

**PROTOCOL  
FOR THE DEVELOPMENT  
OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

**BY**

**NEW YORK STATE  
DEFENDERS ASSOCIATION**  
194 Washington Ave., Suite 500  
Albany, NY 12210  
(518) 465-3524  
[www.nysda.org](http://www.nysda.org)

**IMMIGRANT DEFENSE PROJECT**  
3 West 29<sup>th</sup> St., Suite 803  
New York, NY 10001  
(212) 725-6422  
[www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)

**PETER L. MARKOWITZ**  
**ASSISTANT CLINICAL PROFESSOR OF LAW**  
**CARDOZO SCHOOL OF LAW**

# **IMMIGRANT DEFENSE PROJECT AND NEW YORK STATE DEFENDERS ASSOCIATION**

## **PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN**

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### **PREFACE**

With the increasing entanglement of immigration and criminal law it has become impossible to competently practice in either arena without some knowledge or institutional resources in the other. As a result, professional responsibility standards now require that defenders must, at minimum, be able to accurately assess the immigration consequences of contemplated dispositions and suggest reasonable alternative disposition to mitigate those consequences.<sup>1</sup> This poses a considerable challenge for defenders with significant caseloads and limited resources who are practicing in offices where personnel are already stretching to do more with less. The problem is exacerbated further by the unique complexity and rapidly evolving doctrine related to the immigration consequences of criminal convictions. The Immigrant Defense Project (IDP) and New York State Defenders Association (NYSDA) have developed this Protocol to aid New York State defenders in meeting these challenges.

In order to prepare this Protocol, IDP AND NYSDA interviewed representatives from leading defender offices across the country to survey and assess the range of approaches that such offices have brought to delivering vital immigration advice in the

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\*Peter L. Markowitz is an Assistant Professor of Clinical Law at Benjamin N. Cardozo School of Law where he directs the Immigration Justice Clinic. Prior to entering academia Professor Markowitz worked at The Bronx Defenders, an innovative public defender office in Bronx, New York. At The Bronx Defenders, Professor Markowitz developed and ran a full service in-house immigration project where he co-counseled criminal cases with noncitizen defendants, represented such defendants in subsequent removal proceedings, and worked on systemic reform efforts to address government abuses at the intersection of criminal and immigration law. This protocol was developed in consultation with the staff of the New York State Defenders Association, the Immigrant Defense Project, and the criminal-immigration experts listed in Appendix A.

<sup>1</sup> See New York State Bar Association, Standard for Providing Mandated Representation, Standard 1-7(a)(v) & (e)(v) (2005); New York State Defender Association, Standards for Providing Constitutional and Statutorily Mandated Legal Representation in New York State, Standard VIII(A)(7) (2004); ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) & commentary (3d ed. 1999); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 6.2(a)(3).

defender context. In the sections that follow we separately consider the various components that all defender offices should include in developing their approach to delivering these vital services: the advisal component; the information gathering component; the staff development component; the language access component; and the direct immigration service or referral component. As to each of these components, we present the range of approaches various offices have utilized and we identify key considerations in choosing between the various approaches. Where possible, we also identify best practices; however, we remain cognizant of the fact that what works best for one office or program may not work best for another. Each institutional defender office or assigned counsel program must develop an Immigration Service Plan that will work best in its unique environment. This Protocol is intended as a tool to assist in that inquiry, and the final section discusses how to make that assessment, how to get started implementing an Immigration Service Plan, and how an office with limited resources can phase in such a plan under realistic financial constraints.

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## I. INTRODUCTION

New York is the state with the second largest foreign born population in the United States, both by percentage and by sheer numbers.<sup>2</sup> With over 4 million foreign born residents, such residents comprise over twenty percent of the state population.<sup>3</sup> Half of those foreign born individuals are citizens who are not at risk of deportation but that leaves a full ten percent of the state population that could be at imminent risk of deportation any time they get arrested.<sup>4</sup> Since research has demonstrated that noncitizens offend at roughly the same rate as the general population,<sup>5</sup> we can expect that at least one in ten of the clients serviced by New York State defenders is a noncitizen at risk of deportation. While this percentage certainly varies widely by county, significant immigration populations are not only found in New York City. Immigrants are increasingly making their homes in suburban settings and have had a significant presence in rural agricultural counties for some time.<sup>6</sup> Defender offices in every corner of the state are likely to encounter significant, though varying, percentages of immigrants among their clientele.

Public defenders have always serviced immigrant clients; however, the increasing entanglement of criminal and immigration law over the last two decades makes it more important than ever for defenders to educate themselves and their clients on the

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<sup>2</sup> U.S. Census Bureau, 2007 American Community Survey (R0501. Percent of People Who Are Foreign Born: 2007; Selected Social Characteristics in the United States: 2007; New York ACS Demographic and Housing Estimates: 2007).

<sup>3</sup> *Id.* The 2007 American Community Survey determined that there were 4,205,813 foreign born residents in New York, representing 21.8% of the general population.

<sup>4</sup> *Id.* The 2007 American Community Survey determined that 52.3 percent of New York's foreign born population are citizens.

<sup>5</sup> See Michael Kiefer, *Migrant Rate of Crime Even with Numbers*, THE ARIZONA REPUBLIC, (Feb. 25, 2008) (reporting that a review of criminal justice statistics in Maricopa County, which includes Phoenix, revealed that undocumented immigrants are charged with criminal activity at the same rate as the general population); Laura Hickaman and Marika J. Suttorp. *Are Deportable Aliens A Unique Threat to Public Safety? Comparing the Recidivism of Deportable and Nondeportable Alien*, 7 CRIMINOLOGY AND PUBLIC POLICY, Num. 1 (2008) (relying upon data from Los Angeles County and finding that rearrest rates are the same for noncitizens with immigration violations as compared with the general noncitizen population). *But cf.* Kristin Butcher and Anne Morrison Piehl, *Crime, Correction and California: What Does Immigration Have to Do With It?*, 9 CALIFORNIA COUNTS, Num. 3 (Feb. 2008) (relying upon data from California to demonstrate that noncitizens have significantly lower rates of incarceration than the general population).

<sup>6</sup> According to the U.S. Census 2007 American Community Survey 34,456 individuals – or 1.71% of New York State's noncitizens - are residing in rural areas (U.S. Census Bureau, 2007 American Community Survey). The U.S. Census Bureau's Current Population Survey (CPS) estimates that while the overall numbers of the foreign-born population in the United States are greater in urban areas, the foreign-born population is growing at a faster rate in rural areas (CPS 2003). See also McGaha and Kudlowitz, *Immigration and Housing in Rural America*, Housing Assistance Council Report, Washington, DC, (September 2007); Leif Jensen, *New Immigrant Settlements in Rural America: Problems, Prospects and Policies*, Carsey Institute Report, Vol. 1 No. 3, University of New Hampshire (2006); Davey, Monica. *Immigration, and Its Politics, Shake Rural Iowa*, THE NEW YORK TIMES, December 13, 2007; Brzezinski, Matthew, *Hillbangers*, THE NEW YORK TIMES, August 15, 2004; Jennifer Lee, *For Immigrant Family, No Easy Journeys*, THE NEW YORK TIMES, January 4, 2003; Kevin Sack, *Police Learning Spanish as Latino Population Grows*, THE NEW YORK TIMES, March 4, 2001.

immigration consequences of encounters with the criminal justice system. Significant federal legislation passed in 1996 vastly expanded the range of criminal dispositions that can trigger deportation and, in many cases, mandatory detention during the removal process.<sup>7</sup> Enforcement trends have also greatly increased the likelihood that immigrant clients with criminal convictions will face arrest by federal immigration authorities. Even when clients manage to make it out of the criminal process without encountering immigration officials and without triggering an immigration detainer, they will eventually face scrutiny when they attempt to obtain or maintain legal status. In recent years, immigration has become increasingly aggressive about identifying deportable noncitizens: Immigration and Customs Enforcement (ICE) screens people before release from criminal custody, coordinates with parole and probation to identify deportable individuals, and now aggressively employs warrant squads to make home and workplace arrests of noncitizens with criminal convictions. Simply put, it is no longer a reasonable strategy, if it ever was, to merely hope that immigrant clients will slip through the crack of immigration enforcement.

When immigrants do face immigration scrutiny, many defenders are shocked at how the most minor criminal dispositions (and in some circumstances even non-criminal dispositions) can trigger the most devastating immigration consequences. Criminal incidents as minor as shoplifting, NY PL § 155.25, turnstile jumping, NY PL § 165.15, or even non-criminal possession of small amounts of marijuana, NY PL § 221.05, can all put even long term permanent residents with U.S. citizen family members at risk of deportation. Clients who never spent a day in jail during the criminal process can also face mandatory detention without any prospect of release for the months or even years it takes to fight their removal case. For clients who are ultimately deported, the treatment in their home country will vary greatly; however, in some circumstances it can include brutal persecution and even indefinite detention in the most deplorable conditions.<sup>8</sup> Under this scheme, noncitizen clients facing criminal charges are often more concerned, or would be more concerned if informed, about the immigration consequences they may face than about the criminal consequences of their charges.<sup>9</sup>

Notwithstanding the draconian state of immigration law, there is often a lot that can be done to eliminate or minimize the immigration consequences our clients face as the result of their criminal convictions. Because of the idiosyncratic way that federal immigration law maps onto the fifty states' various criminal codes, an expert knowledgeable in the intersection of criminal and immigration law can often find the unexpected creases between the two where, even serious criminal charges will not trigger deportation. For example, a client contemplating a plea to felony burglary, NY PL §

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<sup>7</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. 104-208, div. C, Sept. 30, 1996, 110 Stat. 3009-546, and, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, Apr. 24, 1996, 110 Stat. 1214.

<sup>8</sup> See, e.g., *In re J-E-*, 23 I & N Dec. 291, 300-01 (BIA 2002) (noting that criminal deportees to Haiti are subject to indefinite detention in conditions “unfit for human habitation” will “receive insufficient calories to sustain human life” and will be subject to “pervasive . . . beatings[] with fists, sticks, and belts[.]”)

<sup>9</sup> NLADA Performance Guidelines for Criminal Defense Representation (1995), commentary to Guideline 6.2(a)(3), 6.3(a).

140.20, with a sentence of five years probation, could be rendered deportable based upon a plea. However, an immigration expert, knowing that the immigration consequences of a burglary conviction often turns on the underlying crime the client intended to commit, could help a defender structure a plea allocution to protect that client from deportation.

Given the prevalence of noncitizen clients, the likelihood that they will later face immigration scrutiny, and the gravity of the immigration consequences they can face, defenders must be able to deliver accurate advice regarding the immigration consequences of contemplated dispositions. While immigration has long been considered a “collateral consequence” of a criminal conviction,<sup>10</sup> current professional standards make clear that defense attorneys are obligated to evaluate and seek to avoid “collateral consequences *including but not limited to deportation.*”<sup>11</sup> Criminal representation standards adopted by the National Legal Aid and Defenders Association, the Chief Defenders of New York State, the New York State Bar Association, and the American Bar Association, uniformly establish that defenders have a duty to investigate and advise clients regarding the immigration consequences of criminal cases.<sup>12</sup> Moreover, the New York Court of Appeals has squarely held that misadvising clients about immigration consequences is ineffective assistance.<sup>13</sup>

Accordingly, the 21<sup>st</sup> century criminal practitioner must be well educated in the immigration consequences of criminal conviction. This necessity, however, must confront the daunting reality that the intersection of criminal and immigration law is one of the most complex, tangled and rapidly evolving areas of law. The Second Circuit has described the “labyrinthine character of modern immigration law” as a “a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion.”<sup>14</sup> How then can we expect defense attorneys with ballooning case loads to develop and maintain the expertise necessary to give thorough and accurate advice on this counterintuitive area of law seemingly tangential to their daily practice?

