WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 2/ November 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.

CLE ON 11/17/2020

On November 17, 2020, from 2-4:30pm, the WNYRIAC, with the Erie County Assigned Counsel Program, is presenting a **FREE 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, Nick Texido from the Assigned Counsel Program, and Brian Whitney from the RIAC.

To register for this CLE, please contact:

rvalkwitch@assigned.org

A half hour of ethics credit will be offered.

More CLE info 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.

CRIMES OF DOMESTIC VIOLENCE LEAD TO DEPORTATION

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

Among the criminal offenses with troubling immigration consequences are those that involve domestic violence (DV) since only one such conviction at any time* will render a noncitizen deportable from the US, including a refugee or a lawful permanent resident (AKA "green card" holder or LPR). In addition, a DV offense may also be deemed a crime involving moral turpitude if it involves causing or threatening bodily harm or is a sex offense. In some cases, if a sentence of incarceration of one year or more is imposed, a DV offense could also be an aggravated felony under immigration law.

A deportable DV crime may include a conviction for a state felony, misdemeanor, or violation, as in the case of harassment pursuant to NYPL §240.26(1), in addition to violations of a protective order, child abuse, neglect or abandonment. Some DV offenses do not even require a conviction to render a noncitizen deportable. Consequently, Family Court findings may also be a problem. DV offenses could include such New York charges as assault, menacing, stalking, harassment, criminal contempt, endangering the welfare of a child, or a DWI offense involving Leandra's Law.

Under immigration law, a domestic violence offense is defined as a crime of violence committed against a spouse, ex-spouse, child, current or former domestic partner, boyfriend, girlfriend, an individual with whom the person shares a child in common, or by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government. A crime of violence is defined at 18 USC §16 as one that has an element the use, attempted use or threatened use of physical force.

A conviction of stalking also causes deportability under the domestic violence ground. The stalking can be against *anyone*; it is not limited to domestic relationships. *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018).

A DV offense for the violation of an order of protection, whether temporary or permanent, is a deportable offense *even if there is no conviction.* The mere issuance of an order of protection is not a ground of removal, though it may be deemed a negative factor when adjudicating discretionary immigration applications. The ground of removal in the statute reads:

"any alien who, at any time after admission, is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for

The Board of Immigration Appeals has held that the purpose of the "stay away" provision in an order of protection is to protect complainants from "further victimization," and therefore, violation of "stay away" orders are grounds of removal for actions that involve protection against "credible threats of violence, repeated harassment, or bodily injury."

*There is no statute of limitations in immigration law, however, only DV offenses committed after admission to the United States or after September 30, 1996 constitute grounds of removal.

whom the protection order was issued is deportable." (emphasis added); 8 USC §1227(a)(2)(E)(ii); Immigration and Nationality Act (INA) 237(a)(2)(E)(ii).

A particular concern with this ground of removal is that the statute appears to say that the only deportable acts are those in the protective order protecting against "credible threats, harassment, or bodily injury." Unfortunately, the case law has not developed favorably for noncitizen defendants. In the past, immigration judges would terminate removal proceedings if the noncitizen had merely violated the "stay away" portion of the OP. However, in a precedential decision issued by the Board of Immigration Appeals (BIA), *Matter of Medina-Jimenez*, 27 I&N Dec. 399 (BIA 2018), when it considered an Oregon case, the Board held that the record indicated that the noncitizen's conviction was "based on his guilty plea to an information charging that he 'did unlawfully and willfully disobey a restraining order filed under the Family Abuse [Prevention] Act of the Jefferson County Circuit Court by entering and remaining or attempting to enter and remain within 150 feet of [the protected victim's] residence.' Thus, the [immigration] court clearly determined that the respondent's underlying conduct involved a violation of the 'stay-away' provision in a protection order issued pursuant to the Oregon Family Abuse Prevention Act ("FAPA"), whose purpose is to protect victims against threats of domestic violence." Id. at 404. This rationale has been accepted by the Seventh, Ninth and Tenth Circuit Courts of Appeal.

