WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

MONTHLY NEWSLETTER ISSUE 43 | JUNE 2024

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 8Th 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

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IMPORTANT UPDATE:

REVOCATION OF HUMANITARIAN PAROLE

The WNYRIAC has learned that migrants who are allowed to enter the U.S. on "humanitarian parole" have had that status revoked upon an arrest. It is similar to what happens with those admitted on student visas who are arrested. The visas may be revoked. The largest populations admitted on "humanitarian parole" have been Afghans and Ukrainians. Some who enter at the southern U.S. border have received this status as well. All migrants who have "humanitarian parole" should have documentation indicating so. Once they enter, they must file for asylum within one year. If you have a client with "humanitarian parole" it will be important to contact us for advice.

MANAGING THE CRIMINAL COURT RECORD

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

The immigration consequences of a criminal conviction can outweigh those of the criminal court proceeding. Defense counsel should have an understanding of how the record before the trial court can be used against a noncitizen in immigration court in order to manage that record carefully. In some cases, it may be advisable to keep a record vague, and in other cases to be deliberate and explicit. This will depend on the charges and the WNYRIAC will assist you in finding this balance.

Generally, when assessing whether a noncitizen is deportable on account of a criminal conviction, an immigration court examines the elements of the crime as defined by statute and relevant case law, and not the conduct of the defendant. According to immigration regulations, the following documents make up the record of conviction and are evidence of a conviction:

> (1) A record of judgment and conviction;
> (2) A record of plea, verdict and sentence;
> (3) A docket entry from court records that indicates the existence of a conviction;
> (4) Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction;
> (5) An abstract of a record of conviction prepared by the court in which the conviction was entered or by a state official associated with the state's repository of criminal justice records, that indicates the following: The charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence;
> (6) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
> *See*, 8 CFR §1003.41

Of course, there are exceptions. For example, an immigration court can review reliable evidence outside the record to establish a requisite relationship in a domestic violence matter. One DV conviction is sufficient to render a noncitizen deportable. Under immigration law, a domestic violence offense is defined as a crime of violence committed against a spouse, ex-spouse, child, current or former domestic partner, boyfriend, girlfriend, an individual with whom the person shares a child in common, or by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government. As such, do not concede, if possible, to a domestic relationship in the criminal matter if there is not one.

In a case involving fraud and deceit, the immigration court may examine restitution orders and plea agreements to determine whether the loss to the complaining witness was $10,000 or more. If so, then the noncitizen would be deemed convicted of an aggravated felony, which would render them deportable without virtually any relief. *Nijawan v Holder*, 129 S.Ct. 2294, 2304 (2009).

Until 2020, we urged defense attorneys to avoid any conviction related to a firearm since one such conviction would lead to the deportation of a noncitizen. However, in *Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020), the Second Circuit Court of Appeals held that because of a categorical mismatch between a broader, indivisible New York State offense and the corresponding federal offense, many firearm possession convictions can no longer lead to deportation. Since the mismatch is due to the differing definitions of an antique firearm, it is critical that a defendant simply plead to the possession of a generic firearm and never specify the type of gun. One the other hand, if a firearm was not the weapon possessed by the defendant, then this may have to be clarified on the record in the plea allocution in order to minimize immigration consequences.

In the past, controlled substance possession convictions almost always resulted in removal proceedings. Today, removal may not result from such convictions. Two recent decisions by the Second Circuit Court of Appeals found New York's narcotic drug definition to be overbroad as compared to the federal definition of controlled substance. *See U.S. v. Minter*, 80 F.4th 406 (2d Cir. 2023); *U.S. v. Gibson*, 60 F.4th 720 (2d Cir. 2023). Because the New York and Federal definitions do not match, defense counsel can carefully structure immigration safe controlled substance pleas after consulting with RIAC counsel.

When it comes to offenses involving the violation of a protective order in a domestic violence conviction, no conviction is required by law. A civil finding of such a violation may also sustain this ground of removal. In order for an immigration court to determine whether a noncitizen is removable for such a violation, the record of the state proceeding must allow for a

FREE IMMIGRANT DEFENSE PROJECT (IDP) CLE TRAINING:

CRIM-IMM 101

June 6, 2024 via Zoom

1:00pm – 2:30pm

Important Note:

This training is not organized by the WNYRIAC. Please click the link below to register or reach out directly to the organizers fore more information at training@immdefense.org

In 2010, the Supreme Court held that the 6th Amendment requires criminal defense attorneys to advise non-citizen clients about the immigration consequences that could arise from the decision to plead guilty or go to trial in Padilla v. Kentucky. This training will provide guidance for defense attorneys on gathering immigration information from clients to work with immigration counsel to understand the immigration consequences of convictions. It will also include updates on current ICE arrest and policing practices in New York City.

Click here to register for IDP's Training.

conclusion that the noncitizen was subject to a court protection order, which was issued for the purpose of preventing violent or threatening acts of domestic violence, and that a court has *found* that the noncitizen engaged in conduct that violated that portion of the order that involves protection against credible threats of violence, harassment, or bodily injury. *See Alvarez v. Garland*, 33 F.4th 626, 641 (2d Cir. 2022); 8 USC §1227(a)(2)€(iii). This may include violating the stay away portion of an OP. *See Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011).

In a very successful challenge of this provision by Prisoner's Legal Services of New York in a summary order, the Second Circuit held that a noncitizen who pled to PL §215.50, when the certificate of conviction did not specify which subsection he pled to, could not be found removable since there was no determination in the record that the Government had met its burden of proof. Essentially, it was unclear which crime the noncitizen had committed. *See Jules v. Garland*, No. 23-6217-AG, 2024 WL 1252410 (2d Cir. Mar. 25, 2024).

Equally important are the facts one never wants to place on the record. First, we never want a client's immigration status divulged on the record. Matters concerning a person's status in the U.S. should be discussed off the record if need be. Second, where violence is not an element of the offense charged, never admit to actual violence or a threat of violence causing injury, or intent to injure. A crime of violence conviction may elevate a conviction from a crime of moral turpitude to an aggravated felony under immigration law. The latter renders a noncitizen deportable with virtually no relief. This difference could be relevant when taking a plea to PL §135.20, kidnapping 2nd, as an example. The Second Circuit held in *U.S. v. Eldridge,*63 F.4th 962,965 (2d Cir. 2023) that a person could be convicted of this offense if they used deception. If so, it would not categorically be a crime of violence, which is beneficial for a noncitizen defendant.

Similarly, when taking a plea to an age neutral offense, do not admit that a complaining witness was underage. A crime against a child is its own category of deportable offense. Only one such conviction will lead a noncitizen to removal proceedings.