WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

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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

SAVE THE DATE

NYSBA's annual Criminal Justice Fall Meeting is a two-day event is dedicated to bringing together legal professionals from across the nation. The weekend kicks off on Friday, September 29, 2023, with a networking event from 5:30-7:00 p.m. at Wellington's restaurant in the Renaissance Albany Hotel.

The hybrid CLE program will take place on Saturday, September 30, 2023. The morning session includes a Court of Appeals update with distinguished panelists Hon. Jenny Rivera, Senior Associate Judge of the Court of Appeals; Robert J. Masters, Esq., Special ADA from the Rockland County DA's Office; and Dan Arshack, Esq., of Arschack, Hajek & Lehrman, PLLC. The afternoon features a panel discussion on Immigration for Criminal Lawyers with esteemed panelists Saad Siddiqui, Esq., from the Bronx District Attorney's Office; and Sophie Feal, Esq., of Legal Aid Bureau of Buffalo.

To learn more about this program and register for the event, click here.

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NOT IF, BUT WHEN:
THE REPATRIATION OF NONCITIZENS ORDERED REMOVED

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

IMPORTANT UPDATE

The WNYRIAC is disappointed to announce that Attorney Brittany Triggs will be leaving us on October 4th. We thank Brittany for her commitment to our project for the past many months. Sophie Feal will be the sole RIAC contact person once Brittany leaves. Please direct crim-imm inquiries to her.

While it is true that some immigrants with removal orders may never have those orders executed, the reasons why are much different than commonly believed. Two of the most often thought of groups of non-deportable noncitizens include Cubans and refugees.

Under U.S. immigration law, once an administratively final order of removal has been entered (this may be by an immigration judge, the Board of Immigration Appeals, or a federal Appeals Court), the Immigration and Customs Enforcement has 90 days to effectuate the removal order and repatriate a noncitizen. These 90 days are called the "removal period. See Immigration and Nationality Act (INA) §241(a)(1); 8 USC §1231(a)(1). During this time, the noncitizen is subject to mandatory detention. If the person has a passport or travel document, this time is used to arrange their travel. If they do not have a passport or travel document, this period allows ICE to communicate with the consulate of the noncitizens' native country. To obtain such a document.

> "…[T]he best practice is to assume that noncitizens with removal orders will be repatriated. Noncitizens in removal proceedings should seek any relief against removal for which they are eligible."

At the end of the 90-day period, ICE may keep someone detained if there is a "significant likelihood of removal in the reasonably foreseeable future." In some cases, noncitizens have had to file writs of habeas corpus in the District Court for their release, since permitting indefinite detention raises serious constitutional questions, and ICE has detained people where there was no significant likelihood of removal. See Zadvydas v. Davis, 533 U.S. 678 (2001). If there is not a significant likelihood, then the noncitizen would be released from detention on an "order of supervision." This release allows the person to apply for a work permit, and remain in the country until they can be removed. There might be some additional requirements while they have this order, including ankle monitoring, ICE check-ins, and obeying the law. Should ICE get a travel document, they would require the noncitizen to come back into custody to execute the removal order.

There are foreign nationals who may or may not be removed within the 90-day removal period because of their home countries' lack of cooperation. While most nations of the world comply with their obligation to accept the timely return of their citizens, there are certain countries that are deemed "recalcitrant" when it involves issuing the necessary travel documents.

Some are considered "at risk of non-compliance." The most recent update from July 10, 2020, classifies 13 counties as recalcitrant and 17 as ARON. The recalcitrant countries are Russia, China, Hong Kong, Cambodia, Laos, Bhutan, India, Pakistan, Iran, Iraq, Burundi, Eritrea, and Cuba. The countries at risk of non-compliance are Ukraine, North Macedonia, Azerbaijan, Afghanistan, Burma, Vietnam, Israel, Jordan, Yemen, Ethiopia, South Sudan, Algeria, Mauritania, Gambia, Sierra Leone, Samoa, and Tonga. See Immigration: "Recalcitrant" Countries and Use of Visa Sanctions to Encourage Cooperation with Alien Removals. https://crsreports.congress.gov/product/pdf/IF/IF11025. Despite these countries being generally noncooperative, ICE has still been able to remove noncitizens to those countries. According to their data from 2019 and 2020 on removals, noncitizens were deported to all the countries on the list. (https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf and https://www.ice.gov/features/ERO-2020).

