

*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

## Welcome

Welcome to the first issue of the Western New York Immigration Assistance Center newsletter. As you may already know, we've been 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).

Criminal defense attorneys are now required 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 figure out 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).**

## CLE Trainings

Thank you to all who attended our Criminal Immigration CLE trainings this Spring. Niagara County, we will see you on September 16th in the third floor Jury Room of the Lockport Courthouse at 1:00 p.m. All NYS public defenders and assigned counsel attorneys are invited to attend. **To register, please email your name, address and affiliation to [mvaleri@ecbavlp.com](mailto:mvaleri@ecbavlp.com).** The trainings are free of charge and provide you with two hours of CLE credit.

Our first round of trainings covered the basics of what constitutes a conviction and what convictions trigger removal, etc. We will be reiterating some of this information in our newsletters. We'd also like to hear from you as to what immigration topics you are most interested in hearing about for round two of our trainings and future newsletters. Please email any comments or suggestions to [mvaleri@ecbavlp.com](mailto:mvaleri@ecbavlp.com).



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- Good Moral Character

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



## What is an Aggravated Felony under U.S. Immigration Law?

BY SOPHIE FEAL, ESQ.  
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An aggravated felony under immigration law is not necessarily a felony. It may include a misdemeanor, such as a petty larceny. It is not necessarily an offense with an "aggravating" factor either. It is a term created by Congress which has very serious implications for noncitizens, and should be avoided by criminal defense attorneys representing noncitizens if at all possible.

The lengthy list of what criminal offenses constitute aggravated felonies is contained at 8 USC §1101(a)(43). Clearly, some of these, like murder, rape, child pornography and sexual abuse of a minor are serious crimes, but others, such as drug "trafficking" are much more commonplace and may be, arguably, minor offenses. A drug "trafficking" crime, for immigration purposes, includes any controlled substance offense which has as an element the sale of

*Torres v Lynch*, 136 S. Ct. 1619 (2016), recently found that the NYS attempted arson 3<sup>rd</sup> is an aggravated felony.

Convictions for aggravated felonies are particularly harsh for noncitizens, especially lawful permanent residents (LPR) and refugees, who reside permanently in the US and have often established strong ties here, because they disqualify these individuals from the most generous forms of immigration relief to avoid removal. For example, an LPR who has had such status for a minimum of five years, and has resided in the U.S. after a lawful admission for at least seven years before committing a removable offense can seek a cancellation of removal waiver so long as he or she is *not* an aggravated felon. The waiver from removal allows an immigration court to balance the equities against the criminal offense, and determine whether the permanent resident deserves a second chance to remain in this country. If this relief is not statutorily available, then the immigration court has no reason to hear about the permanent resident's favorable equities, including

*"Aggravated felonies have very serious implications for noncitizens and should be avoided by criminal defense attorneys representing noncitizens if at all possible."*

any quantity of any drug or the attempt, conspiracy or intent to sell such drug, with the possible exception under some circumstances, of the equivalent of a federal misdemeanor sale of marijuana.<sup>1</sup> Therefore, it is critical that criminal defense counsel, for example, avoid pleas to CPCS 3<sup>rd</sup> (NYPL 220.16), subdivision (1) and those that immediately follow which have sale elements, and choose instead among the last subdivisions which address only the weight of the controlled substance.

In addition, a theft offense (including the receipt of stolen property), a crime of violence (as defined by 18 USC §16<sup>2</sup>), commercial bribery, counterfeiting, forgery, or a crime of obstruction of justice or perjury if a one year sentence of imprisonment is imposed, will also constitute an aggravated felony. With these offenses, it is essential that defense counsel agree only to a maximum term of imprisonment of 364 days if no non-removable offense may be pled to. Similarly, an offense involving fraud or deceit is an aggravated felony if the loss to the victim exceeds \$10,000. And the list goes on. The U.S. Supreme Court, in a legally troubling decision, *Luna*

the existence of US citizen or LPR family, an employment history, rehabilitation, fear of returning to the native country, etc. And there is no exception for those who have been LPRs since childhood or have citizen spouses and/or kids.

Similarly, a noncitizen is barred from receiving asylum if he or she is convicted of an aggravated felony. This means a relatively recently arrived refugee, who does not qualify for the aforementioned cancellation of removal because he or she has not yet accrued the required five years of LPR status or seven years of lawful residence, cannot apply for asylum as relief from removal to a country where they fear persecution. In fact, there are extremely limited forms of relief available to the noncitizen with an aggravated felony conviction, if any at all.

Please contact the Western New York Immigration Assistance Center for guidance if your noncitizen client faces a plea to an aggravated felony so we can preserve his or her right to relief from removal, if possible. Contact information located on first page.

## Footnotes

<sup>1</sup>Under the federal Controlled Substances Act (CSA), "distributing a small amount of marijuana for no remuneration shall be treated as" simple possession, *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). The relevant definition of "sale" under the New York Penal Law is: "to sell, exchange, give or dispose of to another, or to offer or agree to do the same." Penal Law § 220.00(1) (emphasis added). This means that some conduct proscribed by § 221.40 could be punishable as a felony under the CSA, but other conduct proscribed by the statute could be punishable as a misdemeanor. See also, *Martinez v. Mukasey*, 551 F.3d 113 (2<sup>nd</sup> Cir. 2008).

<sup>2</sup>A crime of violence under 18 USC §16 is defined as one that has as an element the use, attempted use or threatened use of physical force or a felony that by its nature involves a substantial risk of physical force.