

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.

CLE SAVE THE DATE

FREE *IN-PERSON* CLE:

Immigration Issues in Criminal and Family Court Proceedings

Date & Time: June 16, 2023; 1PM-3PM

Where: Batavia; exact location TBD

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

To register, email:
abrown@legalaidbuffalo.org

This CLE will introduce both the family law and criminal defense practitioner to the consequences on immigration status of criminal pleas and adverse Family Court findings, and review attorneys' ethical obligations to advise their noncitizen clients of such consequences.

Appropriate for both newly admitted and experienced attorneys



WNY Regional Immigration Assistance Center

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

One Strike, You're Out: A Look at Certain Deportable Crimes Against Persons

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

While all contact with the criminal system is concerning for non-citizens, crimes involving and relating to domestic violence (DV) are especially unfavorable. Immigration and Nationality Act (INA) § 237 (a)(2)(E) states that crimes of domestic violence, stalking, violation of orders of protection, and crimes against children are deportable offenses. Just one conviction or simply a judicial “finding,” in the case of violation of orders of protection, will make a noncitizen deportable from the US. This includes lawful permanent residents and refugees. These crimes are often also considered crimes involving moral turpitude and could even be aggravated felonies, giving the Department of Homeland Security multiple grounds of deportability to charge against a noncitizen.

Crimes of domestic violence have two elements. First, it must be a crime of violence as defined at 18 USC §16(a). This is a crime that has an element the use, attempted use, or threatened use of physical force against the person or property of another. Second, it must be 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.” INA §237(a)(2)(E).

“A violation of an order of protection, whether temporary or permanent, is a deportable offense, no matter who the protected party is. However, the mere issuance of an order of protection is not a ground of removal...”

New York State defines intimate relationships under Social Services Law Section 459-A:

- people legally married or divorced
- people with a child in common, including adopted children
- people related by marriage, like in-laws
- people related by blood, like brothers, parents, cousins
- unrelated people who live, or have lived together for periods of time
- unrelated people in, or were in an intimate relationship (current or former), like same-sex couples and teens who are dating

In contrast, no special relationship is needed between the parties for deportable crimes of stalking, violations of orders of protection, and crimes against children.

The Board of Immigration Appeals has described stalking as having three elements: “(1) conduct that was engaged in on more than a single occasion, (2) which was directed at a specific individual, (3) with the intent to

cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death.” *Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 258 (BIA 2018). With this definition, even a harassment conviction under NYPL §240.26, which is a violation, could be considered a crime of stalking offense. As previously stated, just one conviction for a crime of stalking makes a noncitizen deportable from the US.

A violation of an order of protection, whether temporary or permanent, is a deportable offense, no matter who the protected party is. However, the mere issuance of an order of protection is not a ground of removal. Any noncitizen, “who, at anytime after admission, is enjoined under a protection order issued by a court and **whom the court determines** has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment or bodily injury to the” person(s) for which the order was issued is deportable. INA §237(a)(2)(E). As the statute reads, there **need not be a conviction** in order for this to be a deportable offense, just a judicial determination. As such, it is essential that noncitizens understand the consequences of violating an order of protection, as a “simple” violation can lead to deportation.

Crimes against children include child abuse, neglect, and abandonment. Generally, the Board of Immigration Appeals considers a crime of child abuse to be a maltreatment of a person under the age of 18 that impairs that person’s physical or mental well-being. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Some of the most common crimes against children in New York include endangering the welfare of a child, DWI offenses involving Leandra’s law, and sexual abuse.

Any noncitizen with an order of protection or charges that might fall into these grounds of deportability has a lot to lose. As such it is imperative that defense counsel contacts the RIAC to advise on these cases, for the client’s future and for compliance with counsel’s ethical obligation.

NEW CASE LAW

The BIA recently released a precedent decision in *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023), holding that the law of the federal circuit where venue in removal proceedings sits is controlling for the IJ and the Board of Immigration Appeals (“BIA”). With *Matter of Garcia*, the governing circuit law for removal proceedings will be the geographical location where jurisdiction vested with the filing of a charging document, unless an IJ grants a change of venue to another immigration court. *Garcia*, 28 I&N at 703. With the proliferation of video teleconferencing (VTC) hearings, noncitizens and Immigration Judges (IJs) presiding over their cases have increasingly been in different geographical locations and in different circuit court jurisdictions. For example, Moshannon Valley Processing Center, a new immigrant detention facility has opened up in Pennsylvania, and many New Yorkers are held there while an IJ in Virginia or elsewhere hears the case. This is an important clarification as it allows immigrant defense attorneys to be certain which law applies in their case. WNY RIAC will continue to alert attorneys in their advisals if a plea is only safe or only has minimal consequences in the Second Circuit. With the opening of more immigration adjudication centers, where the IJ’s only hear cases virtually, we expect more litigation on the issue of not only what circuit law applies, but which jurisdiction is proper in petitions for review.