WESTERN NEW YORK IMMIGRATION ASSISTANCE CENTER

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.

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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

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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.

WHAT'S GOING ON?!

IMMIGRATION LAW AND POLICY UNDER THE NEW FEDERAL ADMINISTRATION

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

A major concern these days is what will happen to laws and policies affecting immigrants and other noncitizens under the new federal administration given the rhetoric we heard during the election. What is clear in the whirlwind days since the inauguration is that the new president is implementing a host of his own Executive Actions consistent with his campaign promises. On January 25th, he signed two executive orders with severe restrictions on the admissibility of refugees and a temporary halt on the issuance of visas to those from several Muslim countries, which has gained immense media attention very recently. In addition, and also by Executive Action, President Trump ordered that federal resources be allocated to build a wall separating the U.S. from Mexico, build more detention space for noncitizens, and hire more immigration enforcement personnel. https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.b2c21431be86

Nonetheless, an area of great concern for those of us in crim -imm practice is the enforcement provisions of immigration law. The Immigration and Nationality Act (INA) affords noncitizens in removal proceedings the right to be heard by an immigration judge and several other due process rights, and unless this law is changed by Congress, it will remain the law. However, there are several policies that are set by the Administration related to the INA's enforcement provisions. For example, the previous Governments exercised some degree of prosecutorial discretion in deciding who was placed into removal proceedings and who was actually removed from the U.S. There was a clear outline of the priorities for detention and removal, as well as the factors that may make one eligible for an exercise of favorable discretion, but as this was only policy, and as such, could easily be changed. A foundation for such change was laid in the Executive Order of January 25th https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements which included an expanded definition of who is a priority for removal. "Trump's order focuses on anyone who has been charged with a criminal offense, even if it has not led to a conviction. He also includes, according to language in the order, anyone who has 'committed acts that constitute a chargeable criminal offense,' meaning anyone the authorities believe has broken any type of law — regardless of whether that person has been charged with a crime." https://www.nytimes.com/2017/01/26/us/trump-immigration-deportation.html?_r=0

The problematic language specifically is as follows:

Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

(a) Have been convicted of any criminal offense;

(b) Have been charged with any criminal offense, where such charge has not been resolved;

(c) Have committed acts that constitute a chargeable criminal offense;

(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(e) Have abused any program related to receipt of public benefits;

(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

The Executive Action by former president Obama that is perhaps most discussed these days, and has the most potential to cause extraordinary hardship if eliminated, is the program called Deferred Action for Childhood Arrivals (DACA), which protects from deportation people who came to the U.S. before the age of sixteen, are high school graduates or have served in the U.S. Armed Forces, and have no criminal convictions. For the past several years with DACA benefits, these young people, who were already quite "Americanized," have had employment authorization and with this opportunity have been able to further entrench themselves into the fabric of U.S. society by attending university, securing good jobs and building their own families with spouses and children born in the U.S. It is unclear what would happen to the 750,000 current DACA recipients were the Executive Action abolished, and whether deportation proceedings would follow or not. *See*, http://abcnews.go.com/Politics/happen-daca-recipients-donald-trump/story?id=43546706. Most recently, however, NPR reported that the Trump Administration seeks a favorable solution for those granted DACA. This remains to be seen. *See*, http://www.npr.org/2017/01/22/511103591/big-change-as-trump-administration-pledges-to-find-long-term-solution-for-daca

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handle any massive influx of potential deportees remains a looming question overall when we consider deporting more and more people from the U.S. *See generally*, https://www.washingtonpost.com/opinions/why-trumps-plan-to-deport-criminal-noncitizens-wont-work/2017/01/03/b68a3018-c627-11e6-85b5-76616a33048d_story.html. Moreover, the Trump Administration has called for a federal hiring freeze, which could mean no new immigration judges will be hired in the foreseeable future. *See*, https://www.nytimes.com/2017/01/23/us/politics/federal-hiring-freeze.html?_r=0. On the other hand, as stated above, the Administration has called for hiring more enforcement agents, as well as deploying more judges to detention facilities to enhance removal efforts. Where these judges will come from is unclear.

As well, over the years, the Government has not widely enforced a provision of the INA against those who are encountered in the U.S. without documentation within two years of their unlawful arrival. Under the language of the law, these people are subject to "expedited removal," whereby they may be summarily deported without the opportunity to be heard in immigration court. There is now concern that under the latest Executive Order, the new Administration has expanded its enforcement power under this provision and place more or all people who fall within the mandate of this provision into expedited removal. Clearly, this would impact a noncitizen's ability to obtain relief in immigration court.

Recently, a complaint was filed against the Department of Homeland Security for turning away asylum seekers at the southern border, an action which is contrary to the Government's legal obligations under domestic and international treaties. Advocates are concerned that the border "crackdown" expressed by the new Administration will lead to more such actions. *See*, https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html?utm_term=.297dbafb447b

Finally, the practice of creating sanctuary cities across the U.S. gained momentum after the election. On January 19th, New York State A.G.'s Civil Rights Bureau set forth guidelines by which local law enforcement agencies could limit their participation in federal immigration enforcement activities in several ways, including by: (1) refusing to enforce non-judicial civil immigration warrants issued by Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP"), (2) protecting New Yorkers' Fourth Amendment rights by denying federal requests to hold uncharged individuals in custody more than 48 hours, (3) limiting access of ICE and CBP agents to individuals currently in custody, and (4) limiting information gathering and reporting that will be used exclusively for federal immigration enforcement. *See*, https://ag.ny.gov/sites/default/files/guidance.concerning.local_.authority.particpation.in_.immigration.enforcement.1.19.17.pdf. However, as set forth in the *Washington Post* article attached above, President Trump has also announced an Executive Order eliminating sanctuary cities, and will impose sanctions on cities that are non-compliant with federal immigration enforcement efforts.

Additionally, the requirement to register those of Muslim faith already present in the U.S. was raised during the election. This is not a new idea given that after 9/11, the Government instituted the National Security Entry-Exit Registration System (NSEERS), a program which required certain Muslim men who were not U.S. citizens or permanent residents to register their identities with the immigration authorities. NSEERS created a great deal of insecurity and panic in the Muslim community at the time. While the system was abandoned after it failed to identify a single person associated with terrorism, and President Obama recently eliminated the regulations that implemented the program, NSEERS created a model that theoretically could be again implemented. http://www.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/

So far, what we also know is that on January 20th, retired Marine Corps General John F. Kelly was sworn in as the Secretary of Homeland Security. As Secretary of Homeland Security, he leads the third largest federal department in the United States that includes the Federal Emergency Management Agency, Transportation Security Administration, U.S. Coast Guard, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, and the United States Secret Service. According the *Washington Post*, Kelly has an "open mind" about DACA, is not clearly in favor of a Muslim registry, and says this about The Wall: "a physical barrier in and of itself will not do the job'' and technology such as drones and sensors are also needed to secure the border." https://www.washingtonpost.com/world/national-security/john-f-kelly-confirmed-as-homeland-security-secretary/2017/01/20/439bdde6-de90-11e6-918c-99ede3c8cafa_story.html?utm_term=.b63f5feac231