time that they will be outside of the United States. They must apply for a new visa, attend a visa interview, schedule an appointment with a panel physician, if required, complete the medical exam, receive the completed exam from the physician, submit the medical to the Consulate/Embassy for review, and then the Consulate/Embassy will need to review the medical and adjudicate the visa accordingly. The amount of time each of those steps will take will depend on the processing times of the panel physician and the Consulate/Embassy in their native country at that time. Additionally, if the visa applicant is found to have a substance abuse problem, it is possible that they may be required to stay in the home country for a year or more to seek appropriate treatment in order to be considered for another visa.

*Also note that as set forth in out January 2022 newsletter article, 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.

WNY Regional Immigration Assistance Center

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

NEW CASE LAW CONT'D

second degree, NYPL § 221.25, and substitute it with criminal possession of cannabis in the third degree, NYPL § 222.30. Both the prior and substituted marijuana conviction are "controlled substance offenses" under immigration law, which rendered the defendant deportable and prevented him from naturalizing. The court vacated the conviction and dismissed the accusatory instrument in the interest of justice.

In *People v. Baez-Arias*, ___N.Y.S.3d___ (3d Dep't 2022), the court affirmed the denial of a CPL § 440.10 motion to vacate a conviction based on ineffective assistance of counsel. The defendant alleged his trial counsel informed him that he was unable to advise about the immigration consequences of his guilty plea and he should consult with an immigration attorney. However, the record reflected the defendant was aware a guilty plea to grand larceny in the fourth degree included the "potential that he be deported," because the defendant informed the court he wished to plead guilty if he could be assured of not receiving a certain sentence, "not want[ing] to risk getting deported." Additionally, when the court inquired whether he had conferred with counsel about and understood that as a noncitizen he "may well be deported as a consequences of his guilty plea," the defendant answered affirmatively.

OTHER NEWS

DHS Secretary Alejandro Mayorkas announced that the U.S. will extend Temporary Protected Status (TPS) to Ukrainians and Afghans. TPS is a country-specific, temporary form of relief with *stringent* criminal bars. Requirements include being in the U.S. since no later than March 1, 2022 for Ukraine and March 15, 2022 for Afghanistan. For more information on TPS, see our July 2021 newsletter.

LEGAL AID BUREAU of Buffalo, Inc.

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