The answer is, we can’t leave this burden solely on the shoulders of individual defenders. Rather, in order to assure the competent practice of law in this area, institutional defender offices and assigned counsel programs must develop Immigration Service Plans that support and enable defenders in this task. These plans must provide, at minimum, for the timely delivery of accurate advice regarding the immigration consequences of contemplated dispositions in ongoing criminal cases. What follows is

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<sup>10</sup> *People v. Ford*, 86 N.Y.2d 397 (1995). *But cf. United States v. Couto*, 311 F.3d 179 (2d Cir. 2002) (suggesting the need to revisit the issue of whether deportation is, in some circumstances, a direct consequence of a criminal conviction).

<sup>11</sup> New York State Bar Association, Standard for Providing Mandated Representation, Standard 1-7(a)(v) & (e)(v) (2005) (emphasis added).

<sup>12</sup> New York State Bar Association, Standard for Providing Mandated Representation, Standard 1-7(a)(v) & (e)(v) (2005); New York State Defender Association, Standards for Providing Constitutional and Statutorily Mandated Legal Representation in New York State, Standard VIII(A)(7) (2004); ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) & commentary (3d ed. 1999); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 6.2(a)(3).

<sup>13</sup> *People v. McDonald*, 1 N.Y.3d 109 (2003).

<sup>14</sup> *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

an evaluation[description?] of the various components that should be included in a defender Immigration Service Plan, an evaluation of the various models different offices have employed as to each of those components, and a discussion of how individual defender offices and assigned counsel programs can best tailor an Immigration Service Plan to their own unique needs.

## II. VITAL COMPONENTS OF A DEFENDER IMMIGRATION SERVICE PLAN

There are at least five separate components that should be considered in the development of an Immigration Service Plan. The first and most central piece is the **Advisal Component**. This is the mechanism by which advice is actually delivered to clients and defenders regarding the immigration consequences of contemplated dispositions and regarding realistic alternative dispositions that would mitigate immigration consequences. This is also the component where we see the greatest diversity in how different offices structure their Immigration Service Plans. The other components are to a large degree intended to facilitate the successful execution of the Advisal Component.

Before an office can deliver accurate immigration advice it must, of course, first identify its noncitizen clients and gather some information about their immigration status and history. The **Information Gathering Component** is aimed at accomplishing this task.

In order to raise the consciousness of all staff about immigration issues and to enable attorneys to identify noncitizen clients and work collaboratively to find disposition favorable to their immigration situations, there must be a robust **Staff Development Component** to any Immigration Service Plan.

Over fifty percent of New York State's 2 million noncitizen residents are limited English proficient ("LEP") and are thus unable to receive legal advice in English.<sup>15</sup> Accordingly, any office's Immigration Service Plan must include a **Language Access Component** to address translation and interpretation issues with this segment of their clientele.

Even the best immigration advice and analysis during a criminal case cannot completely insulate all noncitizens from the immigration consequences of their criminal cases. Often, immigrant clients will be in dire need of subsequent representation on affirmative immigration applications or in deportation proceedings.<sup>16</sup> While it will not be feasible for many defender offices to deliver these services themselves each office's

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<sup>15</sup> In 2006, 56.3 percent of New York's noncitizen foreign-born population aged 5 and older were LEP. U.S. Census Bureau, 2006 American Community Survey.

<sup>16</sup> The proceedings by which the government effects the expulsion of noncitizens from the United States, are technically referred to as "removal proceedings." Immigration and Nationality Act ("INA") § 240; 8 U.S.C. § 1229a. For the sake of clarity, we use the colloquial term "deportation proceedings" throughout this Protocol in lieu of the technical term "removal proceedings."



Immigration Service Plan should, at minimum, have a **Direct Immigration Service or Referral Component** that can assist clients in obtaining vital immigration representation.

Each office will find different ways of addressing these various challenges, but any office or program seriously engaged in developing an Immigration Service Plan should, at minimum, ensure that its plan addresses each of these five vital components. What follows is a detailed discussion of each component in turn, and a survey and evaluation of the different models various offices have used as to each component.

### III. ADVISAL COMPONENT

There are three common situations when defenders and/or clients require immigration advice: routine advisals during plea negotiation, post-plea advisals at the conclusion of representation, and on-demand advisals when urgent matters arise in court. The Advisal Component of any office Immigration Service Plan should consider how advice will be delivered in each of these three common scenarios.

The most common scenario is routine advisals during plea negotiations. When noncitizen clients and defenders are assessing a prosecutor or court's plea offer they cannot make a well reasoned decision without a thorough and accurate assessment of the immigration consequences of the contemplated disposition. Further, when that assessment reveals that the offer will carry unwelcome immigration consequences, clients and defenders must be advised regarding reasonable alternative dispositions that will have no, or lesser, immigration consequences.

Take for example, a client facing a misdemeanor assault charge and a misdemeanor weapons charge for possessing a knife with the intent to use. The prosecutor has offered a plea to Assault 3<sup>rd</sup>, NY PL § 120.00(1) (intentionally causing physical injury), with straight probation. Depending on the client's record and immigration history, this plea could render him deportable. After conducting an immigration assessment, the office's immigration expert would advise the client and defender of the likely immigration consequences of the contemplated plea but would also suggest alternative dispositions. For example, the immigration expert might suggest pleading to subdivision 2 of NY PL § 120.00 with a reckless *mens rea* or pleading to subdivision 1 or 5 of Criminal Possession of a Weapon 3<sup>rd</sup>, NY PL § 265.01, which relates to noncitizens possessing weapons but does not have an "intent to use" element. These alternative dispositions are comparable from a criminal justice perspective – all are A Misdemeanors – but the alternative dispositions are less likely to carry immigration consequences. The defense attorney could then explore these possibilities with the prosecutor.

An effective system for the delivery of these pre-plea immigration advisals is the cornerstone of an effective Immigration Service Plan. The best practice with such pre-

plea advisals is for the office's immigration expert to write a memo to the defender and to discuss the immigration consequences directly with the client.<sup>17</sup>

Immigration advice at the conclusion of a case can take many forms. The type of advice that is necessary after a criminal case will vary widely depending on the circumstances. Some clients will need advice about future international travel. They need to understand the immigration risks, if any, associated with such travel; how to speak with immigration officials about their criminal cases if questioned upon reentry since admissions can trigger deportation in some situations; and in some circumstances clients should be given documentation to prove their admissibility if they contemplate future travels abroad. Other clients will need advice about future domestic contact with immigration. They will need advice on their risk of deportation and their eligibility for immigration benefits such as permanent resident status (green card) or U.S. citizenship and may need documentation such as plea transcripts or other parts of the record of conviction to provide to immigration authorities in future deportation proceedings or in support of affirmative applications. In some situations, pre-disposition counseling is sufficient and no further advisals are necessary at the conclusion of a case. However, when such advisals are necessary the best practice is to provide a written advisory letter either to the client or to immigration authorities to explain and document why the criminal disposition does not carry immigration consequences. Clients can then travel with such letters and present them to immigration officials when necessary.<sup>18</sup>

Finally, an Immigration Service Plan must contemplate how defenders will be able to receive advice on demand when urgent matters arise in court that require immediate decisions, such as during arraignments. For example, [let's say] you have an undocumented client at arraignment offered a disposition on a minor case that will get them out of jail immediately. The alternative is rejecting the disposition and having the client stay in jail for several days until the next appearance. Taking an unfavorable disposition in this scenario could forever prevent your client from legalizing her status; however, if the client is held in, there is the real possibility that an immigration detainer will fall and the client will be placed in removal proceedings based simply on her undocumented status. Determining the best strategic approach to this catch 22 situation requires on-demand immediate consultation with an immigration expert.

While these three scenarios – pre-plea, post-plea, and on-demand – are likely to be common to all defenders' practice, there are several different ways an office or program can structure its advisory component to accomplish these tasks. Below is a discussion of five different advisory models, their relative merits, and the challenges posed by each model. While these various approaches are presented as distinct models, there are not necessarily bright lines between them and some offices may wish to develop hybrid approaches that draw upon the various strengths of the different models discussed herein.

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<sup>17</sup> See Appendix C for a sample pre-plea advisory memos.

<sup>18</sup> See Appendix D for a sample post-plea advisory and advocacy letters.

## A. IN-HOUSE MODEL

The In-House Model involves, as the name suggests, having one or more staff attorneys designated as the office's immigration experts and housed in the defender office or, in the case of multi-office institutional defenders, housed in the various local defender offices. In the case of some small defender offices or offices with small immigrant client populations, a percentage of one staff member may be sufficient. For a full discussion of staffing issues see discussion *infra* at Part III(F)(2), Staffing Issues, Staffing Levels for Immigration Experts.

There are several significant benefits to the In-House Model. The physical presence of an immigration expert in the everyday life of a defender office is the best way to assure that defenders and clients have meaningful, easy, and on-demand access to immigration advice. Having an in-house expert provides significant flexibility in terms of the methods of access for clients and defenders. The in-house expert can of course field phone calls and correspond via email but can also meet face to face with defenders and clients in the office and, when necessary, in court or a detention facility. While offices should certainly set up formal processes for accessing immigration advice, the overwhelming caseloads handled by many public defenders means that sometimes even a streamlined office procedure will be an impediment to seeking advice. The flexibility of an in-house expert allows defenders and clients multiple modes of access, which ultimately means expert advice will be sought in a larger percentage of appropriate cases.

Having an in-house expert also facilitates the integration of immigration advice into an office's culture of routine criminal representation. This happens by having someone physically present who can routinely do targeted immigration trainings, updating defenders on relevant development in immigration law; who can share success stories of cases where the office used innovative strategies to mitigate immigration consequences; and who is routinely present at the metaphoric water cooler to talk about their own practice and thereby raise the profile of immigration in the office culture. Having a colleague physically present and dedicated to the task of monitoring and mitigating immigration consequences in the office's criminal cases inevitably makes all defenders more cognizant of the issue. Moreover, the cultural influence of immigration practice on the criminal practice is not a one-way street with an in-house immigration expert. The criminal culture and realities of the local practice, prosecutors, and judges can become best known by an in-house immigration expert. Intimate knowledge of the realities of the office's criminal practice significantly improves the utility of the immigration advice an expert can deliver.

The final benefit of the In-House Immigration Model, as compared with the alternative models set forth below, is that in-house immigration experts can simply do more. Generally, offices that follow the In-House Model tend to also offer some level of direct representation to noncitizens – which often, but not always, means providing deportation defense to criminal defense clients who subsequently land in deportation

proceedings.<sup>19</sup> In-house experts are also more likely to be able to follow the best practices set forth above for writing formal pre-plea advisal memos, for providing post-plea advisal letters and documentation, and for providing in-person expert-to-client immigration counseling. This final benefit arises because, generally, offices that follow an In-House Model have higher expert-to-defender and expert-to-noncitizen-clients ratios.

The primary challenge posed by the In-House Model arises from this same feature: the higher expert-to-defender and expert-to-noncitizen-clients ratios carry with them generally higher costs than the other models set forth below. Finding funding for a dedicated in-house immigration expert is a significant obstacle for many offices. Methods to address this, and other start-up obstacles, are discussed *infra* at Part IX(C), Getting Started, Assessing Funding Options. A second challenge posed by the In-House Model is the professional isolation for a single immigration practitioner living in a world of criminal defense attorneys. Immigration law generally, and criminal-immigration law in particular, are extremely complex ever-changing areas of law. Finding ways to ensure that your office's in-house expert remains current on important developments of immigration law and practice is a real, though surmountable, challenge.<sup>20</sup> Finally, having an immigration expert practicing in a defender office can present challenges to supervisors who are unfamiliar with immigration practice.

