WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter Issue 3/ December 2020

What You Need to Know for Your Noncitizen Client

If your noncitizen client is facing criminal charges or adverse findings in Family Court…

Please contact the WNY Regional Immigration Assistance Center. We provide legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York. *Email contact is most efficient during the pandemic.*

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

Please consider also contacting us if you need assistance interviewing your client to determine immigration status or communicating immigration consequences; or if you would like us to intercede with the DA or the judge to explain immigration consequences on your behalf. We speak Spanish and French.

WHAT IS MY CLIENT'S STATUS IN THE U.S.?

Determining what immigration status your noncitizen client holds is not always easy. Here is a guide that may help:

https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Immigration-Status-101-April-3-2019.pdf

Remember: "Green card" holders are lawful permanent residents ("LPR"). They have the right to live and work indefinitely in the U.S. but they are not citizens, and may be deported on account of a criminal conviction. They must apply to naturalize to become

CONT'D on page 4

WNY Regional Immigration Assistance Center

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

Treatment Courts may have Potential Risks for Noncitizens*

By Sophie Feal, Supervising Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, with contributions from Brian Whitney, Staff Attorney, WNYRIAC, Ontario County PD's Office

As defense lawyers undoubtedly know already, treatment courts are an ideal way by which a defendant can avoid a conviction. As such, proceeding in a treatment court may be particularly helpful to a noncitizen who is concerned about the immigration consequences of a conviction. However, it is critical that defense counsel understand some of the limitations of these courts for the noncitizen.

First, proceeding in any treatment court assumes that the participant wants to engage in court-ordered treatment and is able to do so. This requires participants to have health insurance, either private insurance or Medicaid. The undocumented will most likely have no access to health insurance. They are ineligible for Medicaid, ineligible for benefits under the Affordable Care Act, and due to their undocumented status, rarely obtain employment that includes private health insurance. Therefore, they may not meet a required threshold for participation in such treatment courts. A lawful permanent resident (LPR) may also have limited access to public health insurance. If a client is not covered by insurance, court counselors may help participants engage in treatment programs with income based payment requirements. In such cases, defense counsel will have to work with the courts and counselors to overcome the financial barriers to participation faced by noncitizen clients.

Once there is a plea of guilty, and the court imposes treatment, which under U.S. immigration law constitutes a 'restraint on liberty,' the noncitizen defendant has a conviction under immigration law, even if the treatment court later allows withdrawal of the plea and dismissal of the charges, or withdrawal of plea and reduction to a lesser, non-removable, offense.

Second, treatment courts, including the Judicial Diversion Program (*see*, CPL 216.00), generally require that a plea be entered prior to participation. Once there is a plea of guilty and the court imposes the treatment, which under U.S. immigration law constitutes a "restraint on liberty," the noncitizen defendant has a conviction under immigration law, even if the treatment court later allows withdrawal of the plea and dismissal of the charges or withdrawal of plea and reduction to lesser, non-removable, offense. This is so because under immigration law, the definition of conviction is: 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 submitted, and a judge has ordered some form of punishment, penalty or restraint on liberty. Immigration and Nationality Act (INA)(a)(48)(A); 8 U.S.C. 1101(a)(48)(A). For example, in *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017), the Board of Immigration Appeals held that entry into a pretrial intervention program under

**much of this article appeared in a September 2016 WNYRIAC article that was written by both Sophie Feal and Wedade Abdallah, formerly with the WNYRIAC of the Legal Aid Society of Rochester.*

NEW ASYLUM RULES ENJOINED

In a harsh blow to those seeking refuge from persecution in the U.S., new rules barring asylum for applicants with a broad range of criminal convictions were set to go into effect on November 20, 2020. Notably, the regulations would have barred those with DV convictions from obtaining asylum in the US. Those convicted of a driving while intoxicated or impaired conviction which caused serious bodily injury or death, as well as those convicted of two or more DWIs or DWAIs would also have lost their ability to gain asylum under the rule. Additionally, all those convicted of a felony and some enumerated misdemeanors were barred. For specifics, *see* https://www.federalregister.gov/documents/2020/10/21/2020-23159/procedures-for-asylum-and-bars-to-asylum-eligibility

However, on November 19th, a U.S. District Court issued a TRO, valid to 12/9, finding that the new rule was likely in violation of the asylum statute, arbitrary and capricious, and procedurally invalid. *Pangea Legal Services v. DHS*, 3:20-cv-07721 (N.D. Cal. filed Nov. 2, 2020).

Texas law qualified as a conviction for immigration purposes where the individual admitted sufficient facts to warrant a finding of guilt at the time of his entry into the agreement, and the judge authorized the agreement ordering the individual to participate in the pretrial intervention program required to complete community supervision and community service, and comply with a no-contact order.

