WESTERN NEW YORK IMMIGRATION ASSISTANCE CENTER

December 2016
Volume 1, Issue 6

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

In the 8th Judicial District:

SOPHIE FEAL, Director of the Immigration Program at ECBA Volunteer Lawyers Project, Inc., 716.847.0662 x 314 or sfeal@ecbavlp.com

DANIEL JACKSON, Immigration Staff Attorney at ECBA Volunteer Lawyers Project, Inc., 716.847.0662 x 333 or djackson@ecbavlp.com

In the 7th Judicial District:

WEDADE ABDALLAH, Immigration Program Director at The Legal Aid Society of Rochester, New York at 585.295.6066 or wabdallah@lasroc.org

JENNIFER MORGAN, Immigration Staff Attorney at The Legal Aid Society of Rochester, New York at 585.295.5761 or jmorgan@lasroc.org

❄ *HAPPY HOLIDAYS* ❄

In this issue

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.

SUMMARY OF CRIMINAL IMMIGRATION CASES

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

As 2016 draws to a close, the WNY Immigration Assistance Center would like to thank the public defense community for supporting us during our first year. Below is a summary of several cases that may be of interest to you in representing noncitizens. Some of them have been distributed in the materials at our CLEs.

FEDERAL COURTS

Oral argument was held on November 9th before the U.S. Supreme Court in Lynch v. Morales Santana, Docket No. 15-1191, a case arising from the 2d Cir., to address the questions of whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection; and (2) whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

In Lynch v. Garcia Dimaya, a case arising in the 9th Circuit, the U.S. Supreme Court granted certiorari to address the issue of whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague. This is a critical issue because 18 USC §16 defines a crime of violence. A crime of violence with a sentence of one year or more imposed is an aggravated felony under immigration law. The language under scrutiny defines a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." For a brief time, many years ago, this provision was used by the Board of Immigration Appeals to hold that driving while intoxicated was a crime of violence, though that reasoning was overruled in the federal courts.

The U.S. Supreme Court has granted certiorari in Esquivel-Quintana v. Lynch. The case presents the question of whether a conviction for consensual sexual intercourse between a 21-year-old and someone who is almost 18 constitutes a "sexual abuse of a minor" aggravated felony. Under federal law, the Model Penal Code, and the laws of 43 states and the District of Columbia, the conduct leading to Esquivel-Quintana's conviction is lawful. Esquivel-Quintana has a California conviction. Seven states have laws criminalizing consensual sex between a 21-year old and someone under 18: Arizona, California, Idaho, North Dakota, Oregon, Virginia, and Wisconsin.

Luna Torres v. Lynch, 578 U.S. -- (2016) In a decision by Justice Kagan, the Supreme Court held that attempted arson 3rd degree, pursuant to NYPL 110.150.10, is an aggravated felony under immigration law.

Gill v. INS, 420 F.3d 82 (2d Cir. 2006) Since a person cannot intend to commit a reckless act, an attempted reckless assault pursuant to NYPL 110.120.05(4) could not constitute a crime involving moral turpitude even though the completed crime itself is CIMT.

BOARD OF IMMIGRATION APPEALS

In Matter of Obeya, 26 I&N Dec. 856 (BIA 2016), the Board held that petit larceny in violation of section 155.25 of the New York Penal Law, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded, is categorically a crime involving moral turpitude. Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016), followed.

Matter of Zaragoza, 26 I&N Dec. 814 (BIA 2016) The offense of criminal copyright infringement in violation of 17 U.S.C. § 506(a)(1)(A) (2012) and 18 U.S.C. § 2319(b)(1) (2012) is a crime involving moral turpitude.

Matter of Mendoza, 26 I&N Dec, 703 (BIA 2016) Endangering the welfare of a child under NYPL 260.10(1), which requires knowingly acting in a manner likely to be injurious to the physical, mental or moral welfare of a child, is a deportable offense under immigration law as a "crime of child abuse, neglect or abandonment."

Matter of Estrada, 26 I&N Dec. 749 (BIA 2016) To determine whether an offense is a deportable "crime of domestic violence," an immigration court may inspect the relationship between the offender and the victim by looking at "all reliable evidence," including documents in the formal record of conviction. This includes police reports if they are reliable.

Matter of Tavarez, 26 I&N Dec. 171 (BIA 2013) A conviction for 18 U.S.C. § 32(a)(5) (2006) for interference with a police helicopter pilot by shining a laser light into the pilot's eyes while he operated the helicopter, is a removable offense as a criminal activity that endangers public safety.

Matter of Strydom, 25 I&N Dec. 507 (BIA 2011) It is a deportable offense to violate that portion of a protective order which protects the victim against actual violence, harassment, bodily injury or credible threats of such. The "no-contact provision" in a temporary protection order is one that involves protection against credible threats of violence, repeated harassment, or bodily injury.

Matter of Solon, 24 I&N Dec. 239 (BIA 2007) Assault pursuant to NYPL 120.00(1), which requires specific intent and physical injury, is a deportable crime involving moral turpitude.

STATE COURTS

People v. Peque, 22 NY3d 168 (2013) Since deportation is "a plea consequence of such tremendous importance," due process compels a trial court to advise a noncitizen criminal defendant that deportation may ensue from a guilty plea." However, the trial court's failure to advise does not entitle the defendant to automatic withdrawal or vacatur of the plea. To do this, the defendant would have to establish "the existence of reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial."

People v. Bennett, 139 A.D.3d 1350 (2016) Case remanded to Supreme Court for a hearing on a motion to vacate pursuant to CPL 440.10 to determine whether defense counsel had assured the noncitizen defendant that he would not be deported because of his plea even if the defendant did not provide an affidavit from former defense counsel corroborating such a claim.

People v. Brignolle, 41 Misc.3d 949 (2013); People v. Kollie, 38 Misc. 3d 865 (2013); People v Muniz, 29 Misc. 3d 466 (2010) CPL 216.40(4)(b) A court may determine that a plea of guilty in a treatment court is not required "based on a finding of exceptional circumstances." Exceptional circumstances exist when the guilty plea is likely to result in "severe collateral consequences." Deportation is such an exceptional circumstance.

In re Jose H.-, --- N.Y.S. 3d ---, 2016 WL 6427354 (N.Y. Supp.) 2016 N.Y. Slip. Op. 26349 A New York youthful offender proceeding does not involve a "juvenile court" on which the youth is "dependent" so as to allow the court in such a proceeding to issue the required predicate order for Special Immigrant Juvenile Status.

Matter of Jimenez v Perez, 2016 NY Slip Op 07959 (November 23, 2016). Family Court erred in dismissing petition in which the mother sought to be awarded sole custody of the subject child. A natural parent may seek legal custody of his or her child irrespective of whether the natural parent is presumptively entitled to custody of the child. Thus, the mere fact that paternity has not been established for the putative father does not preclude the mother's custody petition or the issuance of an order, inter alia, making specific findings so as to enable the subject child to petition the United States Citizenship and Immigration Services for SIJS pursuant to 8 USC § 1101(a)(27)(J).