Here is an example from an unpublished decision of the BIA in a removal proceeding from the federal detention facility in Batavia: The factual allegations charged against the noncitizen respondent by the Department of Homeland Security (DHS) were that, (1) on February 18, 2015, the respondent was enjoined under a protection order issued by the New York State Supreme Court in Buffalo, New York, valid until February 18, 2020; and (2) on November 14, 2016, the respondent was convicted by the Buffalo City Court of criminal contempt in the second degree, in violation of New York Penal Law section 215.50(03). The Board held that, based on the rationale set forth in *Matter Medina–Jimenez* and *Matter of Obshatko,* 27 I&N Dec. 173 (BIA 2017), the purpose of the "stay away" provision in the respondent's February 18, 2015 protection order was to protect the respondent's victims from further victimization, and is therefore one that "involves protection against credible threats of violence, repeated harassment, or bodily injury" within the meaning of section 237(a)(2)(E)(ii) of the Act. The noncitizen was thus ordered deported.

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New Cases

In *Santana v Barr*, No 18-2755 (2d 2020), the Second Circuit held that a conviction under NYPL 165.50, with a one year sentence of incarceration, is an aggravated felony. "Receipt of stolen property is a distinct aggravated felony independent of theft and the property received need not have been stolen by means of 'theft' as generically defined." The court also determined that an intent to deprive is inherent in the requirement that an offender "knowingly" possesses stolen property.

In *Rodriguez v Barr*, No. 18-1070 (2d 2020), the Court held that a conviction under NYPL §130.65 constitutes a "sexual abuse of a minor" aggravated felony since it requires both that the victim be under the age of eleven and that the perpetrator's contact with the victim be "for the purpose of gratifying sexual desire."

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

Careful About Destroying Expunged Marijuana Records:

Your client may need them!

When noncitizens seek a benefit under immigration law, they must always prove what happened subsequent to an arrest. While expungements of a marijuana violation conviction are now automatic under the law, this directive does not include record destruction. Expunged records remain available to the defendant or their counsel, and counsel or defendant may then request that they be destroyed. However, it is best NOT to request their destruction before considering the negative immigration consequences that could flow from the unavailability of such records.

In a recent editorial in *The New York Law Journal*, this important point was made about the expungement of marijuana convictions: while "[i]t may be tempting to … demand that court records be destroyed," there are reasons not to. "For example, an individual whose court records have been destroyed will have no way to prove the expungement to a background check company that continues to incorrectly report the case. *More important, individuals with immigration concerns who need to prove what happened to an expunged case will not be able to do so, potentially exposing them to further problems…* Anyone considering records destruction under the OCA policy … should at the very least consult an attorney experienced in the civil ramifications of criminal convictions before taking this irreversible step." (emphasis added).

A recent study published by SUNY at Buffalo found that immigration either reduces or has no impact on violent or property crimes. See, http://www.buffalo.edu/ubnow/stories/2020/10/undocumented-immigration-crime.html

For general information on New York marijuana convictions, see https://www.immigrantdefenseproject.org

On 11/18/20 from 3-4:30 PM,

The Immigrant Defense Project, a fellow RIAC, will offer a free CLE entitled

"*Crim-Imm 101, Understanding Immigration Status for Defense Attorneys.*"

Registration is required at https://zoom.us/webinar/register/6916029681530/WN_YhAiqzjHTy2JB5lGOE54sA

DV CRIMES CONT'D

Under *Padilla v Kentucky*, 559 U.S. 365 (2010), it is your ethical obligation to advise your noncitizen clients of the consequences of a plea. Failure to do so is deemed ineffective assistance of counsel. We are here to help. We encourage you to call the RIAC every time you represent a noncitizen. We will assist you to find a plea that eliminates or minimizes the immigration consequences to your client. To screen for potential citizenship and immigration issues, ask every client one simple question at the earliest opportunity (regardless of name, appearance, language or accent): *where were you born?*

Our contact information is on Page 1.

We wish you a Happy Thanksgiving!