Third, under immigration law, a conviction still exists if an expungement or a vacatur is done under a rehabilitative statute or solely for the purpose of ameliorating immigration consequences (vs. one done on account of a constitutional defect in the underlying conviction). Consequently, it is important for defense counsel to negotiate participation without a plea *up front*. In some instances, this may require the agreement of the Assistant District Attorney assigned to the case.

The Judicial Diversion Program differs from other treatment programs because it provides defense counsel with the ability to negotiate the terms of participation directly with the court. Participation with or without a plea does not require consent of the District Attorney. Pursuant to CPL 216.05(4)(b), a court may grant participation in diversion programs without prior entry of a guilty plea when courts find the existence of “exceptional circumstances.” Such circumstances arise when, regardless of the ultimate disposition, an entry of a plea of guilty is likely to result in severe collateral consequences. In *People v. Kollie*, 38 Misc. 3d 865 (County Ct, 2013), the Westchester County Court held that deportation is a severe collateral consequence. The court also considered ineligibility for relief from deportation, such as cancellation of removal or humanitarian asylum, and cited the Supreme Court’s recognition of deportation as a particularly severe penalty for a criminal conviction (*Padilla v. Kentucky*, 559 US 356 [2010]).

However, in subsequent cases, including *People v. Gabrilov*, 178 A.D.3d 727 (2d Dept. 2019), a decision by the Second Judicial Department, the courts have declined to adopt a *per se* formulation. Instead, courts consider the severity of deportation, a rationale initially adopted in *People v. Brignolle*, 41 Misc.3d 949, 951–952 (Sup Ct, New York County 2013). To assess the severity of collateral consequences, these courts have considered factors such as age, length of residence in the United States, ties to place of birth, prior criminal record, offenses since arrest, employment history, patterns of noncompliance, family ties, and whether drugs are possessed for personal use or sale. *See*, *People v. Radonich*, 49 Misc.3d. 1212(A) (N.Y. Sup. Ct., New York County 2015), *People v. Mills*, 52 Misc.3d 1209(A) (N.Y. Sup. Ct.,

CONT’D ON PAGE 4

CASE LAW UPDATE

In *People v Ulanov*, — AD3d —, 2020 NY Slip Op 07108 (2d Dept 2020), the Appellate Division recently held that a lower court was not absolved of its *Peque* obligation to advise of plea consequences despite defense counsel's statement that the client was a citizen. Hence the defendant was afforded the opportunity to vacate her guilty plea. The appellate court found that "a trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation." (*People v Williams*, 178 AD3d at 1096; *see People v Palmer*, 159 AD3 at 121; *see also People v Peque*, 22 NY3d at 196).

Find decision at http://www.nycourts.gov/reporter/3dseries/2020/2020_07108.htm

TREATMENT COURTS (cont'd)

(New York County 2016), *People v. Rafaniello*, 51 Misc.3d 1218 (A) (N.Y. Sup. Ct., New York County 2016). Consequently, the analysis is on a case-by-case basis because, in the Court's view, "[w]hile the possibility of deportation may be an 'unwelcome and adverse consequence of a conviction,'" it is only under certain circumstances a severe collateral consequence" *People v. Gabrilov*, 178 A.D.3d 727 at 727 (citing *People v. Radonich*, 49 Misc.3d. 1212(A) at 5).

If a plea of guilt is required, there may be other options available. The first would be to enter a plea with no immigration consequences. The second may be to negotiate a contract where the original plea is vacated and replaced with a final disposition that carries no immigration consequences. While the second option may not be ideal because a plea has still been entered, there remains a possibility that immigration authorities will not act immediately to place that person in custody, but will wait until the final outcome, which would be a non-deportable offense assuming the defendant fully cooperates with the terms of treatment.

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With careful negotiations, treatment courts can be accessible to noncitizen clients. Defense counsel should utilize the Immigration Assistance Center to craft proper pleas and negotiate contracts that minimize the immigration consequences faced by noncitizens seeking to participate in these programs.

IMMIGRATION STATUS (cont'd)

a U.S. citizen. The "green card" will state their "A number" and the date they became a permanent resident, which may also be their admission date to the US. This information is very useful to determine whether an LPR in removal proceedings may apply for relief.

A noncitizen who holds a work permit, also known as an employment authorization document (EAD), is not a permanent resident, but usually holds some type of temporary status that allows him/her to live and work in the U.S., such as DACA or TPS. This status is not permanent. Sometimes an EAD holder may have an application for a "green card" pending. Refugees who are not yet permanent residents will have an EAD. The EAD also has the person's A number.

A nonimmigrant visa holder, such as a tourist, professional employee, student, farmworker, etc. will not have a card to show their status. They will have an I-94 document that states how long they are authorized to remain in the U.S. The I-94 is independent of the validity of the visa. They usually must leave the U.S by the date set forth on the I-94. These noncitizens do not generally have A numbers.

Noncitizens who are in removal proceedings will have an A number assigned to them if they do not already have one.

HAPPY HANUKKAH!

MERRY CHRISTMAS!

HAPPY KWANZAA!