WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

MONTHLY NEWSLETTER ISSUE 50 | JANUARY 2025

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

CELEBRATING OUR 50TH ISSUE!

WHAT READERS SAY:

"The newsletter is very interesting and informative."
- Livingston County Public Defender

"Thanks for the newsletter. Keep them coming in - very informative and relevant."
- Erie County Assigned Counsel Member

"I tell my staff attorneys to read the newsletter every month."
-Chief Attorney, Legal Aid Bureau of Buffalo

"I just came across your article in the monthly newsletter. Very informative."
-Thompkins County Assigned Counsel Member

"NYSDA thanks the WNYRIAC for sharing this resource!"
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WHAT CAN WE EXPECT? AN ANALYSIS BY THE WNYRIAC

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

During the election and since, President-elect Trump and his supporters have made numerous statements about their immigration policy plans. The future looks frightening, but we have been here before. At the WNYRIAC, we have practiced immigration law through several monumental challenges in law and policy, including the first Trump administration's efforts to build a wall, restrict asylum, implement the Muslim travel ban, eliminate Temporary Protected Status (TPS), and detain children in "tent-city" facilities in Texas.

Given our 37 years of experience in immigration law, we offer this limited analysis of what defense attorneys might expect their noncitizen clients to face in the coming months and how to address some of these challenges in their practice. Of course, at this early stage, we can only speculate, albeit with an educated eye.

When the 1996 law passed—the one we practice under today—those of us handling deportation defense cases were overwhelmed by its cruelty toward noncitizens who had been convicted of crimes. The law broadly expanded the definition of what constituted an "aggravated felony" to include certain misdemeanors and had a generally retroactive effect. It sought to deport individuals with one domestic violence-related conviction and made it virtually impossible for spouses of U.S. citizens who had entered the U.S. without documents to gain legal status, among other sweeping changes we had not foreseen. After its passage, litigators went to work suing the government, often prevailing, on due process issues, retroactive application, and the scope of mandatory detention. Meanwhile, those of us in the trenches developed novel strategies to overcome the hurdles we faced. Today, litigators are ready to go once again. The ACLU has already filed a suit to obtain details on how ICE's air travel infrastructure could expand to facilitate mass deportation. (*For a better understanding of the litigation undertaken in the past challenging the elimination of TPS, and what litigation may be anticipated if the Enemy Aliens Act is utilized as President-elect Trump has threatened to do, see this interesting analysis by a litigator on the front lines: "Trump's Immigration Agenda: A Closer Look."*)

Following the U.S. Supreme Court's recognition in 2010 that the 1996 law increased the likelihood of removal for noncitizens convicted of criminal offenses and had devastating effects on people's lives, it decided *Padilla v Kentucky*, 559 U.S. 356 (2010). In response, New York State created the Regional Immigration Assistance Centers (RIAC) to help defense attorneys advise their noncitizen clients accordingly. New York also passed legislation capping misdemeanor sentences at 364 days to avoid the harshest immigration consequences of the law and enacted a measure that keeps Immigration and Customs Enforcement (ICE) from arresting noncitizens in and near our courts (*see*, "ICE Out of Courts" - Immigrant Defense Project). We know these types of initiatives will happen again and will be essential to taming the most severe parts of future immigration law and policy.

HOW CAN WE HELP OUR NON-CITIZEN CLIENTS DURING THESE TIMES?

First of all, **immigrants in the U.S. should understand their rights, particularly under the Fourth Amendment of the U.S. Constitution**. *See Know Your Rights with ICE - Immigrant Defense Project* and *We Have Rights*.

The focus of the President-elect's immigration scheme has been on the border, and that is likely where he will begin, along with initiatives that can be easily accomplished through executive orders. However, executive orders and presidential proclamations do not create new authority, they require the president to act on existing authority; they require the president to act within existing authority. We anticipate that, like last time, refugee admissions—solely within the purview of the executive branch—will slow to a trickle. The new administration has also made clear that it will work closely with local law enforcement entities to implement its plan to detain and remove undocumented individuals across the country. This will undoubtedly be controversial in some communities, and the attempt to use the military will likely spur litigation.