There are several offices that currently employ an In-House Model, including: The Bronx Defenders, Neighborhood Defender Service of Harlem, Defender Association of Philadelphia, Public Defender Service for the District of Columbia, and the Monroe County Public Defenders Office.<sup>21</sup> Any office contemplating implementation of In-House Model would be wise to reach out to the leadership and/or immigration experts in these offices.<sup>22</sup>

**B. STAFF SPLIT MODEL: IMMIGRATION EXPERT SPLIT BETWEEN DEFENDER OFFICE AND IMMIGRATION SERVICE PROVIDER**

Offices that employ a Staff Split Model share an immigration staff attorney with a local immigration service provider. Depending on the percentage of time the immigration attorney is present in the defender office and depending on the expert-to-defender and expert-to-noncitizen-clients ratios, the Staff Split Model can capture many of same benefits articulated above with respect to the In-House Model. The degree to which a shared immigration expert can provide flexible access to defenders and clients can infuse the office's criminal defense culture with an immigration consciousness, can absorb the culture of the local criminal practice, and can provide direct services to the

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<sup>19</sup> For full discussion of the range of direct immigration services a defender office could provide see discussion *infra* at Part VII, Direct Immigration Service or Referral Component.

<sup>20</sup> See discussion *infra* at Part V, Staff Development Component.

<sup>21</sup> This is a non-exclusive list of offices employing the In-House Model. Similarly, the offices listed as examples of the other advisal models, see discussion *infra* at Parts III(B)-(E), are merely representative non-exclusive examples.

<sup>22</sup> See Appendix A, Contact list of criminal-immigration experts by defender office.

criminal defense clients will all depend to a large extent on the amount of time that expert spends in the defender office.

However, the Staff Split Model has the potential to offer some additional benefits beyond those available through the In-House Model. First, even to the extent time limits the ability of the expert to deliver direct immigration services during her time at the defender office, the relationship between the defender office and the immigration service provider may provide either a formal or informal route to refer criminal defense clients to the immigration service provider for direct immigration services. Second, the professional isolation that an in-house expert could face, discussed *supra*, is unlikely to present itself under a Staff Split Model, because the immigration expert has access to a community of immigration practitioners, thus fostering collegial support and professional development for the immigration expert.

There are two notable challenges an office may face in implementing a Staff Split Model. First, ensuring that the percentage of the shared expert's time is sufficient to meet the immigration needs of the defender office may prove difficult, both insofar as they need sufficient hours to provide the required assessments and advisals for noncitizen clients and insofar as they need sufficient hours to pass a tipping point where you get the desired cross-cultural osmosis between the office's criminal and immigration practices, with each infusing and informing the other. Second, a shared immigration expert drawn from the staff of an immigration service provider may not possess criminal defense experience, which can be a significant obstacle to developing realistic alternative dispositions which in turn can limit the perceived and/or actual utility of the immigration expert to the defenders and thereby depress critical office "buy-in." For a full discussion of staffing considerations regarding immigration experts, *see* discussion *infra* at Part III(F), Advisal Component, Staffing Issues.

The Defender Association of Philadelphia<sup>23</sup> employs a robust Staff Split Model. Any office contemplating implementation of Staff Split Model would be wise to reach out to the leadership and/or immigration experts from this office.<sup>24</sup>

### C. CENTRAL OFFICE MODEL

Large multi-site defenders offices may want to consider a Central Office Model, whereby one or more immigration experts is housed in the central office but provides immigration consultations to defenders from the various local offices upon request.

There are at least two significant benefits of the Central Office model. First, to the extent there are multiple experts, like the Staff Split Model, the immigration experts have access to a community of immigration practitioners, thus fostering collegial support and professional development. However, unlike the Staff Split Model, there is no obstacle to hiring experts with significant criminal experience – indeed, virtually all

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<sup>23</sup> The Defender Association of Philadelphia office is listed as having both an In-House Model and a Staff Split Model because they employ a hybrid model, with both in-house and staff split experts.

<sup>24</sup> *See* Appendix A, Contact list of criminal-immigration experts by defender office.

experts currently staffing offices that employ a Central Office Model are former public defenders. The second, and perhaps more important benefit of the Central Office Model, is that it is relatively inexpensive to implement. Employing a central office model generally allows offices to take advantage of economies of scale and keep the cost of their Immigration Service Plan down, at least as measured against the office budget generally or measured on a per client basis.

The most significant drawback of the Central Office Model is that the cost savings arise, primarily, because the experts tend to do less with respect to each client. Central office experts are, for example, unlikely to directly counsel clients or to provide direct immigration services, and they tend to provide less post-plea advice and documentation. This is not necessarily the case and an office could decide to implement a robust Central Office Model with a full range of immigration services. However, to the extent central office experts perform services equivalent to in-house or staff split experts, much, though not all, of the cost savings will be lost. Some other significant challenges associated with the Central Office Model arise from the lack of physical presence in the daily lives of defenders, specifically: difficulty providing flexible access to defenders and clients, difficulty infusing the office's criminal defense culture with an immigration consciousness, and difficulty absorbing the culture of the local criminal practice.

There are several offices that currently employ a Central Office Model, including: the New York Legal Aid Society<sup>25</sup>, the Los Angeles County Public Defender Office, Colorado State Public Defender Office, and the Massachusetts Committee for Public Counsel Services. Any office contemplating implementing a Central Office Model would be wise to reach out to the leadership and/or immigration experts in these offices.<sup>26</sup>

#### **D. CONTRACT MODEL**

Some offices implement their Immigration Service Plan through a Contract Model whereby the public defender office outsources its immigration advisals to a separate organization. The defender office contracts with an organization that has expertise regarding the intersection of criminal and immigration law, and staff attorneys from the defender office can then access staff attorneys from the immigration organization as needed.

The primary benefit of the contract model is efficiency. Contracts can obviously be structured such that the defender office can pay per consultation or per hour, for

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<sup>25</sup> New York Legal Aid Society employs a unique hybrid model. Legal Aid is the primary public defender office in New York City with criminal defense division offices in all five boroughs. In addition, Legal Aid has a robust civil division including a centrally housed civil immigration unit with a full staff of immigration attorneys handling, *inter alia*, deportation defense cases. Legal Aid has multiple attorneys in its immigration unit whose job is to liaise with the various criminal defense division offices. While those attorneys are centrally housed in the civil immigration unit, they also spend substantial time in local criminal defense division offices.

<sup>26</sup> See Appendix A, Contact list of criminal-immigration experts by defender office.

example, and therefore the defender office will only have to pay for as much immigration expertise as it requires. The Contract Model also has the significant benefit of allowing defenders to potentially access highly qualified immigration experts working at organizations that are at the forefront of criminal-immigration practice. Finally, the Contract Model, unlike the models set forth above, can be implemented in a jurisdiction that relies upon assigned counsel rather than, or in coordination with, institutional defender offices.

There are some significant limitations to the Contract Model. For example, the Contract Model generally does not allow the immigration experts any direct access to clients. This can be important for at least two reasons. First, without direct access it may not be possible to accurately assess some clients' relevant immigration history. No expert can evaluate the immigration consequences of a criminal disposition without first knowing the client's immigration status and history. Second, direct access can be important because immigration advisals will often require more than a simple explanation of whether a certain plea will render a client deportable. They may also require discussion of a myriad of immigration issues that a defender is ill-suited to address, such as the impact of the contemplated plea on future ability to travel outside the country, applications for naturalization, applications for permanent residence, eligibility for certain forms of relief from deportation, and the likelihood that discretionary relief would be granted.

The Contract Model also shares some of the limitations outlined above for the Central Office Model and the Staff Split Model. Like the Central Office Model, the lack of physical presence of immigration experts under the Contract Model makes it very difficult to infuse the office's criminal defense culture with an immigration consciousness. This is critical because this model depends entirely on defenders to identify a potential immigration issue and seek out advice. Therefore, the "buy-in" of line defenders is essential to the model's success and, accordingly, development of an office immigration consciousness is required. Like the Staff Split Model, the immigration experts in a Contract Model are likely to be highly specialized immigration service providers and are less likely to have significant criminal defense experience or to be knowledgeable about the local practice and players relevant to a individual defender office. These limitations can diminish the perceived and actual utility of the advice delivered (most importantly in developing realistic alternative dispositions) and as such can also negatively impact the "buy-in" from defenders. The Contract Model is also unlikely to be able to deliver any significant direct immigration services to clients, at least not without increasing costs significantly.

The California State Public Defender employs the Contract Model in collaboration with the Immigrant Legal Resource Center, a non-profit immigration advocacy organization. Any office contemplating implementation of Contract Model would be wise to reach out to the leadership and/or immigration experts from these offices.<sup>27</sup>

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<sup>27</sup> See Appendix A, Contact list of criminal-immigration experts by defender office.

## E. STATEWIDE LAYERED MODEL

States that utilize a state-wide public defender system should consider implementation of a Statewide Layered Model. The Statewide Layered Model differs from the others outlined above insofar as it is not currently in use anywhere in the country. Rather, the Statewide Layered Model is a product of IDP's and NYSDA's effort to survey the range of Immigration Service Plans currently in use and then to develop a best practice alternative that maximizes the benefits of the various models and minimizes the obstacles presented by each model.

The Statewide Layered Model, like the Central Office Model, involves at least one highly qualified statewide supervisor of defender immigration services with significant experience and expertise regarding immigration law generally and the intersection of criminal and immigration law specifically. Like the In-House Model, it further requires medium and large size local defender offices to have an in-house immigration expert on staff.<sup>28</sup> Small defender offices and assigned counsel programs could instead have a defender designated as the immigration liaison.

The *statewide supervisor(s)* would:

- (1) assist offices in the development of their individual Immigration Service Plans;
- (2) coordinate training of the in-house immigration experts and liaisons;
- (3) create training materials and criminal-immigration legal and practice updates to be distributed statewide via in-house immigration experts and liaisons;
- (4) collaborate with in-house immigration experts and liaisons to provide training to defenders,
- (5) moderate a listserv for in-house immigration experts and liaisons to assist them in working through difficult criminal-immigration issues; and
- (6) provide phone and email consultation to defenders in those smaller offices or assigned counsel programs without in-house experts.

The *in-house immigration experts* would ideally be drawn from the ranks of an office's defense attorneys<sup>29</sup> and would:

- (1) provide routine advisals during plea negotiation, post-plea advisals at the conclusion of representation, and on-demand advisals when urgent matters arise in court;

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<sup>28</sup> For some medium size offices this person could be part-time defender and part-time immigration expert depending on the size of the office and the size of the immigrant client population. Some large defender offices could require multiple in-house immigration experts, particularly if they choose to provide substantial direct immigration services. See discussion of staffing issues *infra* at Part III(F), Advisal Component, Staffing Issues.

<sup>29</sup> See discussion of staffing issues *infra* at Part III(F), Advisal Component, Staffing Issues.



- (2) collaborate with the statewide supervisor to provide professional development to the line defense attorneys in their respective offices and distribute the criminal-immigration legal and practice updates created by the statewide supervisor; and
- (3) provide direct immigration service as capacity permits.

The *immigration liaisons* would:

- (1) collaborate with the statewide supervisor to provide professional development to the line defense attorneys in their respective offices or jurisdictions (in the case of assigned counsel programs), and
- (2) distribute the criminal-immigration legal and practice updates created by the statewide supervisor but not hold responsibility for providing immigration advisals.

The Statewide Layer Model captures virtually all of the benefits of the other models combined. Like the In-House Model, the physical presence of in-house experts provides both flexible access for defenders and clients and also fosters the cross cultural osmosis of the office's criminal and immigration practices, thus increasing defender buy-in and the utility of the advice in-house experts deliver. Like the Central Office and Staff Split Models the statewide community of in-house experts and liaisons blunts the professional isolation for lone immigration practitioners living in the world of criminal defense attorneys, and instead fosters collegial support and professional development in this complicated area of law. Like the Contract and the Staff Split Models, the Statewide Layered Model enjoys the benefit of highly qualified statewide supervisor(s) with extensive immigration experience and expertise, but simultaneously captures the benefits of the In-House Model by having in-house experts and liaisons drawn from the ranks of defenders, well versed in criminal practice generally and local players and practice in particular. The Statewide Layered Model also captures some, though not all, of the efficiency and economies of scale present in the Central Office and Contract Models insofar as it centralizes some of the components of the Immigration Service Plan – specifically time consuming training and on-going development of professional development materials – and thus either lowers the in-house expert to defender ratio required in local offices or, alternatively, increases the capacity of in-house experts to do direct immigration services. Finally, the Statewide Layered Model can ensure statewide uniform compliance with the critical ethical obligation of defenders to provide timely and accurate advice on the immigration consequences of criminal cases and can foster cross-pollination of best practices between the various defender offices throughout the state.

