WESTERN NEW YORK IMMIGRATION ASSISTANCE CENTER

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We are funded by the New York State Office of Indigent Legal Services (through Erie County) 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.

Immigration Issues for the Noncitizen Defendant

Beginning in early 2017, we hope to come around again to give new CLEs to the Public Defender Offices and Assigned Counsel in the 7th and 8th Judicial Districts. This year's CLEs will focus on criminal convictions and family law findings that may affect naturalization and other benefits available to non-citizens, the grounds of inadmissibility, and an ethics component about the duty to advise non-citizen defendants. The hope is to answer the questions that arose in the first round of CLEs which we began last April. We hope to see even more of you in 2017. In the meantime, please feel free to call or email us for technical assistance.

Contact Information

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Upcoming CLE Training for Family Court Practitioners

November 18, 2016 from 10:00 a.m. to 11:30 a.m. in the Sun Room of the Bar Association of Erie County, we will have our first CLE directed exclusively at those of you who appear in Family Court to cover the unique immigration issues relevant to your practice and representation of noncitizens. All those who offer mandated representation are welcome as well as all Family Court personnel. The CLE will be free. To register, email your contact information to mvaleri@ecbavlp.com.

HAPPY THANKSGIVING!

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WNY IMMIGRATION ASSISTANCE CENTER

A joint collaboration between the Erie County Bar Association Volunteer Lawyers Project, Inc. and The Legal Aid Society of Rochester, New York.

DEPORTABILITY AND INADMISSIBILITY ARE CONCERNS FOR ALL NONCITIZENS

By SOPHIE FEAL, ESQ., Director of The Immigration Program, ECBA Volunteer Lawyers Project, Inc.

The grounds of inadmissibility should never be overlooked when assessing whether a noncitizen may suffer immigration consequences as a result of a criminal plea of guilt. The grounds of inadmissibility may apply to long term lawful permanent residents (LPRs) when they return from trips abroad (even a day trip to Canada!), to a person seeking to study in or visit the U.S., to one applying to become a permanent resident th

rough his or her U.S. citizen spouse or through an employment opportunity.[1] The grounds of inadmissibility may also apply, even without a conviction, for drug-related conducted.

Here is a real-life example of how the grounds of inadmissibility might be a problem for an LPR:

John is 35 years old and has been an LPR of the U.S. for 15 years. He is offered a plea of forgery, in violation of NYPL Section 170.20, a Class A misdemeanor. He is *properly* advised that although forgery is clearly a crime of moral turpitude (CMT) given the existence of an element of intent to defraud, such a crime will only lead to his deportation if it was committed within five years of admission and he has no prior CMT.[2] Based on this advice, he takes the plea. He is sentenced to seven months of incarceration. John, being a typical resident of WNY, travels back and forth from Canada. He has no problems doing this several times over a period of two years. One day, however, an ambitious inspector at the Peace Bridge starts asking some hard questions about John's life, including, "have you ever been arrested?" The next thing you know, John is referred to secondary inspection where his conviction is discovered. He is placed in removal proceedings in immigration court based not upon being deportable, but based upon being inadmissible.

Why is John inadmissible and not deportable? Because the law for each is different.

The law on grounds of deportation for a CMT is stated above.

The law on grounds of inadmissibility is broader and is as follows: A person convicted of *one* crime of moral turpitude at any time is inadmissible from the U.S. *unless* 1) the crime was committed when the noncitizen was under 18 years of age and more than five years before the application for admission; or 2) if the maximum possible sentence offense is not more than one year *and* the noncitizen is not sentenced to more than six months. As such, John's conviction is not an exception to the rule. He was sentenced to 7 months of incarceration.

Similarly, any controlled substances is a ground of inadmissibility without exception. A one-time simple possession of 30 grams or less of marijuana conviction is an exception only to the ground of deportability.

A "simple" driving while intoxicated conviction (e.g. no Leandra's law violation), on the other hand, is not currently a ground of deportation or inadmissibility, even though Canada may deem such convictions as grounds of inadmissibility. However, this is a problem for United States citizens seeking to enter Canada, not the reverse. On the other hand, we are aware that the U.S. State Department is revoking the nonimmigrant visas of those convicted of DWI and related offenses. This has been an issue for foreign students in our region. Therefore, defense counsel may want to warn those in the country on nonimmigrant visas of these serious consequences if they plead to a drunken driving charge.

Finally, the grounds of inadmissibility include conduct for which no conviction is even required, such as for noncitizens suspected of drug abuse or drug trafficking, as well as prostitution.

A noncitizen may be found inadmissible if the Government has "reason to believe" he or she is either a drug abuser or a drug trafficker. Clearly, this arises when there are past drug convictions, but this provision made headlines recently when a Canadian national who was authorized to use marijuana medically, and had done so for years, admitted as much at the U.S. border.[3] He was deemed permanently inadmissible. Another case arose when the car of a Canadian citizen was searched at the U.S. border and authorities found an envelope labeled, "weed money."[4] Though the envelope contained neither marijuana nor money, the driver was barred from entering the U.S. based on the aforementioned "reason to believe" provision. This provision will undoubtedly cause more problems for noncitizens seeking admission to the U.S. as more jurisdictions legalize the use of marijuana, both medicinally and recreationally, in contrast to U.S. federal law which holds that marijuana remains an illegal Schedule I controlled substance and is controlling under immigration law.

When do the grounds of inadmissibility apply? The easiest response is whenever a noncitizen is making an application for admission to the U.S. This includes going through the inspection booths at the Peace Bridge, or at JFK, or applying for any visa at a U.S. Consulate abroad, or when making an application for permanent residence at an office of U.S. Citizenship and Immigration Services.

More specifically, however, the statute says that an LPR is not seeking admission *unless* he or she has been absent from the U.S. more than 180 continuous days, has engaged in illegal activity after having departed the U.S., has entered illegally or, has committed an offense identified in Section 212(a). See, Immigration and Nationality Act §101(a)(13); 8 USC §1101(a)(13). It is that last provision that caused John a problem. Section 212(a) generally states that CMTs, controlled substances offenses, as well as terrorists, human traffickers, Nazis, and those involved in genocide, cannot be admitted (though the list is even longer) to the U.S. Waivers may be available for some of the grounds of inadmissibility, but not all. For example, a controlled substance conviction is virtually unwaivable.

Footnotes

[1]The grounds of inadmissibility are found at Immigration and Nationality Act (INA) §212; 8 USC §1182
[2]The grounds of deportation are found at INA §237; 8 USC §1227
[3]The Buffalo News, "Canadian Officials Slam Marijuana Policy on U.S. Border", September 13, 2016
[4]Id.