Experts anticipate that workplace raids will be the preferred method for mass arrests, particularly in those industries that rely heavily on immigrant labor. A blueprint for this approach can be seen in what happened in Postville, Iowa, nearly twenty years ago, when 389 Central Americans (and a couple Israelis and Ukrainians) were rounded up at a food processing plant. Removal proceedings were held in a makeshift detention camp where few lawyers were available. Many of the workers were Mayan and did not understand the Spanish interpreters provided. The raid was part of Operation Endgame, launched in 2003, which aimed to deport 11 million undocumented people by 2012. (*For employer information on worksite raids, click here.*)

Family lawyers can assist undocumented parents who could be subject to removal in creating a plan for their U.S. citizen children's care if they are suddenly detained. **Completing the New York Parental Designation Form is one vital step toward securing their children's safety and well-being,** as is preparing guardianships and powers of attorney. *See* NY Gen Oblig §5-1552(1). Parental designations allow a parent to designate someone as a "person in parental relation" and empower that person to make limited medical and educational decisions on behalf of the children. The form does not affect parental rights and can be revoked at any time.

On the other hand, industries that rely on immigrant labor will likely lobby for expanded worker visas to ensure a steady and reliable workforce—one of the incentives behind the 1986 legalization law. Agriculture has already raised its concerns; U.S. farm groups want Trump to spare their workers from deportation (*Reuters*).

Given the Republican control of the House and Senate, and the Democratic Party's support for immigration reform, we may see new immigration legislation introduced that focuses on detention and deportation, particularly for those convicted of crimes, and likely limits access to

asylum. It is not impossible that DWIs could become a removable offense, as the government has found many ways already to punish these offenses short of removal.

During his first term, President Trump issued a sweeping rule with the objective of limiting asylum, representing a complete overhaul of the procedural and substantive standards for asylum and related humanitarian protections. The rule drastically reduced asylum eligibility for individuals with certain offenses, including DWIs, any gang-related offense, crimes against children, DV offenses (even without a conviction), all felonies, and receiving public benefits through fraud. Several immigration legal agencies sued and the U.S. District Court for the Northern District of California (N.D.Ca.) issued a nationwide injunction three days before the rule was scheduled to take effect. President Biden later rescinded the policy, and the rule was never implemented.

All administrations establish immigration enforcement priorities, typically placing terrorist activity and serious crimes at the top of the list for detention and removal. This is not new. However, under the second Trump administration, more offenses may be classified as "serious," and enforcement is likely to become more aggressive, as the president-elect himself has made clear. Noncitizens with removal orders that were never executed are also at risk, as they generally do not have the right to raise defenses again before an immigration court.

Perhaps one of our biggest concerns is the potential use of denaturalization as a tool for removal. Stephen Miller has touted this weapon. It is now more important than ever for all defense attorneys — criminal, family and immigration — to fully understand whether their clients engaged in any criminal *behavior* that was not disclosed on a naturalization application, as illustrated in the *Farhane v. U.S.* decision, 26-1666 (2d Cir. Oct. 31, 2024). Farhane was denaturalized for failing to answer "yes" to a question on the application that reads: "*Have you committed a crime for which you have not been arrested?*". *See also*, *Advisory for Defense Attorneys: Identifying Clients at Risk of Denaturalization.* The Second Circuit reasoned that denaturalization cannot be decoupled from deportation, so criminal defense attorneys have a *Padilla* obligation to advise about this possibility. Consequently, **we should be most concerned about immigration status at the time of the criminal CONDUCT, as well as at the time of the plea.**

In addition, we believe it is important to allow individuals who have applied for citizenship and have a pending criminal charge that will not affect their eligibility (please consult with a RIAC before making any assumptions) to **proceed to the naturalization oath as soon as possible. This means that ACDs may not be as attractive as we once believed**, since the criminal prosecution remains pending until dismissal, and immigration authorities typically will not process applications during that time.

