

Providing legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York. Funded by the NYS Office of Indigent Legal Services (through Erie County).

# Immigration Issues for the Noncitizen Defendant

## Contact Information

We are funded by the New York State Office of Indigent Legal Services 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.

Call us. We want to hear from you. In the 8th Judicial District, contact attorney Sophie Feal at 716.847.0662 x 314 or [sfeal@ecbavlp.com](mailto:sfeal@ecbavlp.com). In the 7th, contact attorney Wedade Abdallah at 585.295.6066 or [wabdallah@lasroc.org](mailto:wabdallah@lasroc.org).

## Upcoming CLE Trainings

**SAVE THE DATE: 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 and the CLE will be free. We hope to send out a flyer soon with registration information. If you know someone interested in this program who is not yet on our email list, have them email their contact information to [mvaleri@ecbavlp.com](mailto:mvaleri@ecbavlp.com).

**HAPPY HALLOWEEN!**



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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.



## Mitigation of Criminal and Immigration Consequences for Victims of Human Trafficking

By SOPHIE FEAL, ESQ., Director of Immigration Program, ECBA Volunteer Lawyers Project, Inc. and WEDADE ABDALLAH, ESQ., The Legal Aid Society of Rochester, New York

Human Trafficking is a form of modern day slavery in which vulnerable people, both U.S. citizens and noncitizens, are threatened or coerced into forced labor or the sex industry. Trafficking is defined as the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.<sup>1</sup> Trafficking victims may enter the criminal justice system not as victims, but as defendants. A person may appear to be voluntarily engaging in crimes such as prostitution, drug sales or credit card fraud, when in reality they are being forced by traffickers to engage in these unlawful activities. For those representing noncitizens, identifying your client as a victim of trafficking could result in mitigation of criminal consequences or lead to immigration relief that allows them to remain in the United States. This requires careful screening of your client's immigration status, criminal charges and possible victimization.

Identifying survivors of trafficking may be a difficult task. Most are reluctant to disclose their abuse or identify their traffickers for fear of retribution, and noncitizens also fear deportation. Victims are often threatened with harm to themselves or family members, or in the latter case, disclosure of their activities to immigration authorities, if they speak out about their situation. They also suffer psychologically which may make them difficult to communicate with. Outward signs that defense counsel should look for include, but are not limited to:

- A person who is not in control of their identification or travel documents;
- A person always accompanied to court and meetings by an individual who insists on being present during your discussions;
- A person who may have bruises or display other signs of physical abuse;
- A person who indicates that they owe money to their employer, or their employer withholds wages.<sup>2</sup>

Key questions to ask a client in private could be: "what would happen if you left your job?" "Are there rules about coming and going to work, whom you talk to while at work, or what you can say to them?" "Do you have to do different work than what you were promised when you accepted the job?" And for noncitizens in particular, "Can you tell me about your travel to the United States?" Most importantly, if a survivor of trafficking or related

violence is identified, securing their safety and basic needs, such as housing and health care, may be the first goal. There are organizations in Western New York, such as the International Institute of Buffalo, who offer such services.

While NYCPL §440.10(1)(i) offers the possibility of vacating a prostitution conviction (and it has been used for other offenses as well)<sup>3</sup> if a defendant is the victim of trafficking, it remains unclear in immigration law whether this procedure will be deemed merely rehabilitative (vs. substantively or procedurally defective), and therefore, still a conviction for immigration purposes. Hence, if such a vacatur is sought for a noncitizen, it may be essential that the attorney focus the argument in favor the vacatur on the defect in the underlying conviction, and request that the judge sign such order with the phrase vacated "on the merits." Otherwise such a vacatur may not result in a favorable immigration disposition.<sup>4</sup> The statute also requires that one seeking to vacate under this provision bring the motion with due diligence after the accused has ceased to be a trafficking victim or sought services as a victim of trafficking.<sup>5</sup>

Defense counsel should also be aware that if a noncitizen client is identified as a trafficking survivor and is willing to cooperate or offer information about their trafficking situation to law enforcement they may be eligible for certain immigration benefits. Immigration authorities have the ability to grant benefits to victims of human trafficking, or those who are the victims of certain serious enumerated crimes, and who assist law enforcement with the investigation or prosecution of these crimes. Benefits could include the ability to remain in the United States and work, or sponsorship for a visa that may create a path to permanent residence. If your client already has legal status in the United States, being identified as a victim may secure a disposition that does not result in their removal from the United States. When representing a noncitizen who agrees to assist law enforcement it may be important to negotiate immigration benefits as part of any resolution.

If you believe you have a client who may be a survivor, the WNY Immigration Assistance Center can help you assess your client's case for mitigation of criminal consequences and potential immigration benefits. It is important for you to speak to one of our attorneys before reaching out to law enforcement or the district attorney on these issues.

For those with greater interest in the subject, here is a link to the June 2016 U.S. Department of State's worldwide [Trafficking in Persons](http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm) Report: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

## Footnotes

<sup>1</sup>Trafficking Victims Protection Act (22 USC §7102[9])

<sup>2</sup><https://www.ice.gov/human-trafficking>

<sup>3</sup>See e.g. *People v L.G.*, 972 N.Y.S.2d 418, 424 (Crim. Ct. 2013).

<sup>4</sup>*Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (when a conviction of a crime involving moral turpitude is vacated solely on the basis of an immigration hardship or rehabilitation or other such "post-conviction events," the conviction is not eliminated for immigration purposes.) On the other hand, the Court of Appeals for the Second Circuit has held that vacatur under other subdivisions of NYCPL §440.10 are a nullity for immigration purposes. *Johnson v. Ashcroft*, 378 F.3d 164 (2d Cir. 2004).

<sup>5</sup>*People v L.G. supra* at 427