The only significant obstacle to the Statewide Layered Model is securing the funding necessary for the required personnel. However, because of the efficiencies it creates, as outlined above, the Statewide Layered Model should be less expensive than the In-House Expert Model, measured on a per office basis. If, at some later date, New York State adopts a statewide defenders system, implementation of the Statewide Layered Model would be an excellent way to efficiently assure that defenders across the state are uniformly providing accurate and consistent immigration advisals consistent with their professional responsibility.

While there is no state currently employing the Statewide Layered Model, there are several states that do employ others forms of statewide Immigration Service Plans, mostly through some form of the Central Office Model or Contract Model. Those states include California, Colorado, Massachusetts, and Washington. Any state contemplating implementing a state wide Immigration Service Plan would be wise to reach out to the leadership and/or immigration experts from these states.<sup>30</sup>

## **F. STAFFING ISSUES**

There are two primary staffing issues an office must consider in developing its Immigration Service Plan: (1) what criteria to look for in an immigration expert, and (2) how many immigration experts does the office require or, in some circumstances, what percentage of an immigration expert's time does your office require.

### **1. HIRING CRITERIA FOR IMMIGRATION EXPERTS**

There are two principal tracks to becoming an expert in the intersection of immigration and criminal law: coming from criminal practice or coming from immigration practice. The pool of people with extensive experience in both is so limited that it is unrealistic to limit your search to this pool, though if you can find such a person, their dual expertise will obviously be a significant advantage.

Hiring an expert who comes from the immigration track and has done significant deportation defense litigation for people with criminal convictions, carries the significant advantage that you can expect them to step into the job competent to expeditiously make the daily assessments necessary to evaluate the immigration consequences that a contemplated disposition would carry. Further, experts who come from the immigration track should be prepared to evaluate not just the black letter immigration law issues (i.e., would the client be deportable? would the client be eligible for relief?) but should also be able to make the more nuanced evaluation of discretionary and practical immigration issues (i.e. what is the likelihood an immigration judge would grant relief in this case as a matter of discretion? what is the likelihood that immigration officers would locate the client and initiate proceedings against her?). Finally, to the extent an office determines that providing significant direct immigration services will be part of its Immigration Service Plan, an expert from the immigration track should be able to handle these matters competently on day one.

Hiring an expert who comes from the defender track can also carry significant advantages. While such experts may take some time to develop complete comfort with black letter immigration law issues (and may require access to some experts in immigration law for consultations in the early going) their criminal experience and, hopefully, knowledge of the local players and practice, should make them superior at developing realistic alternative dispositions that would eliminate or mitigate immigration

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<sup>30</sup> See Appendix A, Contact list of criminal-immigration experts by defender office.

consequences in a given case. Their deep understanding of the realities of local criminal practice should also enable experts who come from the defender track, especially if drawn from the existing office staff, to establish credibility with other defenders in the office and increase critical buy-in from line defenders. This is especially so if the expert is a supervisor or senior attorney from the office. In surveying offices with existing Immigration Service Plans, several offices highlighted this factor as critical to the success of the plan. Several offices also reported that supervising or senior experts with defender experience were able, in appropriate select cases, to become directly involved in criminal cases involving noncitizen defendants in important and helpful ways (i.e., by negotiating directly with supervisors in the prosecutor's office or with judges). Finally, to the extent the office does not require a full time immigration expert, having an expert drawn from the office's existing criminal defenders simplifies the staffing and creates flexibility, as an office can simply increase or decrease the individual's criminal caseload as it comes to understand the time required to provide immigration expertise to the office.

## 2. STAFFING LEVELS FOR IMMIGRATION EXPERTS

It is never sufficient to merely designate an individual defender to serve as an office's immigration expert without giving that defender at least some reduction in her caseload. There is no way to get around the fact that implementing an Immigration Service Plan will involve the expense associated with some additional services.<sup>31</sup> There are two primary variables at play in determining how much immigration expert services an office requires: (1) the office caseload of criminal cases with noncitizen defendants, and (2) the range of services the immigration expert will provide. Even with complete knowledge of these two variables it is, of course, difficult to make hard and fast rules about how many experts or what percentage of an expert's time an office will require. Set forth below are general guidelines developed by surveying offices with successful Immigration Service Plans.

The first step in this analysis is determining an office's caseload of criminal cases with noncitizen defendants. Some offices may track this data.<sup>32</sup> However, for the majority of offices, a rough calculation of this number can be easily obtained by taking the percentage of noncitizen residents in your jurisdiction, which can be obtained from census data, and applying it to your office's entire caseload. As discussed above, social science research demonstrate that noncitizens, as a group, tend to offend at the same rate as the general population.<sup>33</sup>

The range of immigration services an office will provide is a choice the office will make in developing its Immigration Service Plan. Accordingly, we organize the difficult staffing level discussion around three potential choices: (1) full advisals and targeted direct representation; (2) full advisals and no direct representation; and (3) bare bones advisals with no direct representation. These are not, of course, the only choices an

<sup>31</sup> See discussion *infra* at Part IX, Getting Started (discussing funding issues and how to phase in an Immigration Service Plan).

<sup>32</sup> See discussion *infra* at Part IV, Information Gathering Component.

<sup>33</sup> See discussion *supra* at note 5 and accompanying text.

office can make about the range of immigration services it will provide; rather, they are merely intended as three illustrative choices.

If an office decides to provide full advisals and targeted direct immigration representation, that office's expert(s) will attempt to give pre-plea advisals (including short file memos and client counseling) in most or all of the office's cases involving noncitizens, and will provide post-plea advisals at the conclusion of representation and on-demand advisals when urgent matters arise in court, as needed. In addition, the expert will provide targeted direct representation, most likely in the form of removal defense cases or affirmative immigration applications, in a select number of cases where the client lacks access to other services and the expert anticipates her representation will substantially affect the outcome of the case. Offices with successful Immigration Service Plans that provide these types of immigration services tend to staff at a ratio of one fulltime immigration expert to every 2500<sup>34</sup> annual cases with noncitizen defendants.<sup>35</sup>

If an office decides to provide full advisals (as described above) but no direct representation, it will require significantly less expert immigration services. Offices with successful Immigration Service Plans that provide these types of immigration services tend to staff at a ratio of one fulltime immigration expert to every 5000<sup>36</sup> annual cases with noncitizen defendants.

If an office chooses to provide bare bones immigration advisals only, the immigration expert(s) will consult on criminal cases when called up to do so by defenders and will evaluate contemplated dispositions and suggest alternatives but will not generally directly counsel clients, provide post-plea advisals, or offer any direct immigration services. Offices with successful Immigration Service Plans that provide

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<sup>34</sup> This number is calculated by surveying offices that provide the types of services described in the above paragraph. We looked at the number of immigration experts such offices had and the number of cases handled by each office per year. We then applied the percentage of noncitizens living in that jurisdiction, drawn from U.S. Census data, *see* discussion *supra* at note 5 and accompanying text (discussing research demonstrating that noncitizens offend at the same rate as the general population), to the number of cases handled per year and divided that number by the number of immigration experts the office to obtain an average ratio of approximately 1:2500.

<sup>35</sup> A quick calculation demonstrates that this staffing level should require each immigration expert to complete approximately eight pre-plea consultations, memos, and counseling sessions each day in order to reach the goal of having such services in all cases. This is obviously impracticable. Despite the goals of having 100% pre-plea advisals, two factors make this goal unattainable. First, some significant percentage of minor cases are disposed of at arraignment with favorable dispositions that are unlikely to carry immigration consequences (such as Adjournment in Contemplation of Dismissals, NY CPL § 170.55, and Disorderly Conducts, NY PL § 240.20) and consultations in such cases are generally not possible and often, but not always, unnecessary. If an office's practice or local criminal court culture is such that a significant portion of the caseload is not disposed of with such pleas at arraignments, a higher staffing level may be required. Second, no matter how engrained in the culture of a defender office immigration practice becomes, the office will never achieve a 100% referral rate on cases involving noncitizen defendants. These two factors significantly decrease the actual number of pre-plea advisals an expert will actually have to perform.

<sup>36</sup> This number is calculated as described in note 34.

these types of immigration services tend to staff at a ratio of one fulltime immigration experts to every 10,000<sup>37</sup> annual cases with noncitizen defendants.

Understanding the size of an office's noncitizen client population and determining the level of immigration services the office will provide should, by use of these guidelines, give the office a ballpark estimate of the staffing level required to implement its Immigration Service Plan.<sup>38</sup>

#### IV. INFORMATION GATHERING COMPONENT

The information gathering component is the part of the Immigration Service Plan that establishes mechanisms for identifying noncitizen clients and gathering sufficient immigration data about those clients to enable the immigration expert to make an informed assessment of the criminal case. There are principally three issues to be considered regarding this component: (1) how immigration information is collected from clients; (2) how information about noncitizen clients is transmitted to the immigration expert; and (3) how immigration information about clients is stored.

In regard to collecting immigration information from clients, the first step is obviously identifying those clients who are not citizens. Of the offices surveyed in preparing this protocol, this job was uniformly performed by the attorney who conducts the initial interview with the client. The surveyed offices also uniformly expressed some level of frustration with the inadequacy of this mechanism because inevitably not every defender conducts the necessary initial screening in every case. However, more reliable alternatives – such as having a paralegal designated to specifically do an immigration screening with all clients – have been deemed either logistically impracticable or prohibitively expensive. Accordingly, the best most offices can do is routinize the initial immigration screening and through training and repetition hope to achieve the highest level of compliance possible. One important decision an office has to make about its initial immigration screenings is how in-depth they should be. The more in-depth, the more useful the screenings are to the immigration expert but the less likely defenders are to regularly conduct them. Below is a list of six initial screening questions that will enable an immigration expert to, in most cases, make a meaningful initial assessment of the potential immigration consequences of a criminal case. Most offices, however, do not include all six questions in their routinized initial immigration screenings because defenders find all six questions too time consuming in the often time-limited context of initial interviews. Accordingly, many offices use only the first three questions

Initial immigration screening questions:

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<sup>37</sup> This number is calculated as described in note 34.

<sup>38</sup> These estimates assume relatively little support from paralegal staff. The ratios could possibly be stretched further with substantial paralegal support. Moreover, under the Statewide Layered Model, higher ratios can be achieved due to the centralization of some components of the in-house expert's duties. See discussion *supra* at Part III(E), Statewide Layered Model.

- (1) Where were you born? (if U.S. or Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands<sup>39</sup>, no further questions are necessary)
- (2) Are you a permanent resident (green card holder)?
- (3) If the client is not a permanent resident, what is your immigration status?
- (4) How long have you held your current status?
- (5) When, and under what status, did you enter the United States (include all entries and exits)?
- (6) Do you have any U.S. citizen or permanent resident family?

When clients have unusual or complex immigration situations, a follow up immigration interview is sometimes required. The best practice is to use immigration experts to conduct these follow up interviews but in some offices this is not possible. Accordingly, defense attorney, paralegals, and law students can also be used to perform these follow up interviews after consultation with an immigration expert. Sample follow-up immigration interview sheets can be found at Appendix F.

