WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

MONTHLY NEWSLETTER ISSUE 36 | NOVEMBER 2023

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

FREE IN-PERSON CLE

Immigration Issues in Criminal and Family Court Proceedings

For mandated representatives in Cattaraugus and surrounding counties

SPEAKER: Sophie Feal, Esq.

DATE & TIME: 1PM-3PM
WHERE: Cattaraugus County Public Defender's Office
175 N. Union St.
Olean, NY 14760

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

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.

To register, please email Abbey at: abrown@legalaidbuffalo.org

LEGAL AID BUREAU of Buffalo, Inc.

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Ontario County NEW YORK

A REVIEW OF WHAT CONSTITUES A FINAL CONVICTION AND HOW IT IS PROVEN UNDER IMMIGRATION LAW

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

A conviction under immigration law requires:

- a formal judgment of guilt entered by a court, **or**
- where an adjudication of guilt has been withheld, a judge or jury has found guilt, or a plea of guilt or *nolo contendere* has been entered, or sufficient facts to warrant a finding of guilt have been admitted, **and**
- a judge has ordered some form of punishment, penalty or restraint on liberty.

A removable crime is defined by the particular elements articulated in a statute or interpreted by judicial decisions. *Matter of Bart*, 20 I&N Dec. 436, 438 (BIA 1992). It is also limited by the record of conviction. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1992). As such, immigration law generally focuses on the nature of an act and not the seriousness of the offense or the severity of the punishment. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

"Post-conviction remedies do not affect the finality of a conviction while they are pending, and vacated crimes remain convictions for immigration purposes unless the offense was vacated on constitutional grounds, as opposed to rehabilitative reasons such as successful completion of a judicial diversion program."

A noncitizen is subject to removal from the United States based on a criminal conviction that fits categorically within one of the criminal removal grounds. Only if the full range of conduct penalized by the State criminal statute falls within the federal generic definition of the crime, will there be a categorical match. Actual conduct is irrelevant. As has been pointed out in previous newsletters, the Second Circuit Court of Appeals has found that certain New York offenses, including those involving firearms and cocaine, are not categorical matches to the federal law and hence, cannot serve as the basis for removal.

Despite common sense, violations under New York law are deemed to be "crimes" for immigration purposes because they may subject a defendant to more than five days of incarceration. 8 CFR § 244; NYPL 10.00 (3).

As well, the conviction must be final for it to serve as a ground for removal. *Id*. The Board of Immigration Appeals (BIA) has held that a conviction does not have a "sufficient degree of finality" for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived. *Matter of J.M. Acosta*, 27 I&N Dec. 420, 432 (BIA 2018). However, a pending leave to appeal, which is "not-of-right," to the State's highest court, renders

the conviction final unless such leave is granted. This decision also created a rebuttable presumption that a conviction was final if the Department of Homeland Security established that the time for a direct appeal of the conviction had passed. The noncitizen was required to overcome this presumption. However, in *Brathwaite v. Garland*, 3 F.4th 542, 546 (2d Cir. 2021), the Second Circuit found this rebuttable presumption arbitrary and unreasonable because late filings are standard practice in New York for criminal appeals, and it is almost impossible for most applicants to show that their criminal appeal is substantive, a requirement to overcome the presumption, when briefs have not been written and the record has not been compiled. *Id.* at 555. Therefore, the matter was vacated and remanded to the BIA for further proceedings. *Id.* Indeed in October, the BIA upheld the Court's decision in *Matter of Brathwaite*, 28 I&N Dec 751 (BIA 2023).

"Violations under New York law are deemed to be "crimes" for immigration purposes because they may subject a defendant to more than five days of incarceration."

Post-conviction remedies do not affect the finality of a conviction while they are pending. As we have discussed in previous newsletters, vacated crimes remain convictions for immigration purposes unless the offense was vacated on constitutional grounds, as opposed to rehabilitative reasons such as successful completion of a judicial diversion program. *Matter of Thomas*, 27 I&N Dec. 674 (A.G. 2019).

