

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

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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.

SAVE THE DATE!

The WNYRIAC and NYSDA present a FREE virtual CLE

“Representing Youth in Family and Criminal Court Proceedings”
March 29, 2022, from 3-5PM

REGISTER WITH NYSDA [HERE](#)

This CLE is intended for defense attorneys who seek to understand the various criminal proceedings for youth charged with crimes and their collateral consequences, as well as the available civil proceedings to assist unaccompanied migrant children and youth to gain legal immigration status.

Guest Speakers:

Mary Armistead, Esq.
Staff Attorney at The Legal Project, Albany;
Adjunct Professor of Immigration Law,
Albany Law School

Lana Tupchik, Esq.
Managing Attorney at Tupchik Legal Group,
PLLC; Attorney for the Children, Criminal
and Family Law Panels, Erie County
Assigned Counsel Program



WNY Regional Immigration Assistance Center

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



The Consequences of Criminal Convictions and Family Law Findings on Noncitizens: A Summary of our CLE for Defense Counsel

By Abbey Brown, Legal Assistant, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

On January 28th, the WNYRIAC and the Erie County ACP co-hosted a virtual CLE covering the consequences noncitizen clients may face due to dispositions in criminal and Family Court. As our readers know, the WNYRIAC is funded by the New York State Office of Indigent Legal Services 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). *Padilla* holds the Sixth Amendment's right to effective counsel requires defense attorneys to provide individualized advice to noncitizen clients on the immigration consequences of pleas.

Brian Whitney, Staff Attorney at the WNYRIAC, began the CLE by discussing this constitutional right and related ethical obligations. Where noncitizens are concerned, the stakes of criminal and Family Court proceedings can encompass immigration consequences such as deportation, which the Supreme Court has noted "is a 'particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence'" *Sessions v. Dimaya*, 584 U.S. __ (2018), quoting *Jae Lee v. United States*, 582 U.S. __ (2017). Brian explained that defense counsel should always ask every client where they are born, regardless of appearance, name, or accent. This is the threshold screening tool to determine whether or not your client needs an immigration advisor. Furthermore, Brian pointed out that the critical time in the process for your noncitizen client is *prior* to them taking a plea, when it may still be determined whether a certain plea will or will not impact the individual's immigration status. Broadly speaking, attorneys who represent noncitizens in criminal and Family Court should meet their obligations by:

- ⇒ Determining the client's immigration status, background, and goals
- ⇒ Analyzing immigration consequences with an immigration attorney (the WNYRIAC!)
- ⇒ Eliminating or minimizing risk as much as possible
- ⇒ Providing accurate and complete advice to the client

Sophie Feal, Supervising Attorney at the WNYRIAC, began her portion of the CLE by discussing the main "players" in the immigration space and how your client may first be arrested. The Department of Homeland Security (DHS) is comprised of Immigration and Customs Enforcement (ICE), U.S. Citizenship and

"Court ordered participation in drug treatment *is* considered a restraint on liberty for immigration purposes, which constitutes a conviction if a plea of guilt has already been entered. *However*, this consequence may be avoided by having your client participate in pre-plea treatment, which is determined in a case-by-case manner."

Immigration Services (CIS) and Customs and Border Protection (CBP). CBP may encounter your client at the border or they may make a stop at a port of entry and make an arrest. In addition, your client may be encountered by local law enforcement at a traffic stop and then involve CBP or ICE. Arrest may also occur due to concerned citizens' reports, remediation of immigration status, or ICE can find the individual through prisons, jails, probation or parole. After arrest, your client may be taken into custody by ICE, who are responsible for the detention and deportation of noncitizens. ICE uses

"detainers" to pick up people from criminal custody, Sophie explained. Detainers are administrative documents which request law enforcement agencies to inform ICE when a person is to be released and to hold a person in custody up to

48 hours so that ICE can pick them up. However, ICE can no longer be in or near a courthouse in New York State to arrest noncitizens (Read more on the Protect Our Courts Act [here](#)).

Sophie then urged the audience to remember that “green cards” can be expired, but this does not mean that the client has lost their permanent residency status, just proof of it. Importantly, an expired “green card” means that the client cannot leave the U.S. and they may have trouble proving their eligibility to work legally. Since a background check must be completed before a new card is approved, it is unlikely that the card will be renewed while your client’s criminal charges are pending. *Renewing a “green card” will flag criminal charges because an FBI background check will be conducted in that process.* Ultimately, to lose permanent residency, an immigration judge must find your noncitizen client deportable. Ask clients with prior convictions if they have ever been in removal proceedings, what happened, and inform the WNYRIAC when seeking a consultation.

Other types of status your client could hold, aside from being a “green card” holder (lawful permanent resident), include: non-immigrant visa status (e.g., student, tourist, employment), refugee or asylee status, temporary status (e.g., TPS & DACA), and undocumented status (e.g., crossed border w/o inspection, overstayed visa, violated visa terms). Understand that these types of status are not forms of U.S. citizenship. Of course, your client would be a U.S. citizen if they show any of the following: a U.S. birth certificate – including birth in Puerto Rico, Guam and the U.S. Virgin Islands, U.S. passport, derivative citizenship, acquired citizenship at birth, and/or naturalization after obtaining lawful permanent residency (LPR or “green card” holder). An LPR may file for U.S. citizenship through naturalization if they meet certain legal requirements, including being a person of “good moral character” (GMC) for a prescribed statutory period prior to filing the N-400 application for naturalization (usually five years). A criminal conviction will most likely affect LPRs who are seeking naturalization. However, a criminal conviction is *not* necessary to lack GMC, so family lawyers should also seek WNYRIAC assistance. See [here](#) for a sample N-400 application.