Once clients are identified as noncitizen, in most instances the case should be referred to the immigration expert.<sup>40</sup> Offices, therefore, need to establish a referral mechanism. The referral mechanism should be as streamlined as possible so as not to deter defenders from seeking immigration consultations. At minimum, the referral system should transmit to the immigration expert a copy of the charging instrument, a copy of the client's rap sheet, and whatever immigration information was gathered from the client. Sample immigration consultation referral sheets can be found at Appendix B.

Offices also need to determine what type of immigration information will be included in the office's hard case file forms and what immigration information will be included in the digital case management system. At minimum, whatever immigration initial interview questions an office chooses should be included in the hard file and/or the case management system. Some case management software, such as NYSDA's Public Defender Case Management System, specifically include fields related to immigration,<sup>41</sup> but virtually any system can be customized to include such data. In addition to the initial interview questions, the hard file and/or the case management system should include the client's best language, if they are not fluent in English.<sup>42</sup> Finally, some offices have considered utilizing a check box on the case file (or on in the case management system) that requires defenders to affirm that "I have inquired into my client's immigration status, investigated the immigration consequences of the criminal case, and have advised my client of such consequences, if any." The obvious purpose is to hold defenders

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<sup>39</sup> For information on birthright citizenship in Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, see 8 U.S.C. §§ 1401, 1402, 1406, 1407. Nationality at Birth and Collective Naturalization, and, Presidential Proclamation No. 5564, November 1986.

<sup>40</sup> In a limited category of minor cases, it is possible to train defenders to make these assessments without consultation.

<sup>41</sup> See < [http://nysda.org/html/pd\\_case\\_management\\_system.html](http://nysda.org/html/pd_case_management_system.html)> for a description of NYSDA's Defender Case Management System; see also Appendix J, NYSDA Defender Case Management System screen shot.

<sup>42</sup> See discussion *infra* at Part VI, Language Access Component.

accountable for following an office's Immigration Service Plan. If such a check box is included in a case management system, supervisors can get regular reports as to which defenders are not regularly attesting to such immigration screening and thus can address that problem before it leads to a malpractice suit or an ineffective assistance of counsel claim.<sup>43</sup>

## V. STAFF DEVELOPMENT COMPONENT

A robust staff development component is essential to the success of any Immigration Service Plan. The primary goals of training the defender staff are to:

- alert them to their ethical and professional responsibility to investigate and advise clients about the potential immigration consequences of their criminal cases;
- foster “buy-in” to the Immigration Service Plan by making them aware of the devastating immigration consequences that even minor criminal cases can have on noncitizens;
- convince them that despite the draconian state of immigration law, an immigration expert can often devise ways to eliminate or mitigate the immigration consequences of even very serious charges;
- educate them about the basic doctrine involved in assessing the immigration consequences of criminal convictions;
- persuade them that a full and accurate assessment of the immigration consequences of a criminal case almost always requires consultation with an immigration expert; and
- clarify the office's expectation that every defender has a responsibility to investigate immigration consequences in every case.

A successful staff development plan should include: trainings for new attorneys, annual refreshers for all attorneys, and ongoing periodic updates about important legal developments and innovative practice strategies targeting specific issues.

Development of materials to synthesize and organize this exceedingly complex area of law is also essential to a successful staff development plan. IDP has already created some essential training materials that all defenders in New York should know about and utilize – most importantly, an Immigration Consequences Checklist,<sup>44</sup> a Quick Reference Chart for Determining Immigration Consequences for Common New York Offenses,<sup>45</sup> and a Possible Strategies for Avoiding or Minimizing Potential Negative Immigration Consequences PowerPoint.<sup>46</sup> In addition to these reliable overview

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<sup>43</sup> See discussion *supra* at note 9-13 and accompanying text.

<sup>44</sup> See <[http://www.nysda.org/idp/docs/06\\_ImmigrationConsequencesChecklist.pdf](http://www.nysda.org/idp/docs/06_ImmigrationConsequencesChecklist.pdf)> (attached as Appendix I).

<sup>45</sup> See <[http://www.nysda.org/idp/docs/06\\_QuickReferenceChartforNewYorkStateOffenses.pdf](http://www.nysda.org/idp/docs/06_QuickReferenceChartforNewYorkStateOffenses.pdf)>; see also Appendix K, Criminal-Immigration Resource List of Publications, Websites, and Professional Organizations.

<<http://www.nysda.org/idp/webPages/crimJustice.htm>>

<sup>46</sup> See <<http://defendingimmigrants.org>>.

resources, the development of ongoing training materials, such as practice updates highlighting legal developments and innovative strategies, can be a powerful staff development tool. Examples of such targeted practice updates can be found in Appendix E.

In addition, an office must consider how to support the ongoing professional development of an office's in-house immigration expert, if any. Because of the potential for professional isolation with a sole immigration expert working in a office of criminal defense attorneys, an office's financial support for its immigration expert to obtain resource materials, attend conferences, and become a member in immigration practice oriented professional associations is particularly important. A list of such resource materials and immigration practice orientated professional organizations can be found in Appendix K.

## **VI. LANGUAGE ACCESS COMPONENT<sup>47</sup>**

With the phenomenal growth of immigrant communities comes linguistic diversity. Clients who do not speak English well enough to communicate about important legal issues are limited English proficient ("LEP"). An LEP individual is commonly defined as any person who does not speak English as their primary language and has a limited ability to read, speak, write or understand English. Over fifty percent of New York State's 2 million noncitizen residents are LEP.<sup>48</sup> LEP status is also closely related to poverty, food insecurity, and lack of economic mobility, making LEP individuals a particularly vulnerable client population.<sup>49</sup> To comply with the law and avoid discrimination based on national origin, public defenders should always, in every interaction, provide LEP clients with language assistance services (including written translation and oral interpretation).

The duty to provide language services to LEP clients is based in the law as well as in the ethical obligation of attorneys to zealously represent their clients. Federal, State and local laws mandate the provision of language services by public defender organizations.<sup>50</sup>

Every public defender office should have a written language access policy that clearly states the office's commitment to providing translation and interpretation services to all LEP clients and its commitment to prohibit national origin discrimination. Such a

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<sup>47</sup> This section of the Protocol was written by Amy Taylor, Language Access Project Coordinator for Legal Service NYC.

<sup>48</sup> In 2006, 56.3 percent of New York's foreign-born population aged 5 and older were LEP. U.S. Census Bureau, 2006 American Community Survey.

<sup>49</sup> *Immigrant Well-Being in New York and Los Angeles*, The Urban Institute (2002), available at <<http://urban.org/publications/310566.html>>.

<sup>50</sup> See Title VI, Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.; Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency*; DOJ Title VI Guidance, available at <<http://www.usdoj.gov/crt/cor/lep/DOJFinLEPFRJun182002.htm>>; New York State Human Rights Law, N.Y. Exec. Law § 290, et seq., and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101, et seq.



policy should also detail how the office will provide language services at all points of contact with LEP clients. Other important areas to be covered in a language policy include: how the need for language services will be determined; how the provision of language services will be documented in the client's file; the preferred method(s) of provision of both oral and written language services; the office's approach to the use of family members as interpreters; the organization's policies around the hiring and training of bilingual staff; and any other administrative issues around the implementation of the language policy. A sample language access policy can be found at Appendix H.

All public defender offices should post notices conspicuously, in multiple languages, explaining that free bilingual or interpreting services are available in connection with the provision of legal services. The same notices should be posted on an organization's website and on all outreach materials.

### **1. WRITTEN LANGUAGE SERVICES (TRANSLATION)**

As a general rule of thumb, any document that would be given to an English-speaking client should also be sent to an LEP client in a language they can understand. Written translation services can be acquired through private translation companies, freelance translators, or in-house by bilingual staff trained in translation skills. Public defender organizations should, as a best practice, translate commonly used important documents into the most frequently encountered languages of its client population. For documents that are exceedingly lengthy or for less commonly encountered languages, oral interpretation is an acceptable alternative.

As a best practice, any documents that must be signed by an LEP client should be translated orally or in writing before the client signs the document. An affidavit of translation should be attached to each signed document which is orally translated. When a client will have to testify or appear at a hearing or interview at which the signed document will be used for cross-examination or to determine credibility, the client should be given a translated version of the signed statement.

### **2. ORAL LANGUAGE SERVICES (INTERPRETATION)**

For frequently encountered languages, the best practice is to hire staff that can communicate effectively and efficiently with the LEP client population. This option is also often the most cost effective since contracting for these services can be quite expensive. When a bilingual attorney represents an LEP client, no interpretation is necessary, thus eliminating the extra time and expense required when providing interpretation. Bilingual staff must be properly tested on their language ability and, if serving as staff interpreters, on their knowledge of interpretation skills and ethics. Bilingual staff must also be trained on issues of confidentiality, the role of the interpreter, and technical terminology. A simple but important first step an office can take is to collect and circulate a list, organized by language, of all bilingual staff members competent to interpret.

For less commonly encountered languages, contracted services are often a very good option. There are many private companies that offer interpretation services. These services are also sometimes offered at a reduced rate by community-based organizations. Pro bono translation services can also sometimes be obtained by partnering with, *inter alia*, interpretation training programs. It is important to avoid conflicts when hiring an interpreter who may be from the same small or insular community as your client.

Telephonic interpretation is one way to access interpretation in a wide array of languages on short notice. Telephonic interpretation is an excellent back-up resource when bilingual staff or contracted interpreters are not available, or for very short conversations with an LEP client. These services can be used in many situations, but often are most useful when communicating with a client over the telephone. Since non-verbal communication is often an important component of communicating with any client, and cannot be recognized over the phone, telephonic interpretation should not be the only mechanism available to communicate with LEP clients. All public defender offices should have a contract with a telephonic interpretation service in order to communicate with LEP clients in an emergency when other interpretation services cannot be secured.

Many LEP clients are accustomed to using family members and friends as interpreters because they are not often provided with such services free of charge in their daily interactions with the public. When a client requests to use a family member or friend, public defender offices should always clearly offer the use of in-house language services and state that they are free of charge. Using family members and friends creates a number of potential problems for LEP clients. Family members and friends are rarely skilled in the art of interpretation and are often not proficient in both languages to the degree that would allow them to interpret properly. This situation can also create serious confidentiality and conflict of interest concerns. The use of minor children to interpret for other than ministerial communications should be clearly prohibited absent exceptional or emergency situations.

### **3. LANGUAGE SERVICES IN COURT**

New York State Courts are required to provide interpretation services for LEP clients in all civil and criminal court proceedings.<sup>51</sup> As a best practice, public defender offices should bring an interpreter to court proceedings to interpret any communication between an LEP client and her attorney outside of the court proceeding or any lawyer-client communication during the court proceeding. This interpreter can also monitor the sufficiency of the interpretation services provided by the court. Defenders should be cautious about using court interpretation staff for confidential communications with clients. Finally, defender offices should insist that courts provide their LEP clients with commonly used important court forms and notices in the most frequently encountered languages of the court population.

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<sup>51</sup> New York State Unified Court System, Rule 217, available at <<http://www.nycourts.gov/rules/trialcourts/217.shtml>>.

## VII. DIRECT IMMIGRATION SERVICE OR REFERRAL COMPONENT

Providing direct immigration services can be both the most important component of an Immigration Service Plan to noncitizen clients and the most difficult to finance. Because of the funding challenges, it can be tempting to view direct immigration services as beyond the scope of the criminal defense office's mission and thus to forego this component entirely. That would be a mistake. It is self-defeating for an office to invest the time, energy, and resources into developing an Immigration Service Plan but then do nothing to ensure that the office's hard work at mitigating immigration consequences bears real fruit when a client actually faces federal immigration authorities.

