

# WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 10 / July 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.

### FREE CLE via Zoom

The Erie County Assigned Counsel Program and the WNYRIAC present:

#### "Understanding Immigration Status"

July 22, 2021, 9:30 AM to 10:30 AM

Featuring:

Sophie Feal, Supervising Attorney, WNYRIAC

This one-hour CLE is intended to introduce criminal defense and family law attorneys to the most common immigration statuses that they may encounter when representing noncitizens, and the corresponding documentation, in order to better understand the consequences of their clients' encounter with the legal system, and to receive the most accurate legal consultations from the WNY Regional Immigration Assistance Center.

If you are interested in attending, please e-mail [rwalkwith@assigned.org](mailto:rwalkwith@assigned.org) to register no later than 9:00 AM Wednesday, July 21.

1.0 of non-transitional CLE credit in the category of Areas of Professional Practice will be earned for this program. This program is appropriate for both newly admitted and experienced attorneys.

Those who register will receive instructions on joining the webinar. No subscription is needed, and it is a simple process to join.



### WNY Regional Immigration Assistance Center

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



## TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE

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

Defense counsel should always ask every client “where were you born?” This threshold question is the vital first step toward protecting the constitutional rights of your noncitizen clients. It is also helpful to screen for individuals who may have or who may be eligible for temporary protected status (“TPS”). TPS is a lawful status which affords a period of protection from removal for certain noncitizens who are nationals of or habitually resided in (if stateless) certain countries which are designated by the Secretary of the Department of Homeland Security (“DHS”). INA § 244. It additionally affords noncitizens the ability to apply for employment authorization. INA § 244(a)(2). According to a recent report on TPS holders nationwide, New York is historically one of four states in which the majority of TPS beneficiaries reside.\* The status provides significant protection to New Yorkers who may be otherwise unable to remain safely within the United States.

DHS designates countries based on the following conditions: ongoing armed conflicts (such as civil wars), environmental disasters (such as earthquakes or hurricanes), epidemics; or other extraordinary and temporary conditions. INA § 244(b)(1). Currently, the following countries are either designated or have had their designation extended by DHS: Burma, El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Syria, Venezuela, and Yemen. Each designation/extension has specific cut-offs and filing requirements published in the Federal Register. INA § 244(b). This information is also available on the United States Citizenship and Immigration Services (“CIS”) website: <https://www.uscis.gov/humanitarian/temporary-protected-status>. In addition to meeting these registration and re-registration requirements, TPS beneficiaries must maintain continuous physical presence and residence in the United States and be “admissible,” with narrow exceptions of certain grounds of inadmissibility for humanitarian purposes, family unity, or public interest. INA §§ 244(c)(1)(A) & 244(c)(2); INA §212(a).

TPS country designations are temporary and do not afford a path to permanent residence and citizenship. However, neither does a grant of TPS prevent TPS-holders from applying for any immigration benefit or protection for which they may be eligible. Designations can be made for periods of up to eighteen months, with extension or termination decisions made by DHS sixty days prior to a designation’s expiration. INA § 244(b)(2). In practice, however, many noncitizens live in the U.S. under protections which can be re-designated or extended for years or even decades. For example, Somalia was first designated in 1991, due to the Somali Civil War, a designation which is currently extended through Sept. 17, 2021.

Interactions with the criminal justice system can have serious consequences for noncitizens who are otherwise eligible for or who have received a grant of TPS status, including ineligibility for the benefit and withdrawal of TPS protection and placement in removal proceedings. INA § 244(c)(2)(B) states that noncitizens are ineligible for TPS if they have been convicted of any felony or two or more misdemeanors. Individuals are also ineligible for TPS if they are found inadmissible on criminal, drug, and security-related grounds. INA § 244(c)(2)(A). Finally, noncitizens subject to the mandatory bars to asylum are also ineligible. INA § 244(a)(2)(B). These bars include, *inter alia*, “particularly serious crimes” within the United States, as well as serious nonpolitical crimes *outside* the U.S. INA §208(b)(2)(A).

