

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

Please contact the WNY Regional Immigration Assistance Center. We provide legal support to providers of mandated representation for noncitizens in the 7th and 8th Judicial Districts of New York. We also offer free CLE trainings. Call us to schedule one for your office or to find out about already scheduled dates.

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We are funded by the New York State Office of Indigent Legal Services to assist you in your 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. Our Center was established so that we can share our knowledge of immigration law with public defenders and 18b providers to help you determine the immigration consequences of any particular case you may be handling. There is no fee for our services.

Upcoming

Save the Date

In the first half of November 2020, the WNYRIAC with the Erie County Assigned Counsel will present a CLE on "Appeals and Post-Conviction Relief for Noncitizens under Padilla and Peque," featuring Jane Yoon and Erin Kulesus from the Appeals and PCR Unit of the Legal Aid Bureau of Buffalo. We will send you invitations when they are available.

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WNY Regional Immigration Assistance Center

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The Repatriation of Noncitizens Ordered Removed

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I have often been asked by defense attorneys how likely is it that their client will actually be removed from the United States and repatriated to their native country once an order of removal has been entered. There is some confusion around this issue. For example, those who are admitted as refugees often believe they cannot be deported from the U.S. since they were admitted in a “special” status which recognized their fear of persecution. This is untrue.

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), Immigration and Customs Enforcement (ICE) has 90 days to effectuate the removal and repatriation of a noncitizen. This 90 days is 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. The removal period allows ICE to communicate with the consulate of the noncitizen’s native country to secure the needed travel documents for repatriation in cases where no valid passport has been produced.

If a noncitizen is not physically removed by the end of the removal period, s/he may be released from detention and placed under an “order of supervision,” which generally requires them to meet with an ICE officer regularly. The decision of whether to release a noncitizen after the removal period ends is made administratively by asking whether there is a “significant likelihood of removal in the reasonably foreseeable future.” In some cases, noncitizens have filed writs of habeas corpus in District Court for their release, since permitting indefinite detention raises serious constitutional questions. See *Zadvydas v Davis*, 533 U.S. 678 (2001). However, even when the noncitizen is released and placed under an “order of supervision,” if a travel document becomes available, then they may again be taken into custody for repatriation.

There are foreign nationals who may not be removed within the 90 day removal period. 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

Update on Alleged Hysterectomies in Georgia

On September 21st, 2020, the National Immigration Project of the National Lawyers Guild and Project South, an Atlanta-based social justice organization, filed a FOIA request seeking “release of any and all records prepared, received, transmitted, collected and/or maintained by U.S.

Immigration and Customs Enforcement (ICE) which describe, refer or relate to policies, guidelines, or procedures regarding gynecological procedures performed on individuals in ICE custody, including but not limited to, hysterectomies, oophorectomies, salpingo-oophorectomies, or the administration of drugs that may induce infertility.”

Such documentation is requested from all detention facilities holding noncitizens, including the Buffalo Federal Detention Facility, and not just the controversial, privately owned Irwin County Detention Center in Ocilla, GA.



New Case

In an August 17, 2020 decision, the U.S. Court of Appeals for the 2d Circuit held that a drug sale conviction (even one involving no remuneration) is a crime of moral turpitude (CMT) since it involves “reprehensible conduct and a culpable mental state.” *Mota v Barr*, 2020 WL 4743168. This means that despite two good recent decisions from the Circuit Court, holding that NYPL §§ 220.31, 220.34 (7)&(8), 221.45 are not controlled substances grounds of removal, they still may be CMT grounds of removal. See, *Harbin v Sessions*, 860 F.3d 58 (2d 2017) and *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018).

For further information, also see, <https://www.pbwt.com/second-circuit-blog/when-is-a-controlled-substance-not-a-controlled-substance>

BOTTOM LINE: Call the WNYRIAC when you have a noncitizen client facing any criminal charge!

issuing the necessary travel documents. Some are considered “at risk of non-compliance (ARON).” These countries vary from time to time. As of January 2020, ICE has classified ten countries as recalcitrant and 23 as ARON. Recalcitrant countries include China, Pakistan, and Iran. ARON countries include Russia, Venezuela, and Ethiopia. The full list may be seen here: <https://fas.org/sqp/crs/homesec/IF11025.pdf>

Since 1952, the United States 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 employee) to nationals of those countries. This measure had 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 (of which ICE is a branch) 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 had no fear of removal. They often took removal orders in immigration court, without seeking any relief, such as asylum. However, times are changing. According to the *Miami Herald*, “In fiscal year 2020, as of Feb. 24, ICE has completed 1,208 removals of Cuban nationals. In 2019, more than twice as many Cubans were deported than in 2018. In December, federal officials released the latest deportation statistics, which showed that 1,140 Cubans were detained nationwide during the 2019 fiscal year, compared to 463 in 2018. In 2017 there were 160 arrests.” See, <https://www.miamiherald.com/news/local/immigration/article240823201.html>

In the end, it has always been my practice to advise clients in removal proceedings to never assume they will not be repatriated. Such an assumption is not a wise defense to removal. 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. In addition, those under orders of supervision, even Cubans, should assume that ICE is still attempting to arrange their repatriation and may indeed effectuate the removal.