There are, however, a wide range of ways an office can ensure that its clients receive the necessary direct immigration services. The most obvious, most effective, and most expensive way is to utilize in-house experts to perform, at minimum, vital immigration services that indigent clients cannot receive from other non-profit service providers.<sup>52</sup> However, for offices that lack either the will or resources to take on this type of representation, there is a range of ways they can help clients obtain the required services. For example, defender offices can work out prioritized referral arrangements with non-profit immigration service providers. Some defender offices have developed relationships with law firms or other members of the private bar, to facilitate *pro bono* referrals. Whatever the mechanism, it is critical that at a minimum, an office develop a functioning referral system.

To the extent an office is considering taking on some direct immigration services, there are two primary types of immigration representation to consider: affirmative applications (i.e. applications for citizenship, permanent resident status, or asylum) and deportation defense representation. An office need not choose to do one rather than the other; however, it is important to reflect upon the differences between the two. The primary benefit of doing affirmative applications is that they take significantly less attorney time than deportation defense representation; thus, the office can serve many more clients by focusing on affirmative applications. Affirmative applications also have a prophylactic effect. For example, by getting your clients citizenship you protect them against future immigration problems. The primary benefit of focusing on deportation defense work is that there are extremely limited *pro bono* legal services for people facing deportation as the result of criminal convictions. Thus, if your office does not represent your indigent clients who land in deportation proceedings, it is very likely they will go unrepresented.<sup>53</sup> Research demonstrates, not surprisingly in this hyper-complicated area of law, that a person's chance of success in deportation proceedings is substantially lower when she is unrepresented.<sup>54</sup>

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<sup>52</sup> For a full discussion of funding strategies see discussion *infra* at Part IX(C), Getting Started, Assessing Funding Options.

<sup>53</sup> There is no right to appointed counsel in deportation proceedings. 8 U.S.C. § 1362. In fact, federal law forbids the expenditure of federal dollars on defense services for people facing deportation. *Id.*

<sup>54</sup> See ABA Report, *The Quest to Fulfill Our Nation's Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees*, ABA Adopted by the House of Delegates (Feb. 13,

One final option in the direct service arena is working with clients likely to land in removal proceedings to train them to represent themselves. Such *pro se* trainings are a poor substitute for direct deportation defense representation but they require only a minimal time and resource commitment and are certainly preferable to seeing your clients go unrepresented without any training at all. A list of *pro se* resources for immigrants facing removal can be found in Appendix L.

### VIII. SPECIAL CONSIDERATIONS FOR ASSIGNED COUNSEL PROGRAMS

Developing and implementing an Immigration Service Plan for an assigned counsel program present its own unique set of challenges. First and foremost, the majority of the advisal models, discussed *supra* at Part III, are simply not compatible with structure of assigned counsel programs. However, individually assigned counsel are under the same professional obligation to provide accurate advice regarding potential immigration consequences and to work to develop alternative dispositions, when appropriate, that would mitigate immigration consequences. The two advisal models that are most compatible with assigned counsel programs are the Contract Model and the Statewide Layered Model. Unless and until New York State adopts a statewide defender system, the latter model is useful only in theory. As such, administrators of assigned counsel programs should work with contracting jurisdictions to establishing consulting contracts with appropriate immigration legal services organizations to provide on-demand immigration consultations to individual attorneys handling assigned cases. Attorneys working in assigned counsel programs without such consulting services available should consider making applications to the court, in appropriate cases, for funds to obtain an expert immigration consultation.

Assigned counsel programs should also publish guidelines for their attorneys that make clear that investigating and advising on immigration consequences is part of the process of providing effective representation in criminal proceedings to noncitizen clients. In order to assist attorneys in satisfying this professional responsibility, such programs should mandate that each attorney take part in appropriate training on the immigration consequences of criminal convictions. Such programs should also mandate that their attorneys screen every client to identify potential immigration issues and that their attorneys employ the use of interpreters and translators to communicate with LEP clients. Finally, assigned counsel programs should, at minimum, compile comprehensive referral lists of *pro bono* and low cost immigration service providers for attorneys to distribute to noncitizen clients.

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2006) (finding that in 2003, only 14 percent of non-detained asylum seekers without counsel were granted asylum in comparison to 39 percent with counsel; and for detained asylum-seekers 3 percent gained asylum without counsel compared to 18 percent success with counsel); *see also Access to Civil Justice: Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases*, Northeastern School of Law, Program on Human Rights and the Global Economy (Dec. 10, 2007), available at <<http://www.civilrighttocounsel.org/pdfs/Access%20to%20Civil%20ustice,%20CERD%20Shadow%20Report.pdf>>; David Udell and Rebekah Diller, *Access to Justice: Opening the Courthouse Door*, Brennan Center for Justice White Paper, at New York University School of Law (2007), available at <[http://brennan.3cdn.net/297f4fabb202470c67\\_3vm6i6ar9.pdf](http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf)>.

## **IX. GETTING STARTED: DEVELOPING AN IMMIGRATION SERVICE PLAN FOR YOUR OFFICE**

### **A. NEEDS ASSESSMENT**

The natural starting point for any office planning to develop an Immigration Service Plan is to conduct a needs assessment of its community generally and its client population specifically. Obtaining a reliable estimate of the size of the office's noncitizen client population, through using internal or census data, will allow the office to determine how many or what percentage of an immigration expert it will require.<sup>55</sup> Surveying a sample of the noncitizen client population is the most direct way to determine the types of immigration services that would be most important to them. Surveying the capacity and range of services provided by local non-profit immigration service providers will also be critical.

### **B. IDENTIFYING EXPERT IMMIGRATION RESOURCES**

One important consideration in determining which advisal model would work best for your office is identifying the expert immigration services available to you. It is always possible to do a generalized search for attorneys with expertise in the intersection of criminal and immigration law; however, the pool of qualified applicants with such expertise is likely to be limited and offices should at least explore the possibility of an internal hire or of sharing personnel with a local immigration service provider. If there are existing supervisors, appellate attorneys, or senior trial attorneys within a defender office that may be interested in becoming the office's immigration expert, there are significant advantages to such internal hires.<sup>56</sup> As discussed *supra*, if a local immigration service provider is interested in a staff split, this could be a good way to facilitate direct immigration representation for your office's clients. The possibility of a staff split may be especially worth exploring if you determine your office requires less than a full time immigration expert. Finally, identifying organizations and individuals with particular expertise in the intersection of criminal and immigration law is important if you are considering implementing a Contract Model Immigration Service Plan. Knowing the full range of expert services available is an important step in determining the best advisal model for your office's Immigration Service Plan.

### **C. ASSESSING FUNDING OPTIONS**

The most significant hurdle for most offices in implementing an Immigration Service Plan is identifying funding for the additional expert immigration services required. The most logical and most stable source of funding is, of course, including the relevant expenses in the office's primary contract with the state defining the office's

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<sup>55</sup> See discussion *supra* at Part III(F)(2), Advisal Component, Staffing Issues, Staffing Levels for Immigration Experts.

<sup>56</sup> See discussion *supra* at Part III(F)(1), Advisal Component, Staffing Issues, Hiring Criteria for Immigration Expert.

defender duties and compensation. This is, no doubt, easier said than done. However, some offices in New York and around the country have successfully negotiated contracts that include budget items for providing expert immigration services to defender clients. The now uniform acceptance by all leading state and national professional organizations, that competent defense services requires advice on the immigration consequences of criminal cases,<sup>57</sup> should be potent ammunition in negotiating such services into an office's contract.

For offices that are unable to negotiate such contracts, there are other options available. A number of offices have started their Immigration Service Plan by making a joint application with a recent law school graduate for post-graduate fellowships.<sup>58</sup> Such fellowships generally provide funding for a staff attorney for approximately two years. Another start-up funding option is outside fundraising, either through grants or through private donors. It may be difficult to sustain funding through such transient sources because private funders are often most interested in starting something new. However, even if your office was initially unsuccessful in negotiating immigration services into your state contract, you may be in a better position for such negotiation after you have an immigration project up and running, and can therefore document the vital impact of such services.

#### **D. CRAFTING AN IMMIGRATION SERVICE PLAN**

Choosing which advisal model to utilize (or choosing to create a hybrid model) is the most fundamental choice an office must make in crafting its Immigration Service Plan. The steps outlined above are necessary precursors to this fundamental choice. You simply cannot make a well informed strategic decision about which model to employ until you understand the size and needs of your office's noncitizen clients, the range of relevant immigration services already available to that client population, the range of potential immigration experts available to the office, and the funding possibilities and limitations.

With this information in hand, your office should carefully consider the advantages and challenges posed by the various advisal models, discussed *supra* at Part III. Once you have considered the various models that could work for your office, there is no need to reinvent the wheel. Consulting with the leadership and immigration experts in offices that already employ any models you are considering is a logical and invaluable final step in crafting your Immigration Service Plan. Ultimately, figuring out which advisal method will work best for an institutional defender office is a complicated task that requires both the steps outlined above and an intimate knowledge of the organization, practice, and culture of the office.

Once an office has selected the advisal model it intends to deploy, the development of the other components – information gathering, staff development,

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<sup>57</sup> See discussion *supra* at note 9-13 and accompanying text.

<sup>58</sup> The Open Society Institute (Soros Justice Fellow) and Equal Justice Works, among others, have previously funded such fellowships.

language access, and direct immigration service – will follow somewhat naturally from the considerations outlined above.

#### **E. PHASING IN AN IMMIGRATION SERVICE PLAN**

There are several reasons to consider gradually phasing in an Immigration Service Plan. Some offices will be unable initially to fully fund their plan. Other offices will hire immigration experts with considerable criminal defense experience but who need time to educate themselves more fully on the immigration consequences of criminal convictions. Other offices will hire immigration experts with considerable immigration experience but who will need time to learn the realities of the office's criminal practice. Still other offices will simply decide to focus exclusively on implementing certain components of their Immigration Service Plan initially and wait until they are satisfied with those components before moving on to full implementation.

Whatever the reason, implementing the advisal and staff development components can be a logical starting point. It is likely that referrals will build slowly (especially before an office has implemented its information gathering component) thus allowing the new immigration expert additional time for her own professional development and to plan implementation of the information gathering and language access components of the plan. Once these components are phased in and once the profile of the office's immigration practice increases, referrals will flow more regularly. Finally, when the immigration expert is comfortable handling the office's regular referrals in an expeditious manner, she will be in a good position to determine the range of direct immigration services she has the capacity to provide.

We do not mean to suggest here that a phase-in is necessarily preferable to a full launch of an office's Immigration Service Plan. A planning period where all components of the Immigration Service Plan are fully developed, followed by a full launch can also work well for some offices and some immigration experts.