Sophie then transitioned into a discussion about the definition of “conviction” and reminded the audience that a conviction for immigration purposes is a formal judgment of guilt entered by a court or, where an adjudication of guilt has been withheld, a judge or jury has found guilt, or

IMPORTANT UPDATES

On February 17, 2022, the Second Circuit held that a New York petit larceny conviction requires at least the intent to substantially erode the owner’s property rights and, therefore, the offense is categorically a “crime involving moral turpitude” involving “theft,” as defined by the Board of Immigration Appeals. The Circuit rejected the respondent’s argument that petit larceny’s “intent to appropriate” criminalized conduct outside this agency definition after the New York Court of Appeals declined to accept certification to resolve the issue. See *Ferreiras v. Garland*, No. 19-4111 (2d Cir. 2022).

In *People v. Acosta*, 2022 NY Slip Op 00737 (App. Div. 1st Dept.), the defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPCS. The First Department held the appeal in abeyance and remanded. The defendant was deprived of effective assistance when counsel failed to advise him that his guilty plea to a drug-related felony would result in mandatory deportation and merely stated that “this may and probably will affect his immigration status.” The defendant was to be afforded the opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty if alerted to the deportation consequences of his plea.

The US DOJ’s Executive Office for Immigration Review, which is responsible for the nation’s immigration courts, announced in February that the Fishkill Immigration Court will close following the State of New York’s decision to close the Downstate Correctional Facility in which the Court is located. The agency ceased holding hearings out of the physical space located within the facility effective Feb. 17, 2022. All pending cases for those in custody will be transferred to the Ulster Immigration Court located within the Ulster Correctional Facility in Napanoch, New York.

a plea of guilt or *nolo contendere* has been entered, or sufficient facts to warrant a finding of guilt have been admitted, *and* a judge has ordered some form of punishment, penalty, or restraint on liberty. Convictions may be vacated or expunged, but a vacated conviction may still have immigration consequences, and dismissal or expungement under a rehabilitative statute will constitute a conviction. This includes marijuana expungements. Court ordered participation in drug treatment *is* considered a restraint on liberty for immigration purposes, which constitutes a conviction if a plea of guilt has already been entered. For more on marijuana, see our [November 2021 newsletter](#). *However*, this consequence may be avoided by having your client participate in pre-plea treatment, which is determined in a case-by-case manner. See *People v. Gavrilov*, 178 A.D.3d 727 (2d Dept. 2019). It is also important to know that a conviction is not always required to render a noncitizen deportable. This is true in the case of the violation of an order of protection. A mere finding by a court, even a Family Court, that such an order has been violated makes it a deportable offense.

The WNYRIAC also advises family law practitioners. While we are concerned that criminal convictions can be grounds of deportability, we are also concerned that Family Court findings can constitute a lack of GMC as set forth above. In addition, most forms of immigration benefits allow an adjudicator to determine whether the applicant merits the benefit as a matter of discretion. Applicants also have the burden of proving both statutory eligibility and discretionary merit for relief in immigration court, and are required to provide relevant records. Understand that any underlying facts of a “bad act” may be the subject of questioning, and any arrest may lead to an adverse exercise of discretion. Finally, here are some general tips for family law practitioners:

- ⇒ Never discuss immigration status on the record. In removal proceedings, the government has the burden of proving alienage and could use the record of the previous proceeding to establish it.
- ⇒ Be careful about testimony with admissions to criminal acts. Not all criminal acts require convictions to be grounds of deportability or inadmissibility.
- ⇒ Negotiate settlements such that allegations which might be criminal acts are avoided. Keep disposition orders short. If your client will seek LPR status, other than as a refugee, the “likelihood of becoming a public charge” will make them ineligible for such status, so it is important to be careful about public benefits as a solution to poverty issues.
- ⇒ If your client is undocumented and has no right to work in the U.S., be careful about working as a solution to poverty issues or child support.
- ⇒ Clients should not use false documents or false social security numbers.
- ⇒ Orders that permanently sever the parent-child relationship could have an impact on immigration benefits if one is counting on the other for a benefit.

Our goal at the WNYRIAC is to fashion pleas for defense counsel and their noncitizen client that will avoid removal from the United States altogether, preserve admissibility, and maintain eligibility for immigration benefits or relief from removal. Whenever you represent a noncitizen client, no matter the charges, please contact the WNYRIAC for guidance.

CONGRATULATIONS!

The WNYRIAC wishes to congratulate our colleague, and great immigrant advocate, Ben Nelson at the Monroe County Public Defender’s Office, for his victory before the Second Circuit Court of Appeals on February 9, 2022. He convinced the court that the administrative decision below, denying his client relief from removal, was “permeated” with legal and procedural errors. For those interested in the decision, [click here](#).