

# WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

MONTHLY NEWSLETTER

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## Everything You Need to Know for Your Noncitizen Clients

**If your noncitizen client is facing criminal charges or adverse findings in Family Court. Please contact the WNY Regional Immigration Assistance Center.**

We are funded by the New York State Office of Indigent Legal Services (ILS) to assist mandated representatives in the 7th and 8<sup>th</sup> Judicial Districts 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 contacting us, whether you are a criminal defense, appellate or family defense attorney, for any of the following services:

- To receive advisals on plea offers and other dispositions to reduce and alleviate the immigration consequences on a noncitizen's status
- To join you in communicating to your client the aforementioned advisal we have provided
- To assist you by providing language access to communicate with a client who does not speak English when your office does not have such capacity, or provide you with a list of referrals to interpretation/translation services
- To assist you in determining the status of a noncitizen who does not have documentation of that status available
- To communicate our advisal concerning your noncitizen client in writing or orally to opposing counsel or to a court
- To provide CLEs on the immigration consequences of crimes to your defender community
- To participate in case conferences with you and others in your office to discuss noncitizen cases in the criminal justice system
- To refer you to deportation defense services and counsel

## Legal Marijuana Poses Unforeseen Challenges for Noncitizens

In our trainings, we warn attorneys to let their noncitizen clients know that marijuana is still a federal controlled substance and involvement with marijuana can be serious for noncitizens. [This article strikingly illustrates that fact.](#) "As an immigrant, Maria Reimers tried to do everything by the book. She entered the U.S. legally, married an American citizen and secured a green card to work. Together, she and her husband managed to open a small storefront in Ephrata, a dot of a town in Washington state. But when Reimers tried to become a U.S. citizen in 2017, she was denied for lack of "good moral character." Federal immigration officials deemed her work "illicit drug trafficking," because the couple's business in Ephrata sells state-regulated cannabis. Though it is legal in Washington state, their retail shop has put Reimers' dream of citizenship in jeopardy. She gets to keep her green card, but her attorney recommended that she not visit her family in El Salvador because of the possibility that she'd be detained at the border when she returned."



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## **ALLEGATIONS IN FAMILY AND CRIMINAL COURT MAY RENDER AN ASYLUM APPLICANT INELIGIBLE FOR RELIEF**

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

We hear more and more about the migrants who have made their way from the Texas border to New York City and then to motels and other shelters in Upstate New York. These noncitizens bring unique legal issues that are unlike those of the permanent residents or others seeking “green cards,” and defense attorneys should be aware of the consequences of unlawful acts, arrests and convictions on their particular status.

Most of the migrants from the Southern border are applying for asylum in the United States, and are not yet legally refugees. Asylum seekers arrive and apply for such status here, whereas refugees are accorded the status abroad and are then lawfully admitted to the U.S., eligible for a work permit and to public benefits immediately. The method of entry to the country does not affect asylum eligibility. Some arrive with temporary visas and others by crossing the border without documents.

Asylum applicants may have their claims adjudicated in removal proceedings by an immigration court if they are apprehended by law enforcement, or by the United States Citizenship and Immigration Services (USCIS) if they are not in proceedings. A person has up to one year after the date of entry to apply for asylum or else they are generally ineligible to do so. To qualify, applicants must meet the Immigration and Nationality Act (INA) definition of refugee, which is

“Asylum eligibility, like other types of immigration benefits, is subject to discretion. This allows an adjudicator to determine whether the applicant merits the benefit as a matter of discretion, so applicants have the burden of proving both statutory and discretionary eligibility for relief. Any “bad act” may be the subject of questioning, such as allegations in a Family Court petition of abuse, neglect or abandonment of a child. And while a DWI-alcohol related conviction is not a deportable offense, it can lead to a negative exercise of discretion.”

“any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country *because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*” §101(a)(42)(A)(emphasis added).

The standard of proof can be difficult to meet, and does not include those who come to the U.S. solely because of war, for economic reasons, or seeking the “American dream.” Indeed, national data indicates that less than half of all asylum applications presented in Immigration Court are granted. The rates are a bit higher when a claim is adjudicated by USCIS.

An asylum applicant may apply for a work authorization once they have filed their application, though the permit will not be granted until 90 days have lapsed. This leaves them in a vulnerable

position without the right to work or access to most public benefits. If an immigration judge or a USCIS officer determines that an asylum applicant has met their burden of proof and is granted the relief, then they will be deemed an asylee with a pathway to lawful permanent residency and U.S. citizenship, like refugees. There is no limit to the number of people who can be granted asylum each year as there is with refugees.