We are generally concerned with law enforcement contact. **Noncitizens should not**

remain in the justice system any longer than necessary, minimizing their contact with courts, probation, parole, and jails. This may require rethinking probation terms and rehabilitative programs as sentencing options. The latter are already risky, given that rehabilitative vacaturs hold no value under immigration law. If a noncitizen is ordered by a court to participate in a rehabilitative program post-plea, the original plea will still constitute the conviction for immigration purposes.

When it comes to general immigration advice, it has been suggested noncitizens traveling abroad should return to the U.S. before January 20th and, similarly, should file applications for benefits before that date. **However, if the noncitizen has a pending or prior criminal conviction, this advice should only be given in consultation with a RIAC or an immigration lawyer**, as the adverse consequences of traveling or filing applications could be severe. Even traveling within the U.S. could pose a problem, as some local jurisdictions may be more likely than others to enforce U.S. immigration laws. Additionally,, the application of immigration law can vary from one federal circuit to another. We are relatively fortunate in the Second Circuit.

Finally, all noncitizen clients in the justice system should be advised that immigration law may change, **and we cannot predict whether new consequences may arise for current criminal behavior**, including the retroactive application of immigration laws making individuals deportable from the U.S.

For a community-centered FAQ on what to expect during the Trump Administration, please see: *What Do We Expect at the Beginning of Trump 2.0 and How You Can Get Prepared*.

Any Admissible Evidence Can be Used to Determine Loss Amount

A noncitizen is deportable for an aggravated felony if they are convicted of a fraud offense where the loss amount associated with the conviction is at least $10,000. In *Matter of Dominguez Reyes,* 28 I&N Dec. 878 (BIA 2024), the Board of Immigration Appeals held that the amount listed in a forfeiture order was sufficient to prove the loss amount, that the immigration judge was free to consider any admissible evidence, and that the court was not limited to the plea agreement or other *Shepard* documents in making its determination (*see* our June 2024 article, "Managing the Criminal Court Record," for more on what constitutes the record of conviction). The court further reiterated that to sustain this ground of removal, the loss amount must be sufficiently tethered and traceable to the conduct of conviction, and not based on dismissed or acquitted conduct.

[Click here to read the decision.]

Trump's Deportation Plan Faces Legal and Logistical Hurdles

Donald Trump's proposed mass deportation plan aims to remove millions of immigrants in 2025, relying on strategies such as expanded detention, family separations, and expedited removal. The plan faces significant vulnerabilities, including the legal requirement for deportation hearings, which U.S. immigration courts — already burdened by years-long backlogs — cannot accommodate. The administration is expected to expand expedited removal, bypassing hearings but risking violations of due process and international law. This could lead to wrongful deportations of asylum seekers, legal residents, and potentially U.S. citizens. Resistance efforts by states, legal advocates, and civil society will focus on slowing implementation, educating communities on their rights, and protecting the rule of law to mitigate these far-reaching impacts. [Click here to read more.]

Celebrating 50 Issues: Our Top Practical Picks!

Click the title to view the article

The Repatriation of Noncitizens Ordered Removed

Preserving the Best Defense for a Permanent Resident in Removal Proceedings

How Does My Client Become A U.S. Citizen? The Requirement of "Good Moral Character"

When Are There Immigration Consequences to a Crime Without a Conviction?

The Consequences of Criminal Convictions and Family Law Findings on Noncitizens: A Summary of our CLE for Defense Counsel

Deportability and Inadmissibility: What's the Difference? And Why It Matters

Working with English-Language Learners, The Deaf & Hard of Hearing Community, and Interpreters in a Legal Setting

Careful: You May Need to Assess When a Naturalized Committed an Offense to Properly Advise

Allegations in Family and Criminal Court May Render an Asylum Applicant Ineligible for Relief

Benefits of Filing Notices of Appeal for Noncitizens

Happy Holidays!

The WNY Regional Immigration Assistance Center
A partnership between the Ontario County Public Defender's Office
and the Legal Aid Bureau of Buffalo, Inc.