# **IMMIGRANT DEFENSE PROJECT AND NEW YORK STATE DEFENDERS ASSOCIATION**

## **PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN**

### **APPENDICES**

- A. Contact list of criminal-immigration experts by defender office
- B. Sample immigration consultation referral form
- C. Sample pre-plea advisal and advocacy documents
- D. Sample post-plea advisal and advocacy letters
- E. Sample criminal-immigration practice updates
- F. Sample follow-up immigration interview sheet
- G. Sample new attorney training outline
- H. Sample language access policy
- I. IDP Immigration Consequences Checklist
- J. NYSDA Defender Case Management System screen shot
- K. Criminal-immigration resource list of publications, websites, and professional organizations
- L. Pro se resources for immigrants facing removal



**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

**Appendix A**

**Contact List of Criminal-Immigration  
Experts by Defender Office**

**CONTACT LIST OF CRIMINAL-IMMIGRATION  
EXPERTS BY DEFENDER OFFICE  
(PARTIAL LIST)**

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Jennifer Friedman JenniferF@bronxdefenders.org	Bronx Defenders (718) 838-7878
Isaac Wheeler IsaacW@bronxdefenders.org	Bronx Defenders (718) 838-7878
Hans Meyer hans.meyer@state.co.us	Colorado State Public Defender (303) 620-4999, ext. 1136
Caitlin Barry immigration@philadefender.org	Defender Association of Philadelphia/ Nationalities Service Center (267) 765-6673 and (215) 609-1546
Peter J. Thompson pthompson@philadefender.org	Defender Association of Philadelphia (267) 765-6787
Kathy Brady kbrady@ilrc.org	Immigrant Legal Resource Center (contracts with California Office of State Public Defender) (415) 255-9499
Graciela Martinez Gmartinez2@lacopubdef.org	Los Angeles County Public Defender (213) 974-2875
Wendy S. Wayne wwayne@publiccounsel.net	Massachusetts Committee for Public Counsel Services (617) 623-0591
Drew Dubrin DduBrin@monroecounty.gov	Monroe County Public Defender (585) 753-4947
Heidi Altman haltman@ndsny.org	Neighborhood Defender Service of Harlem (212) 876-5500
Jojo Annobil JAnnobil@legal-aid.org	New York Legal Aid Society (212) 577-3292
Ward Oliver WOliver@legal-aid.org	New York Legal Aid Society (212) 577-3393
Kate Paek KPaek@legal-aid.org	New York Legal Aid Society (212) 577-3374

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Michelle Fei MFei@immigrantdefenseproject.org	Immigrant Defense Project (supports defender offices in and outside of NY) (212) 725-6486
Benita Jain BJain@immigrantdefenseproject.org	Immigrant Defense Project (supports defender offices in and outside of NY) (212) 725-6485
Manuel D. Vargas MVargas@immigrantdefenseproject.org	Immigrant Defense Project (supports defender offices in and outside of NY) (212) 725-6485
Joanne Macri Jmacri@nysda.org	New York State Defender Association (518) 465-3524
Gwen Washington Gwashington@pdsdc.org	Public Defender Service for the District of Columbia (202) 824-2527
Ann Benson defendimmigrants@aol.com	Washington Defender Association (556) 732-0611
Jonathan Moore jonathan@defensenet.org	Washington Defender Association (206) 623-4321

**IMMIGRANT DEFENSE PROJECT AND  
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# **Appendix B**

## **Sample Immigration Consultation Referral Form**

**REFERRAL TO CAP IMMIGRATION**

JF
IW

ATTACH RAP SHEET AND INDICTMENT OR COMPLAINT

Attorney or CA: \_\_\_\_\_

Date: \_\_\_\_\_

CLIENT: \_\_\_\_\_  
[name as it appears in Pika]

Client's language: \_\_\_\_\_

Real name: \_\_\_\_\_  
[if different from above]

**Location:**  In  Out

**Detainer**  Yes  No

Next Court Date and Part: \_\_\_\_\_

On for:  disposition  motions/R&D  hearing & trial  Other \_\_\_\_\_

**Reason for Referral:** (Check all that apply)

- Plea consultation on open case
- Wants to travel
- Wants to apply for citizenship
- Other:

**Immigration status:**

- LPR (since \_\_\_\_\_)
- Visa overstay (date \_\_\_\_\_)
- Entered illegally
- Other:

**Explanation of Problem:** (If necessary, elaborate on the back of this sheet)

**OFFER OR LIKELY DISPOSITION:**

Timeframe:  By next Court date  Open  Other \_\_\_\_\_

Client/Family Contact numbers: **(please indicate whose number)**

**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

# **Appendix C**

## **Sample Pre-Plea Advisal and Advocacy Documents**

## SAMPLE PRE-PLEA ADVISAL MEMO TO DEFENDER

TO: Defender  
FROM: Isaac Wheeler  
RE: Mr. D's immigration consultation  
DATE: November 29, 2006

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I understand the client is a permanent resident with no record being offered a youthful offender disposition w/ probation on a criminal poss of a controlled substance charge. You asked for advice about how to counsel him on the immigration consequences and how to allocate to best protect him on the immigration front down the road

What to tell him about the YO:

- not deportable while in the US: can renew his green card, etc.
- if he leaves the US, they may deny him re-entry as someone they have "reason to believe is a drug trafficker" and put him in deportation proceedings
  
- It will completely bar him from applying for citizenship as long as he is on probation. As a practical matter, it will probably lead to denial of citizenship for up to 5 years after that (so, 10 years from the date of the onset of probation).

What to say regarding the YO at allocution:

"Mr. D is entering this plea in specific reliance on advice provided by our office concerning the immigration consequences of this plea. Mr. D has been advised that under present law this plea does not constitute a conviction within the meaning of the Immigration and Nationality Act and that the records underlying this disposition will not be made available to the Dept of Homeland Security."

He should come see me when he gets out.

## SAMPLE PRE-PLEA ADVISAL MEMO TO DEFENDER

TO: Defender  
FROM: Isaac Wheeler  
RE: Mr. H's immigration consultation  
DATE: November 29, 2006

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The client entered on a visitor visa and has overstayed but is married to a US citizen and is in the process of getting his green card. You asked for advice on how to explain to the DA why this plea matters for immigration and for advice on what is the best plea option for him.

### **Here is why the plea matters, to explain to the DA:**

- He is eligible to adjust his status and is working with an attorney on getting his green card. Conviction of an offense that makes him inadmissible will bar him from getting that status.
- Any felony crime involving moral turpitude (CIMT) will bar him from getting his green card. A misdemeanor CIMT could bar him and at best will be a significant negative factor in that process.

**Now here's the deal on pleading:** the charged offenses are all CIMTs. We're trying for a non-CIMT plea. I am still looking at "making a punishable false written statement," 210.40, which might work if he filled out some form that said that false statements were punishable. I can get back to you about that by early tomorrow afternoon. But right now I believe the best plea will be 175.30, offering a false statement for public filing, an A misdemeanor. The key here is to admit to no more than the bare elements of that statute, and in particular to avoid allocuting to:

- an intent to defraud
- an intent to cause a loss to the government
- an intent to deceive or obstruct the government
- the fact that the information was material to an award of benefits.

None of these things is necessary for conviction under 175.30. Optimally, he would get a superseding complaint charging him with offering a false statement and simply saying that he knowingly offered false information on a public form on such and such a date, knowing that it would become part of the records of a public agency. If the complaint doesn't specifically say that he lied about employment status to obtain benefits, it would help a lot.

This sets up a weak argument for a non-CIMT, but a weak argument is better than none. Even if the offense is determined to be a CIMT, it won't be a statutory bar to status as long as he gets no jail -- but better to have this additional line of defense.

I am cell reachable with questions tomorrow, and will let you know if I conclude that the 210.40 seems any better.



## SAMPLE PRE-PLEA ADVISAL MEMO TO DEFENDER

To: Defender

Fr: Isaac Wheeler

Re: Mr. P

Date: 11/15/2005

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As I said in my earlier email, I agree with you that neither 120.25 (F) nor 120.20 (M) is a safe plea for Mr. P. I haven't heard back from you whether the charged VTL §1212 misdemeanor is a possible disposition, but assuming that it is, I am reasonably confident that it is not a crime involving moral turpitude. It is, at any rate, by far the best alternative of the charged offenses if no entirely safe disposition (discon, trespass, etc.) is available.

First, I've found no case directly suggesting that reckless driving generically constitutes a CIMT. The BIA has suggested in dicta that it does not, at least where "reckless driving" is understood to include mere "gross or wanton negligence." *Matter of C-*, 2 I. & N. Dec. 716, 719-20 (BIA 1947) (reasoning that "willful damage" to property under Canadian law may be satisfied by conduct that in the United States would amount to "nothing more than reckless driving" and holding that statute requiring "willful damage" in non-vehicular context is not a CIMT). Other cases weakly suggest that reckless driving with a fully reckless mens rea is not generally regarded as a sustainable ground of removability. *See Matter of Catsro-Garcia*, No. A77-197-301, 2004 WL 2374372 (BIA July 23, 2004) (noting without comment that respondent was charged with California reckless driving, involving "willful or wanton" disregard of risk); *In re Yue*, No. A43-40-198, 2003 WL 23508703 (BIA Dec. 17, 2003) (noting without comment that IJ found that Georgia reckless driving, involving "reckless disregard for the safety of persons," is not a CIMT; DHS did not appeal this determination despite appeal of other findings with regard to charged grounds of CIMT removability).

Second, although VTL § 1212 requires a reckless and not merely negligent state of mind, *see, e.g., People v. Grogan*, 260 N.Y. 138, 183 (1932) (so holding with respect to predecessor statute); *People v. Boice*, 455 N.Y.S.2d 859, 860 (App. Div. 3d Dep't 1982) (same), a crime requiring a reckless disregard of danger must typically involve some further aggravating circumstance, such as infliction of serious bodily injury, to constitute a CIMT. *Matter of Stankiewicz*, No. A91-648-013, 2004 WL 2374870 (BIA Aug. 18, 2004) (dicta; citing *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996)); *see also Matter of Fernandez*, No. A23-506-187, 2004 WL 2374533 (BIA Aug. 2, 2004) ("'[M]oral turpitude can lie in criminally reckless conduct' in the presence of some aggravating factor or series of factors, such as the death of a person or the use of a firearm." (quoting *Matter of Medina*, 15 I. & N. Dec. 611, 613 (BIA 1976))). Other relevant aggravating factors include an element of depraved indifference or a grave risk

of death. *Matter of Fernandez*, 204 WL 2374533. Section 1212 contains none of these; the statute is offended by “unreasonabl[e] interfere[nce] with the free and proper use of the public highway” or “unreasonabl[e] endanger[ment of] users of the public highway,” without more. In particular, as one lower court has pointed out, in contrast to PL § 120.20, the degree of risk of injury posed to others is irrelevant to conviction under § 1212. *See Matter of Vincent H.*, 775 N.Y.S.2d 457 (Queens Cty. Fam. Ct., 2004) (citing *People v. Moran*, 192 A.D.2d 885, 885 (App. Div. 3d Dep’t 1993)). There is therefore a reasonably strong argument that § 1212 is not a CIMT.

Another possibility to explore is a plea to a criminally negligent offense, since any level of mens rea below recklessness is highly unlikely to be considered a CIMT. *See Stankiewicz*, supra (holding that criminally negligent homicide under § 125.10 is not a CIMT). There are obviously good reasons not to take E-felony vehicular assault under 120.03(1) & (2), but if Mr. P was drinking it seems to cover the facts. A *Gill*-type nonsensical plea to attempted negligent assault would be an apparently safe A misdemeanor if that’s what the DA is looking for. *See Gill v. INS*, 420 F.3d 82, 90-91 (2d Cir. 2005).



## OFFICE OF THE STATE PUBLIC DEFENDER

DOUGLAS K. WILSON  
STATE PUBLIC DEFENDER

October 31, 2008

**To: David Lipka**

**From: Hans Meyer**

**Re: Immigration Advisement for Client  
DOE, Jane**

David,

Below is my attempt to provide you with several plea and sentencing options for negotiation on behalf of your client, as well as an explanation as to what might be the potential immigration consequences of those options.

### Client's Immigration History

Based on the information your client has provided to us, my understanding of Ms. Doe's immigration history is as follows: Ms. Doe is a citizen and national of South Korea who first entered the U.S. on an unknown date in the past. Ms. Doe relates that she has been an LPR for the last ten years.

### Criminal History

It appears that Ms. Jess has no prior criminal history, except for a defective headlights in Jeff CO in 2006 (class A traffic infraction); and a defective vehicle in 2001 (class A traffic infraction). She has no other history of federal, state, or municipal convictions.

### Current Criminal Case

Ms. Jess is currently charged with F4 ID theft, F5 check forgery and F5 attempted theft (\$1,000 to \$20,000). Her current offer is a DJ/S split: DJ to F4 ID theft w/ 2 yrs probation; PG straight up to 2nd degree forgery (M1); 100 UPS, Rx/alc eval/txt; restitution.

### Immigration Statutes Implicated by the Case

In this situation, your client's primary immigration concern are the grounds of deportability enumerated at 8 USC 1227(a)(2); INA 237(a)(2). These are the statutory grounds by which ICE may lawfully attempt to strip your client of her LPR status.