For evidence of a conviction, an Immigration Judge may examine the record of conviction which is comprised of the following:

- an official record of judgment and conviction;
- an official record of plea, verdict and sentence;
- a docket entry from court records that indicates the existence of a conviction;

CONT'D ON PAGE 4

The Impact of Undisclosed Offenses

At a recent CLE, a member of audience raised a significant issue about how a client may be denaturalized for not having admitted a criminal arrest and conviction that would have subjected him scrutiny by the adjudicator and possible removal. The key question on the naturalization application being: Have you EVER committed, assisted in committing, or attempted to commit, a crime or offense for which you were NOT arrested? ☐ Yes ☐ No

Here is an important practice advisory from the Immigrant Defense Project to remind practitioners that when a client is naturalized, one should be certain to consider whether an offense was committed before the date of naturalization and whether the arrest was disclosed on the naturalization application:

https://www.immigrantdefenseproject.org/wp-content/uploads/Advisory-for-Defense-Attorneys-Identifying-clients-at-risk-of-denaturalization3-1.pdf

- official minutes of a court proceeding or transcript in which the court takes notice of the conviction;
- any record or document prepared by the court in which the conviction was entered;
- any document or record attesting to the conviction maintained by a penal institution as the basis to assume custody.

Immigration and Nationality Act §240(c)(3); 8 CFR § 1003.41

The regulations further state that "Any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." 8 CFR § 1003.41 (d). The Board of Immigration Appeals has held that "A document that requires authentication but that is not authenticated is not admissible as "other evidence that reasonably indicates the existence of a criminal conviction" within the meaning of 8 C.F.R. § 1003.41(d)." *Matter of J.R. Velasquez*, 25 I&N Dec. 680 (BIA 2012).

When a statute is divisible — it has at least one portion covering conduct within the alleged criminal removal classification, and other conduct that does not — the Immigration Judge may look to the record to determine under what section a noncitizen was convicted. This would include an indictment, jury instructions, signed guilty plea and plea transcripts. *Descamps v. US*, 133 S.Ct. 2276 (2013).

Similarly, since crimes involving fraud or deceit, and tax evasion are aggravated felonies only if the "loss to the victim" or revenue loss to the government is $10,000 or more, and money laundering is also an aggravated felony if the amount of funds laundered exceeds $10,000, immigration judges may look to the criminal record to determine the amount of the loss. Therefore, the legal strategy is to avoid any reference in the record of conviction to any loss in an amount in excess of $10,000, including in any restitution order.

In addition, an immigration adjudicator may use factual evidence, and not just the elements of the state offense or the record of conviction, to prove a domestic relationship to

CONT'D ON PAGE 5

NEW IDP DETAINER FAQ

The Immigrant Defense Project, a RIAC serving New York City, has just released a **new community-facing website "Immigration and Customs Enforcement (ICE) Detainer FAQ"**, available in English and Spanish.

This "ICE Detainer 101" will explain:

⇒ What is an ICE Detainer?

⇒ Why do I have an ICE Detainer?

⇒ How does ICE know about Me?

⇒ How Long Can I Be Held in Criminal Custody on a Detainer?

⇒ What Can I Do About an ICE detainer?

determine whether a crime constitutes a DV offense triggering removal proceedings. *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). Therefore, DHS could submit a police report showing that the complainant in a case is a person in an intimate relationship with the defendant pursuant to Social Services Law Section 459-A.

ICE Revises INTERPOL Red Notice Policy

U.S. Immigration and Customs Enforcement announced an agency-wide guidance about the use of Red Notices and Wanted Person Diffusions, as part of its commitment to comply with the requirements of INTERPOL's Constitution and Rules on the Processing of Data. https://www.ice.gov/news/releases/ice-updates-guidance-use-interpol-red-notices-during-law-enforcement-actions

Red notices are issued for fugitives wanted either for prosecution or to serve a sentence. A Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action. Wanted Person Diffusions serve a similar purpose but are circulated directly by an INTERPOL member country to one, some, or all other INTERPOL member countries.

The full directive is not publicly available, but ICE's press release lists a number of changes, including:

- Restricting ICE field officers from taking enforcement actions solely on the basis of a Red Notice;
- Requiring that ICE provide individuals named in Red Notices the underlying documentation associated with the Red Notice, and provide them the opportunity to contest it or its contents.