Since 1952, the U.S. has had visa sanctions available as a legal tool to pressure uncooperative countries and will discontinue granting both immigrant (permanent residency) and nonimmigrant visas (tourist, student, professional) to nationals of those countries. This measure has been used just twice in recent history- against Guyana in 2001 and Gambia in 2016. President Trump, however, in an early executive order, directed the Department of Homeland Security (the parent organization of ICE) and the Department of State (responsible for the overseas issuance of visas), to "effectively implement" this sanction. In turn, it was imposed on Cambodia, Eritrea, Guinea, Sierra Leone, Burma, Laos, Ghana, and Pakistan (See link above for details.)

Additionally, the situation with Cuban nationals has been unique due to a historical lack of diplomatic relations between the US and Cuba. Consequently, Cubans have no fear of removal. They often took removal orders in immigration court without seeking any relief, such as asylum. However, times have changed. In 2019, there were 1116 people returned to Cuba. That number was much smaller in 2020, probably due to the global pandemic, but still, 96 Cubans were returned to their native country by ICE.

Consequently, the best practice is to assume that noncitizens with removal orders will be repatriated. Noncitizens in removal proceedings should seek any relief against removal for which they are eligible. Once a final removal order is entered, it is extremely difficult to obtain a stay of the removal order and reopen a case to seek a benefit, especially if the relief was available at the time of the removal proceedings. Regardless of the country of birth or situation in that country, noncitizens under orders of supervision should still assume and live life as though ICE is still attempting to arrange their repatriation and may indeed effectuate the removal.

Flip to page 4 to read about recent important 2d Circuit Decisions

RECENT 2ND CIRCUIT DECISIONS

Decision with a profound impact on what constitutes a drug-related deportable offense

In the case, *U.S. v. Minter*, No.21-3102, 2023 WL5730084 (2d Cir. Sept. 6, 2023), Minter was convicted of the federal offense of being a felon in possession of a firearm. The Government sought a sentence enhancement under the Armed Career Criminal Act because he had a previous conviction under NY PL §220.39(1) (sale of a narcotic drug). The Court held that because New York's definition of cocaine was categorically broader than the relevant federal definition of cocaine, the appellant was not subject to a sentence enhancement. Specifically, the Court reasoned that, "… the CSA prohibits possession of only optical and 5 geometric isomers of cocaine, while New York's statute prohibits possession of all 6 cocaine isomers. Because of this categorical mismatch, Minter argued, his 2014 conviction for selling cocaine could not serve as a predicate offense for a 8 sentencing enhancement under the ACCA." The *Minter* decision builds on the Second Circuit opinion in *U.S. v. Gibson*, 60 F.4th 720 (2d Cir. 2023), which made clear that post-January 23, 2015 convictions of "narcotic drug" offenses are not necessarily deportable offenses because the NY definition of "narcotic drug" includes any derivative of opium or opiate, such as naloxegol, though naloxegol was removed from the federal schedule in 2015.

The *Minter* and *Gibson* decisions should mean that convictions of New York offenses involving narcotics do not establish deportable controlled substances offenses. *Please always talk to us at the RIAC before assuming any plea is safe given the nuances in immigration law, and also recognize that this decision affects only the Second Circuit, like several important decisions of the past couple years.* If a client is detained and placed in removal proceedings, they may be transferred to a detention facility outside of this circuit. Equally, they may leave this circuit and not have the benefit of this decision if placed in removal proceedings elsewhere.

Peguero Vasquez v. Garland, No. 21-6380 (2d Cir. 2023)

In a September 13th decision, the 2nd Circuit reaffirmed that the law at the time of the conviction is the law that applies when evaluating if an immigrant is removable. In this case, Mr. Peguero Vasquez was convicted under NYPL Section 170.20 in 2017. In his removal case before the immigration judge and the Board of Immigration Appeals, he argued, among other things, that he was not removable for a crime involving moral turpitude committed within 5 years of admission, because the maximum sentence was not a year or more. He argued that since the One Day to Protect New Yorkers Act is retroactive, his A misdemeanor was only punishable by 364 days, and therefore not a year or more. The 2nd Circuit did not agree and ruled that for immigration purposes, one must look at the statute as is was at the time of conviction, and the retroactivity therefore, did not apply.