

# WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 4/January 2021

## 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.\*

#### Buffalo Office

**Sophie Feal**  
290 Main Street  
Buffalo, NY 14202  
716.853.9555 ext.269  
sfeal@legalaidbuffalo.org

#### Canandaigua Office

**Brian Whitney**  
3010 County Complex Dr.  
Canandaigua, NY 14424  
585.919.2776  
bwhitney@legalaidbuffalo.org

### A Disappointing Number of Padilla IAC Findings in 2020

In a State with a RIAC system available to all mandated attorneys, we should not see *Padilla* violations. Please contact us!

- ◆ ***People v. Martinez*, 180 AD3d 190 (1st Dept) (1/20/10 DOI)**

Reversal of summary denial of 440 motion. Counsel said deportation was possible, but it was mandatory. In finding no prejudice, Supreme Court erred in focusing on events in 2017, not at the time of the 2007 plea. Much proof of the defendant's primary purpose of remaining in the U.S. Remand to different justice.

[http://nycourts.govreporter/3dseries/2020/2020\\_00252.htm](http://nycourts.govreporter/3dseries/2020/2020_00252.htm)

CONT'D PAGE 4

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. We speak Spanish and French.**

### WNY Regional Immigration Assistance Center

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



# PRESERVING THE BEST DEFENSE FOR A PERMANENT RESIDENT IN REMOVAL PROCEEDINGS

By Sophie Feal, Supervising Attorney, RIAC, Legal Aid Bureau of Buffalo, Inc.

Cancellation of Removal for Lawful Permanent Residents (“cancellation”)\* is the most generous waiver from deportation that is available to lawful permanent residents (AKA “green card” holders or “LPRs”). An applicant for this relief must meet the following statutory requirements:

- ◆ Have been an LPR for at least 5 years;
- ◆ Have resided in the U.S. continuously for 7 years after a *lawful* admission;
- ◆ And have never been convicted of an aggravated felony.

8 U.S.C. §1229b; Immigration and Nationality Act (INA) §240A(a).

It is important to note that the accrual of the required seven years of continuous residence is stopped by either the commencement of removal proceedings by a properly issued “Notice to Appear,” or by the *commission* (not the resulting conviction) of a criminal offense that renders the LPR inadmissible to the U.S. INA §240A(d)(1); *Pereira v. Sessions*, 138 S. Ct. 2105, 2109 (2018). The latter is a critical point for defense attorneys to understand, and any contact with the criminal legal system within the first seven years of a noncitizen’s continuous residence must be carefully examined.

Two statutory categories of offenses are listed under §240A(d)(1) as stopping time. The first is comprised of offenses which render the LPR “inadmissible” to the United States. These include, for example, crimes of moral turpitude (CMT) and controlled substance offenses. The second category includes criminal and security offenses which render an alien deportable and inadmissible as well, such as the two set forth above. Crimes of domestic violence and firearms offenses would be excluded from this category, since they are generally grounds of deportation, but not grounds of inadmissibility (though a DV offense may also be a CMT).

In *Barton v. Barr*, 140 S. Ct. 1442 (2020), the US Supreme Court held that if, upon examination of the applicant’s prior records, a permanent resident has been convicted of a disqualifying offense which was committed during the requisite seven year period, the statutory period is unmet, and the LPR is ineligible for cancellation of removal. The Court makes clear that it is not just the offense with which removal was charged that disqualifies the applicant, but that its ruling allows immigration judges to review the removal offense and *any prior of-*

*fense(s) committed* during the statutory period and resulting in a conviction. For this reason, we at the RIAC may need to determine your client’s correct date of admission, review your client’s “rap” sheet, and perhaps the accusatory instrument, to see whether the client has prior convictions, what they are, and whether the necessary continuous residence time has been legally cut off.

**Any contact with the criminal system within the first seven years of a client’s permanent residence must be carefully examined to determine his/her statutory eligibility for this waiver of deportation.**

\*This form of relief should not be confused with Cancellation of Removal for Non-permanent residents, which has different eligibility requirements, and is available to noncitizens who never had any status in the United States.

Another of the eligibility requirements for cancellation of removal is that an LPR never have been convicted of an “aggravated felony.”

So what is an aggravated felony? Basically, it is a specific offense set forth at 8 USC §1101(a)(43); INA §101 (a)(43). The list of aggravated felony crimes includes murder, rape, sexual abuse of a minor, arson (by US Supreme Court case law), and drug trafficking regardless of the sentence imposed. This latter offense includes any controlled substance offense in which sale or intent to sell is an element. Aggravated felonies also include a crime of theft (including possession of stolen property even if not by theft) where a one year sentence of incarceration is imposed; a crime of violence (as defined in 18 USC §16) where a one year sentence of incarceration is imposed; as well as the offenses of commercial bribery, counterfeiting, forgery, perjury or obstruction of justice, if a one year sentence is imposed regardless of actual time served. A crime of fraud where the loss to the victim is greater than \$10,000 is also an aggravated felony. The attempts of any of these crimes are treated the same as the underlying offense. They are also aggravated felonies.