There are, however, statutory criminal bars to asylum eligibility. An asylum seeker becomes ineligible if they have a conviction for what is called a “particularly serious crime.” A felony or misdemeanor offense that qualifies as an aggravated felony under immigration law is automatically considered a “particularly serious crime” (PSC). See INA § 208(b)(2)(B)(i).

The BIA and most federal circuit courts have held that an offense may be deemed a PSC even if it is not an aggravated felony. The determination is made on a case-by-case basis. The following may be considered by the adjudicator:

- ⇒ The elements of the offense;
- ⇒ All reliable information including but not limited to the record of conviction and sentencing information: (i) the nature of the conviction; (ii) the circumstances and underlying facts for the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community;
- ⇒ According to the Board of Immigration Appeals, adjudicators are not required to analyze the mitigating circumstances surrounding the offense, and, in fact, the BIA discouraged such considerations, explaining that “offender characteristics” are irrelevant because they “may operate to reduce a sentence but do not diminish the gravity of a crime.”

Here are some examples of how convictions are analyzed:

- ⇒ Offenses involving unlawful trafficking in a

## ICE's FY 2023 Report on Arrests, Detentions, and Deportations

In case you missed it, ICE has released its [Fiscal Year 2023 report](#), offering a comprehensive look into their activities from September 30, 2022. The numbers are staggering - with an increased budget of 8 billion dollars, ICE conducted 170,590 administrative arrests, marking a 19.5% rise from FY 2022. Notably, almost half of these arrests involved individuals with pending criminal charges or convictions, signaling a significant increase from the previous year. The report also highlights a 59% surge in detainers lodged and a substantial uptick in deportation numbers, including a staggering 97.5% increase from FY 2022. The last five pages provide a detailed list of people removed by country of citizenship, shedding light on deportation frequency to specific countries such as Cuba, Mali, and Vietnam. These statistics underscore the pressing issues surrounding ICE's operations and their impact on immigrant communities.

## The WNY Regional Immigration Assistance Center

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



controlled substance, regardless of the sentence imposed, are presumptively deemed to be PSCs. See 8 U.S.C. § 1231(b)(3)(B); *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); Attempted sale of a controlled substance per N.Y. Penal Law, § 220.39(1) is a PSC.

⇒ Without unusual circumstances, a single conviction for a misdemeanor offense is typically not a PSC. *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).

⇒ Offenses against a person: e.g. assault, kidnapping in the third degree, burglary in the first degree, manslaughter, attempted robbery in the third degree, first degree sexual abuse, and rape in the first degree have all been deemed PSCs.

⇒ Offenses against property are less likely PSCs, but burglary in the first degree and grand larceny in the fourth degree have been deemed so.

⇒ ID theft, bank and mail fraud may be PSCs as well.

⇒ Firearms offenses may be PSCs.

⇒ Criminal contempt in the first degree is a PSC.

In addition, asylum, like other types of immigration benefits, is subject to discretion. This allows an adjudicator to determine whether the applicant merits the benefit as a matter of discretion. Hence, applicants have the burden of proving both statutory and discretionary eligibility for relief and are required to provide the relevant records to establish a favorable exercise of discretion. The underlying facts of a “bad act” may be the subject of questioning, such as allegations in a Family Court petition of abuse, neglect or abandonment of a child. Arrests may also lead to an adverse exercise of discretion, even without a conviction. And while a DWI-alcohol conviction is not a deportable offense, it can lead to a negative exercise of discretion.

An asylee, like a refugee, is eligible to apply for permanent residence one year after their asylum grant. At that time, they will be subject to the grounds of admissibility under U.S. immigration law. Not all of these require convictions either.

It is important to contact the RIAC whenever you represent a non-citizen, and the more you know about their status in this country and what benefits they are seeking or may seek, the more clear our advice to you can be.

## IDP's Resources Amidst *Minter* Decision

Following the Second Circuit's September decision in *U.S. v. Minter*, benefiting many immigrants with New York narcotic drug convictions, IDP created a series of [community-facing resources](#) in English, Spanish, and Haitian Kreyol. In partnership with the Drug Policy Alliance, we have [PSA videos in English, Spanish, and Haitian Kreyol about the decision and who could benefit](#). Please share these videos widely with your networks. You can share them directly from our [webpage](#) or from our [social media](#).