

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 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

Addressing Collateral Issues in Parental Representation

The New York Office of Indigent Legal Services' Parental Representation Standards, [found here](#), directs attorneys to counsel clients on collateral issues affecting their case, including immigration. The RIAC can assist attorneys with this duty. The specific provision states:

H-1. Collateral issues. Advise and counsel clients on basic rights and responsibilities attendant to all legal and non-legal issues impacting the client's case. Commentary: Matters not specifically arising from the state intervention case can directly affect the client's identified goals in the case. Advising, providing guidance on self-advocacy, representing or obtaining representation, or informally advocating for the client in such matters can assist in attaining the client's goals in the state intervention case. These matters may include, but are not limited to: 1. Child support; 2. Criminal proceedings; 3. Divorce; 4. Domestic violence; 5. Family offenses; 6. Guardianship and kinship guardianship;

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BENEFITS OF FILING NOTICES OF APPEAL FOR NONCITIZENS

By Wedade Abdallah, Managing Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

Under the Immigration and Nationality Act (INA), a noncitizen may be ordered removed if they are convicted of certain criminal offenses. Noncitizens cannot be removed until their convictions have become final.

For immigration purposes a conviction becomes final once direct appellate review of a conviction is exhausted or waived. In *Braithwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021), the Second Circuit Court of Appeals affirmed this standard. The court ruled that an Appellate Division order granting a motion to file a late notice of appeal was evidence that a conviction was not final for immigration purposes. Under New York law, a motion to file a late notice of appeal pursuant to CPL §460.30(1) may be made within one year and thirty days of the criminal judgment. The court found that because late filings are a matter of course, the courts “treat appeals taken by written notice of appeal filed within 30 days of a conviction and those taken by a granted §460.30 motion as identical.” *Id* at 554.

As a result of the decision in *Braithwaite*, immigration courts must now give late filed notices of appeal the same force and effect as those filed within the traditional 30 day statutory deadline. Although New York courts often grant motions to file late notices of appeal, the decision to do so is ultimately discretionary, and requires a finding that the statutory factors have been satisfied. CPL §460.30(1). It is in your client’s best interest to file the notice of appeal within the 30 day statutory deadline and not leave to chance whether a motion to file a late notice will be granted.

Benefits of a Filing a Notice of Appeal

Immigration advocates recommend that an appeal of a conviction, even if filed late, should be done in every noncitizen case. This includes appeals from family court orders. There is no harm that can come from filing a notice of appeal in a case. The client can only benefit from it.

A pending appeal may allow a noncitizen who faces removal to develop equities and show rehabilitation. These are requirements for virtually every form of immigration relief. If the finality of a conviction is delayed, a noncitizen sentenced to prison may avoid having their removal hearing heard while they are serving their state sentence. This may enable them to defend their immigration case while free in the community where there is greater access to representation, witnesses, and favorable evidence. For those convicted of an aggravated felony offense and sentenced to prison, a pending appeal could prevent mandatory immigration detention after the completion of their state sentence.

A direct appeal may also be the sole opportunity for an attorney to challenge the voluntariness of a plea. An issue that must be raised on direct appeal is the failure of a plea court to properly advise an individual of the potential immigration consequence of a guilty plea. If a direct appeal is not taken,

an individual may lose the opportunity to have their conviction vacated on this basis.

It is also possible that a noncitizen may be removed from the United States while their appeal is pending. Counsel should not abandon an appeal even if the client has been removed. Obtaining a reversal of a conviction may enable the client to return to the United States.

Best Practices

In 2023, the Office of Indigent Legal Services set forth the following as best practices for appellate counsel when representing a non-citizen:

When the client is not a United States citizen, counsel must promptly determine whether immigration proceedings are pending, what potential impact the appeal could have on immigration status, and whether the appeal presents viable issues related to potential immigration consequences. Counsel must investigate the advice provided by trial counsel concerning immigration consequences and where appropriate, pursue an ineffective assistance claim. As soon as practicable, counsel should do an initial assessment of the case, including regarding whether a stay and bail pending appeal should be sought.

These best practices include evaluating a client's eligibility to collaterally attack a conviction. Counsel should be aware that the immigration courts do not recognize the validity of all vacatur. For example, a vacatur of a conviction for the purposes of avoiding immigration consequences, remains a conviction for immigration purposes. For an immigration court to recognize a vacatur, it must be based on constitutional defects in the underlying proceeding or some other legal infirmity. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

Before undertaking any efforts to vacate a conviction, it is important to speak with an immigration attorney to ascertain the impact a vacatur will have on a noncitizen's immigration status.

Parental Representation cont'd

7. Housing; 8. Immigration; 9. Mental health proceedings; 10. Paternity; 11. School, education, and special education issues; 12. SSI and other public benefits; and 13. State central registry expunction. The process of evaluating collateral issues with the client has many benefits. It helps build mutual confidence and respect in the attorney/client relationship, educates the client, assists the client in developing self-advocacy skills, and provides the attorney with insight into the client's goals.

The WNY Regional Immigration Assistance Center

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