If an LPR is statutorily eligible for cancellation of removal, s/he may apply for this relief before an immigration court in removal proceedings, and if relief is granted as a matter of discretion, it effectively waives the criminal grounds of removal with which the LPR has been charged, and allows him/her to remain in the US with LPR status. In order to prevail on an application for cancellation, LPRs must essentially prove that their equities outweigh criminal and other “bad” acts. The burden of proof is on the LPR applicant.

Equities, as set forth by the Board of Immigration Appeals in its leading decision on the issue, *Matter of C-V-T*, 22 I. & N. Dec. 7 (BIA 1998), include:

- Family ties within the U.S. (if lawfully present);
- Residency of long duration in the U.S. (especially beginning in childhood);
- Evidence of hardship to the respondent and family if deportation occurs;
- Service in Armed Forces (usually with an honorable discharge);
- History of employment (judges like to see the filing of income tax returns as well);
- Existence of property or business ties;

**CONT'D ON PAGE 4**

## No ICE Enforcement Allowed in NYS Courts

On December 15, 2020, Gov. Cuomo signed the “Protect our Courts” bill that had been passed in July by the State Legislature. The law prohibits Immigration and Customs Enforcement (ICE) from making a civil arrest while a person is going to, attending, or leaving court unless the officer presents a valid judicial warrant. Just before passage of the bill, the SDNY had enjoined ICE from conducting any civil arrests on the premises or grounds of New York State courthouses, as well as such arrests of anyone required to travel to a New York State courthouse as a party or witness to a lawsuit. This prohibition included the area surrounding a courthouse.



## **SAVE THE DATE!**

*Registration information coming soon*  
**February 19<sup>th</sup>, 2021 from 1-3 PM**

“UNDERSTANDING YOUR  
FOREIGN-BORN CLIENT: Refugee  
and Immigrant communities and their  
perspectives of the U.S. criminal justice  
system and court-ordered treatment”

1.0 Diversity credit  
1.0 Professional Practice credit

## Padilla IAC (cont'd)

- ◆ *People v. Lantigua*, 184 AD3d 80 (1st Dept) (4/30/20 DOI)

Error to summarily deny CPL 440.10 motion regarding IAC as to advice on immigration consequences. In unsworn letter, counsel admitted his flawed performance. The defendant received no relevant advice at the plea proceedings. The motion court should not have focused on likelihood that the defendant would have been convicted after trial. IAC claim may succeed even where a favorable outcome is unlikely. The defendant faced only a short sentence if convicted after trial and he had family here.

[http://nycourts.gov/reporter/3dsries/2020/2020\\_02557.htm](http://nycourts.gov/reporter/3dsries/2020/2020_02557.htm)

- ◆ *People v. George*, 183 AD3d 436 (1st Dept) (5/15/20 DOI)

The defendant's guilty plea subjected him to mandatory deportation. His 440 motion charged that defense counsel was ineffective in failing to make any effort to negotiate a plea with less severe immigration consequences. Plea counsel did not consider immigration impact, according to a supporting affidavit. Where the alleged IAC was the failure to negotiate an immigration-friendly plea, the defendant must show a reasonable probability that the People would have made such an offer. The defendant made such showing. Motion court abused its discretion in denying the 440 motion without a hearing.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02852.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02852.htm)

- ◆ *People v. Ni*, 184 AD3d 541 (COA) (6/25/20 DOI)

The defendant was convicted, after a jury trial, of 3rd degree grand larceny and other crimes. In a 440 motion, he asserted that his attorney advised him that a guilty plea to petit larceny would result in mandatory deportation. In fact, such a plea would only have rendered the defendant deportable with the possibility of discretionary relief. The defendant claimed that he rejected a favorable plea offer based on the misadvice. A hearing was necessary to determine whether counsel gave erroneous guidance and the defendant was thereby prejudiced.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03621.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03621.htm)

- ◆ *People v. Gomez*, 186 AD3d 422 (1st Dept) (8/14/20 DOI)

Direct appeal raising IAC claim. Affirmance. One judge dissented. At the plea hearing, the court asked, "do we have any *Padilla* issue here?" Defense counsel responded that he had spoken to the defendant "about all possible consequences." The defendant then pleaded guilty to the crime, an aggravated felony. The consequences were not "possible," but virtually certain. The majority failed to explain why this case was not governed by many previous decisions holding that the court could review an IAC claim where counsel represented that he advised the client of possible immigration consequences when the defendant, in fact, faced mandatory deportation.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_04518.htm](http://nycourts.gov/reporter/3dseries/2020/2020_04518.htm)

### Cancellation (cont'd)

- Existence of value and service to the community;
- Proof of genuine rehabilitation if a criminal record exists;
- Evidence attesting to a respondent's good character in general.

Balanced against the aforementioned equities are any and all negative factors, including the nature and underlying circumstances of grounds of removal, which means the judge will want to know what happened and why, and whether it will happen again; additional significant immigration violations; existence of a criminal record, and other evidence of bad character or undesirability. However, an immigration judge may not look to an applicant's criminal record in order to reassess his or her ultimate guilt or innocence.

It is also noteworthy that the cancellation waiver is only available once. If an LPR has received this form of relief in the past, s/he will not be eligible for it a second time, and will be deportable, absent any other form of relief for which s/he qualifies.