WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 27 / February 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.

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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.

Welcoming Brittany Triggs, Esq., to the WNYRIAC

In January, Brittany M. Triggs, Esq. joined our RIAC team as a staff attorney at Legal Aid Bureau of Buffalo. She comes to us with three and a half years of immigration removal defense experience, two years in AmeriCorps serving immigrants, and having spent time living in the Dominican Republic, England, Honduras, and Spain. Brittany was recently named a member of the fourth co-hort of the Karen Lee Spaulding Oishei Fellowship for Leaders of Color. She is licensed in New York and the District of Columbia. She speaks Spanish.

Please do not hesitate to reach out to her for your questions regarding your non-citizen clients!

Welcome Brittany!

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GETTING OUT OF IMMIGRATION CUSTODY: HOW CONTACT WITH THE CRIMINAL SYSTEM AFFECTS BOND ELIGIBILITY IN IMMIGRATION COURT

By Brittany Triggs, Staff Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

Obtaining a bond (the equivalent of bail) in immigration proceedings is much different than in criminal proceedings, especially with NY's recent bail reform. Immigration and Nationality Act §236 ("INA") governs the apprehension and detention of noncitizens by immigration authorities. For those immigrants who are not subject to mandatory detention during their removal proceedings (which is a large number of people), an immigration judge ("IJ") may release a non-citizen who does not "pose a danger to the safety of the other persons or of property" and who "is likely to appear for any scheduled proceedings." An IJ may also issue a bond to mitigate any risk of flight.

When a non-citizen is first taken into Immigration and Customs Enforcement (ICE) custody, an officer makes the initial custody determination. At that time, a non-citizen may be released on their own recognizance, released under a bond, or detained. When the officer serves the Notice of Custody Determination to the non-citizen, the non-citizen has the option to request a custody redetermination before an immigration judge. Even if they did not request a custody redetermination, one may be requested through a motion to the immigration court.

The immigration court will then initiate bond proceedings, which are separate from removal proceedings and are not made on the record.

In the 2nd Circuit, it is the government's burden to show that the respondent (a non-citizen in removal proceedings) is a danger to the community, not a flight risk, nor a threat to national security. The government will present the respondent's arrest history, pre-sentencing investigation reports, pending criminal charges and actual convictions, and anything else to prove that the respondent is a risk of flight or a danger to the community. As the federal rules of evidence do not apply in removal proceedings, nearly all evidence is admissible.

If the IJ determines that the respondent is a danger, then they must deny bond. While respondent's counsel can submit mitigating evidence, it is very hard to overcome the finding that one is a danger to the community. Even if a criminal court makes a determination that a non-citizen is not a danger to the community, the immigration court can and will still find that they are. It is especially difficult to overcome a finding of danger when a non-citizen has a pending criminal proceeding, particularly if the immigration court has access to a pre-sentencing investigation report which an IJ will use to determine dangerousness. It may be easier to overcome a finding of danger if enough time has passed since a conviction and the non-citizen has few or no criminal contacts during that time.

Flight risk is easily mitigated by having letters of support from family, friends, and community organizations, proof of a fixed address, a long residence in the US, an employment history, no failure to appear findings or bench warrants in the past, as well as eligibility for relief from deportation and a clean criminal and immigration history. The IJ is supposed to consider the non-citizen's ability to pay, and the minimum bond amount cannot be lower than $1,500.

An IJ or ICE may also order alternatives to detention, in combination with or in lieu of a bond. Some alternatives include ankle monitoring and regular check-ins at ICE. Non-citizens who are not detained and thus are on the non-detained docket of the immigration court, not only have the gift of freedom but the benefit of time. More time allows them the opportunity to collect more evidence in support of their relief, or if the outcome will be removal, it allows them a chance to tie up the loose ends of their lives in the US as well as prepare for a life in their country of birth.

A non-citizen has the right to appeal a bond decision by an IJ. Unfortunately, the Board of Immigration Appeals ("BIA") moves slower than the immigration court and usually relief has been granted or the client is ordered removed from the US before the BIA can make a decision, rendering the appeal moot.

As mentioned earlier, there is a whole category of "criminal non-citizens" who are ineligible to request a bond as they are subject to mandatory detention under INA §236(c). These grounds include having crimes involving moral turpitude, aggravated felonies, drug crimes, and terrorist crimes. Which is yet another reason why getting an advisal on the immigration consequences of pleas is so important.

ICE Arrests & Deportations

In January, Immigration and Customs Enforcement published their Fiscal Year 2022 (FY22) report, which includes numbers on administrative arrests and deportations, among other statistics. The following are some of the most relevant findings:

- All arrests doubled from FY21 to FY22. Of the over 142,000 arrests, at least 1/3 had contact with the criminal legal system.
- Deportations also increased. Of the over 72,000 people deported in FY22 over 60% had a criminal history.
- The top three criminal charge categories of "at large" (meaning, not jail or law enforcement turnovers, or border contact) arrests were for: 1. Dangerous drugs 2. Immigration violations 3. Driving while intoxicated.
- Top offenses for which ICE detainers were issued: 1. Assaults (about 1/3) 2. Sex crimes (about 10%) 3. Robberies (about 3%).

See, https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf

SORA CASES

SORA cases may be more problematic for noncitizens. ICE has an on-going operation called "Operation Predator" where they comb the sex offender registries as a way to target immigrants they believe are removable for arrest, detention, deportation.

See, https://www.ice.gov/factsheets/predator