TPS may be withdrawn if noncitizens are not eligible at the time status was granted or they become ineligible at any point thereafter. INA § 244(c)(3). If withdrawal of TPS is based on a ground of removability, the decision will include a charging document noting such ground(s) and the noncitizen will have a chance at a *de novo* determination of eligibility in removal proceedings. 8 C.F.R. §§ 244.10, 244.14.

Deferred Enforced Departure (“DED”) is a related country-specific immigration benefit. Unlike TPS, it is authorized under the president’s foreign relations power. Eligibility for each designation is set by the president, and some individuals who are ineligible for TPS may still be eligible for DED based on narrower restrictions for criminal offenses. Currently, Liberia and Venezuela are designated countries. Information on these designations is also available on CIS’s website: <https://www.uscis.gov/humanitarian/deferred-enforced-departure>.

When representing a noncitizen, New York defense counsel should work with their local RIAC to identify TPS-eligible noncitizens, and determine which clients already have temporary protected status by providing the advisor with their clients’ place of birth and nationality. Once these individuals are identified, the RIAC will help defenders to advise and to negotiate with an eye towards complying with the status’s requirements.

\*Lora Adams, *Pulling Back the Curtain: Analysis of New Government Data on Temporary Protected Status*, Catholic Legal Immigration Network, Inc. (Mar. 31, 2021), <https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/pulling>.

### **FYI**

- ◆ The National Immigration Project has issued a community advisory based on the Government’s recent prosecutorial discretion guidelines. The advisory sets forth the criteria that will be used by attorneys for Department of Homeland Security to determine when to arrest, detain, prosecute and remove noncitizens. You may share this advisory with your clients. See *here*, [https://nipnlq.org/PDFs/practitioners/practice\\_advisories/gen/2021\\_09June\\_OPLA-memo.pdf](https://nipnlq.org/PDFs/practitioners/practice_advisories/gen/2021_09June_OPLA-memo.pdf)
- ◆ Stanford Law School has created information on the Institutional Hearing Program (IHP), a system of immigration courts nationwide which schedule removal proceedings while noncitizens are still serving prison sentences. There is one such IHP at the Ulster Correctional Facility in New York. Prisoner Legal Services of New York represents most of these noncitizens. While the information contained in these documents about California may not be helpful to us, there is enough general information here to share with clients. Imprisoned noncitizens, in particular, lack information to basic immigration law. See *here*, [IHP Criminal Defender Companion Guide](#), [IHP Client Handout \(English\)](#), [IHP Client Handout \(Spanish\)](#)

### **New Cases**

⇒ On June 10, 2021, the Supreme Court issued a decision in *Borden v. United States*, 593 U.S. \_\_\_\_ (2021). While this is a federal sentencing enhancement case, it has immigration implications. The decision held that crimes with a *mens rea* of recklessness are excluded under the force clause of the Armed Career and Criminal Act (ACCA). The ACCA’s force clause is nearly identical to the force clause contained at 18 USC §16(a), which defines “crimes of violence” and “domestic violence crimes” under immigration law. Thus, an offense committed with a reckless state of mind will not be a deportable crime of violence aggravated felony nor a crime of domestic violence. However, reckless crimes may still be deemed crimes of moral turpitude, especially when there is serious bodily injury, a vulnerable victim, or a deadly weapon involved.

Available [here](#)

⇒ In *People v. Bernard*, 2021 NY Slip Op 03601 (2d. Dept. 2021), the Second Department reversed an order denying a CPL 440.10 motion and ordered a hearing on whether the defendant was denied effective assistance of counsel for counsel’s failure to advise of immigration consequences to a guilty plea. In addition to the defendant’s averments of failure to advise, there was no evidence in the transcript of such an advisal, and the defendant sufficiently alleged, based on his family ties in the U.S., that a decision to reject the plea offer and take a chance at an acquittal after trial would have been rational.

Available [here](#)