

# WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 33 / August 2023

## 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.

<b>Sophie Feal</b> 290 Main Street Buffalo, NY 14202 716.853.9555 ext. 269 sfeal@legalaidbuffalo.org	<b>Brittany Triggs</b> 290 Main Street Buffalo, NY 14202 716.853.9555 ext. 202 btriggs@legalaidbuffalo.org
--	--

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 IN-PERSON CLE

For Monroe County Mandated Representatives

Co-hosted by Monroe County Public Defender's Office & the WNYRIAC

*Immigration Issues in Criminal and Family Court Proceedings*

**Speaker:** Sophie Feal, Esq.,  
Managing Attorney, WNYRIAC

**Date & Time:** August 4th, 12PM-2PM

**Where:** The Ebenezer Watts Building

**CLE Credit:** .5 for Ethics and 1.5 for Professional Practice

To register, please email:

[KennedyFlanagan@monroecounty.gov](mailto:KennedyFlanagan@monroecounty.gov)



### WNY Regional Immigration Assistance Center

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

## What Is Happening at the Southern Border? A Snapshot of Current Asylum Processing

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

In May of 2023, the Biden Administration implemented a rule called Circumvention of Lawful Pathways, also known as the “Asylum Ban Rule,” when it ended the Trump Administration’s “Title 42” public health-related ban to entry. Under this new rule, a response to what has been deemed the “border surge,” those seeking asylum at the border of the U.S. fall into two tiers. One is for those who enter lawfully with a visa, humanitarian parole (which is how many Ukrainians, Afghans, Cubans and Venezuelans were recently admitted), or with an appointment with Customs and Border Protection (CBP). Upon entry they will have access to the asylum system described in our [July newsletter](#).

The second tier is comprised of those who do not enter lawfully. The result for them, with some exceptions for unaccompanied minors and others, is that they are presumed to be ineligible to file for asylum

“When a person is deemed ineligible for asylum, they must meet a higher standard of proving their fear of return which in turn only makes them eligible for limited protection in the U.S. There is no right to family reunification, or lawful permanent residence and U.S. citizenship.”

unless they can prove they applied for and were denied asylum in a third country through which they traveled to the U.S. This rule is quite different from the law and the procedures that were in place for decades before former President Trump first sought to limit migration at the southern border. U.S. law authorizes asylum seekers to come to the U.S. to make their claim. The very first sentence of 8 U.S.C. § 1158 (the U.S. asylum statute) says that any noncitizen “whether or not at a designated port of arrival” and irrespective of their immigration status may apply for asylum.

Advocates further believe President Biden’s policies are equally a violation of the internationally recognized right to seek refuge from persecution in another country.

When a person is deemed ineligible for asylum, they must meet a higher standard of proving their fear of return which in turn only makes them eligible for limited protection in the U.S. There is no right to family reunification, or lawful permanent residence and U.S. citizenship.

Among the problems raised with the system is that the app used to make an appointment with CBP for processing, called “CBP One,” (for more information, see <https://www.americanimmigrationcouncil.org/research/cbp-one-overview>) is only able to schedule 1000 appointments each day, and its use has caused much frustration due to technical glitches. According to one news source, “this leaves migrants with valid asylum claims languishing in Matamoros [Mexico] in squalid and dangerous conditions. In the encampment we visited, approximately 2,500 people sheltered in shabby tents without running water, cooking, or bathing facilities, awaiting entry to the U.S.” Moreover, the rule in general has decreased substantially the amount of people eligible to apply for asylum according to immigrant advocates. On the other hand, the Government

touts that unlawful entries along the southern border have decreased 70% from their record highs since the end of Title 42 on May 11<sup>th</sup>.

The rule is being legally challenged by both pro- and anti-immigration groups. Advocates argue that the regulations contradict the statutory right to seek asylum at the U.S. border. The Citizenship and Immigration Services asylum officer's union, an entity that represents federal government employees tasked with adjudicating asylum applications, has filed a persuasive amicus brief opposing the new rule, along with other entities, including a roundtable of former immigration judges. On July 25, the Northern District Court of California held that the rule is not in accord with statutory authority, is arbitrary and capricious, and that this complex rule's notice procedures did not comply with the Administrative Procedures Act. The Court then stayed the ruling for 14 days to give the Biden administration an opportunity to appeal.

In June, The American Immigration Council testified before a House Committee about its concerns for humanitarian protection and the need to allocate sufficient resources to address them, as well as to change immigration law to create a functional system for the reality of 21<sup>st</sup>-century migration.

Finally, as we pointed out in last month's article, criminal charges and convictions can render an asylum applicant ineligible for this relief, and/or the benefit of later obtaining permanent residency.



## Appellate Rights When Deported

While not new law, we would like to alert attorneys to a 2016 decision in which the Court of Appeals of New York issued a clarifying decision to determine when an intermediate appellate court can use its discretion to dismiss an appeal when the defendant is unavailable due to involuntary deportation. *People v. Harrison*, 27 N.Y. 3d 281 (2016). Previously, this Court held in *People v. Ventura*, that the Appellate Division abused its discretion in dismissing two pending direct appeals due to the involuntary deportations of defendants. 17 N.Y. 3d. 675, 934 (2011). In *Harrison*, the Court distinguishes between direct appeals and permissive appeals. The Court affirms that if there is a direct appeal, which is a fundamental right of a defendant, it cannot be dismissed by an intermediate court because the defendant has been involuntarily deported. However, should a defendant have a permissive appeal, such as an appeal of the order denying his motion pursuant to CPL 440.10 to vacate his judgment of conviction, for which there is no fundamental right, the intermediate courts may use their discretion to dismiss such cases where the defendant has been involuntarily deported.