Of utmost importance to avoid in this case are the "aggravated felony" (AF) grounds of deportability, which bar most forms of relief from removal. See 8 USC 1227(a)(2)(iii). The "aggravated felony" grounds most likely at play in your client's case are: a) a "theft offense" for which the client receives a sentence to a term of imprisonment of one year or more, INA 101(a)(43)(G); b) an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000, INA 101(a)(43)(M).

Also of importance to your client is to avoid deportability based on convictions for "crimes involving moral turpitude" (CIMT). See 8 USC 1227(a)(2)(i) & (ii). This analysis depends in part on how long your client has been an LPR. The reason why the duration of your client's LPR status is so important to her immigration status issues is that if your client has been in the U.S. as an LPR for more than 5 years before the commission of a CIMT, then she may be able to plead to one CIMT offense and avoid becoming removable, as long as the offense does not trigger any other grounds of removal and as long as Ms. Doe has absolutely no other criminal convictions that could be considered CIMT offenses.

For your information, I have included the removal provisions for CIMT offenses. First, 8 USC 1227(a)(2)(i) provides that an alien is removable if she "is convicted of a crime involving moral turpitude committed within five years after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed." 8 USC 1227(a)(2)(i).

Second, 8 USC 1227(a)(2)(ii) provides that "any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial" is deportable. 8 USC 1227(a)(2)(i)(ii).

Applying these two provisions to your client's situation helps explain why it is so important to know both that she has no other criminal history and also was admitted as an LPR over 5 years ago. Thus, for purposes of CIMT offenses, Ms. Doe may be able to plead to one CIMT offense and avoid being deportable altogether, as long as the crime doesn't trigger any other ground of deportability in the process.

### **Brief Synopsis of Recommended Disposition**

In this case and based on your explanation to me regarding the strengths and weaknesses of your case, I would recommend the following dispositions starting with the safest option:

- a) 18-5-903, Criminal Possession of a Financial Device (M1) or (F6), sentence to 364 days or less
- b) 18-4-501, Criminal Mischief (M2 or M1) or Felony Attempt (F5), sentence to 364 days or less
- c) 18-5-104, Second Degree Forgery (M1), sentence to 364 days or less
- d) 18-5-902, Identity Theft (F4) or Attempt (F5), sentence to 364 days or less

### **Plea and Sentencing Strategies**

I have identified the following plea and sentencing options to assist you in negotiations with the District Attorney. They are listed in descending order of safety. Within each plea section, I have provided a short analysis of what the potential immigration consequences are likely to be.

**a) A plea to 18-5-903, Criminal Possession of a Financial Device (M1) or (F6)**

This plea arrangement is probably safest given the scope of acts prohibited by the statute. I think the best bet would be to shoot for the M1 plea and see if you can get into the Record of Conviction (the Rule 11, the written elements sheet, the written count to which the person pleads guilty, and any factual admissions made by the Defendant on the record) the following information:

- 1) Get in the *written* Rule 11 Agreement that your client committed the offense under the theory that she "reasonably should know" that the device was "lost".
- 2) Negotiation for a *written* added or amended count to the offense that either tracks the above language ("reasonably should have known that the device was lost") or which tracks the general language of the statute. This would help to insulate against a determination that your client's offense is one where moral turpitude inheres.
- 3) Waive the establishment of a factual basis or stipulate only to the factual basis in so much as it would support the offense to which you are pleading.
- 4) Keep any sentence to a term of imprisonment to 364 days or less and any order for restitution in the case to under \$10,000. This would avoid any potential of the offense being classified as an aggravated felony.

**Potential Immigration Consequences:** This plea is probably the best option available to your client under the circumstances. First, this crime arguably does not rise to the level of a CIMT offense. This is because, where the record of conviction is pled and written with particularity as explained above, the conduct at issue doesn't necessarily involve moral turpitude -- it's just knowingly possessing someone else's lost financial device.

If for some reason you cannot get that specific language into the Rule 11 agreement and other documents, you should at the very least work to have the record of conviction (the Rule 11 agreement, the elemental sheet, the added or amended count) simply track the general language of the statute. This will help make sure that the record of conviction for immigration purposes is vague. If done correctly, ICE may be unable to prove up a particular theory under the statute.

Second, even if this offense is deemed to constitute a CIMT, it should not make your client deportable because a) it is a first CIMT offense and your client has no other criminal history, and b) your client has been an LPR for roughly 10 years. Because more than 5 years has passed since she committed a first CIMT offense, that offense will not trigger deportability under CIMT grounds.

Lastly, with a sentence of less than 364 days and restitution of less than \$10,000, your client should be insulated against any allegations of an "aggravated felony" conviction for immigration purposes or the possibility that ICE could charge the conviction under a different deportability ground.

**b) A plea to 18-4-501, Criminal Mischief (M2 or M1) or Felony Attempt (F5), sentence to 364 days or less**

This is a plea strategy that I have developed for clients who must take a felony conviction based on the circumstances of their particular case. Your client should know that a plea to this offense is not

bulletproof. If you are looking at this kind of plea, it should be structured as follows to give your client the best argument that it should not trigger any particular ground of removability:

1) Rule 11 should state in *writing* that "D damaged *his own personal property* in which another person had a *temporary possessory interest*"

NOTE: I created the "temporary" language relating to the other person's possessory interest, since I think the statute contemplates conviction under that kind of a theory (i.e. boyfriend kicking his t.v. in his apartment during an argument with his girlfriend, who is just staying there temporarily). If you can't get the exact language of "temporary" into the Rule 11 or the added written count, in the alternative you could plead it to exactly the same language in step #1 without the word "temporary" in the Rule 11 or charging document. I still think that provides strong arguments against removability.

2) The *written* added or amended count or charge should track that same language as that written into the Rule 11 Agreement, if possible. In the alternative, the added count should simply track the generic language of the statute, not any specific factual averment.

3) Waive any factual basis or stipulate only to the factual basis in so much as it would support the elements of the offense to which you are pleading. This is not nearly as important of a consideration as the written information to be included in the Rule 11 and added count.

4) Keep any sentence to a term of imprisonment of 364 days or less.

**Potential Immigration Consequences:** I believe that, although this plea is a bit more risky, when correctly pled it provides very strong arguments for immigration purposes. First, this crime arguably does not rise to the level of a CIMT offense if crafted, pled and written with particularity as explained above. If you simply cannot convince the DA to agree with the theory of conviction, make sure all documents the record of conviction simply tracks the general language of the statute in its entirety. Again, if done correctly, I believe that ICE will be unable to prove up a particular theory of conviction under the statute.

Even if this offense is deemed to constitute a CIMT, it should not make your client deportable based on the same reasons that I mentioned above, being that it is a first CIMT offense not committed within 5 years of Ms. Doe's admission as an LPR. Again, a sentence of less than 364 days and restitution of less than \$10,000 should avoid "aggravated felony" grounds.

**c) A plea to 18-5-104, Second Degree Forgery (M1), sentence to 364 days or less**

This offense would be best pled as follows:

1) Try to keep the Rule 11 Agreement, elemental sheet, and count free from any mention as to what is the written instrument.

2) Keep any sentence to a term of imprisonment to 364 days or less.

***Potential Immigration Consequences:*** This offense is likely to be considered a CIMT, although there are arguments that the statute is divisible, in that there are some ways to violate the statute that do not involve moral turpitude. Regardless, the best practice in this case would be to keep the record of conviction vague as to the nature of the written instrument.

Even if held a CIMT, your client would not be deportable for the same reasons mentioned above. Controlling the sentence and restitution amount would also avoid aggravated felony grounds.

**d) 18-5-902, Identity Theft (F4) or Attempt (F5), sentence to 364 days or less**

This offense is almost certain to be a CIMT offense. If you do plead to it, I would suggest to plead to subsection (a) under that statute, and to try and track the general language of the statute in all documents that are part of the record of conviction.

***Potential Immigration Consequences:*** This offense is likely to be considered a CIMT. Regardless, the best practice in this case would be to keep the record of conviction vague as to the nature of the written instrument outlined in the statute.

Even if held a CIMT, your client would not be deportable for the same reasons mentioned above. Controlling the sentence and restitution amount in the same way as mentioned above would also avoid aggravated felony grounds.

**e) The Current Split Plea Offer**

I would be reticent to plea to the current split offer in your case. Although there is a provision of the immigration law that we might be able to rely on in avoiding removal for multiple CIMT offenses arising from a single scheme of criminal misconduct, I would suggest that we instead look for only one offense to which your client might plead. If for some reason we need to revisit that situation, we can certainly do so.

**Other Immigration Considerations**

David, I know this is a lot of information to send to you all at once, and some of it may be somewhat confusing. Please give me a call or follow up with an email to inform me about your negotiations in this case and to let me know if I can help with any further discussion or strategies for your client. I would appreciate hearing how the case is progressing.

Regards,

Hans Meyer

1.50

**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

# **Appendix D**

## **Sample Post-Plea Advisal and Advocacy Letters**



**Robin G. Steinberg**  
*Executive Director*

**SAMPLE POST-PLEA CLIENT ADVISAL LETTER**

**Jenny Kronenfeld**  
*Deputy Director*

May 28, 2003

**Florian Miedel**  
*Legal Director*



**David Feige**  
*Trial Supervisor*

Dear Mr. W :

*Team Leaders:*  
**Peter Carter**  
**Amy Gallicchio**  
**Julia Kuan**  
**Jake Stevens**

This letter summarizes several issues we have discussed concerning your immigration status. I understand it is your desire to be able to live and work in the United States permanently. I also understand that your mother has filed a relative petition on your behalf, but that it will be several years before your preference date comes up. The details below will help minimize obstacles to your return.

Most important, you must return to Jamaica before September 9, 2003. Because you have overstayed this visit, your visa is now invalid. If you leave voluntarily before September 9, you may be able to obtain a new visa to return after three years. If you leave after September 9, you will not be allowed into the United States for ten years from the date you leave the country.

When your preference date arrives, you should apply for permanent residency. The three-year period should have passed at this point. If your application is approved, you should get a new visa and be able to return.

Your recent conviction for petite larceny should not be an obstacle. Since the crime you pled guilty to is a misdemeanor, is your only crime, and you were sentenced to less than six months imprisonment, it will fall within the "petty offense exception" and will not bar you from returning or becoming a permanent resident. You should be sure to get a certificate of disposition from the court before you leave the country, as proof of your plea. We can help you with this if necessary. Please remember, you must disclose this conviction on any INS form or if asked by an INS agent. Failure to truthfully disclose this conviction could create a permanent bar to your return.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Peter Markowitz, Esq.

**Robin G. Steinberg**  
*Executive Director*

**SAMPLE CLIENT TRAVEL LETTER**

**Jenny Kronenfeld**  
*Deputy Director*

April 28, 2005

**Florian Miedel**  
*Legal Director*

RE: ██████ S█████, A ██████

**David Feige**  
*Trial Supervisor*

To Whom It May Concern:

*Team Leaders:*  
**Peter Carter**  
**Amy Gallicchio**  
**Julia Kuan**  
**Jake Stevens**

I am an immigration attorney and have consulted with Mr. S█████. I write this letter to assist with his immigration inspection and to explain that he is neither inadmissible nor deportable.

Mr. S█████'s one and only admission to the United States occurred on May 19, 1993. (see attached I-94). On April 21, 1999, he was convicted of Petite Larceny and was sentenced to a Conditional Discharge. (see attached certificate of disposition). On April 19, 2001, Mr. S█████ was convicted of the non-criminal offense of Disorderly Conduct. (see attached certificate of disposition).

Mr. S█████ is admissible because he has only one conviction that might be considered a crime involving moral turpitude ("CIMT") – his conviction for petite larceny – and that one conviction is not a felony and he was not sentenced to any time in jail. Accordingly, he qualifies for the non-discretionary petty offense exception. See INA § 212(a)(2)(A)(ii)(II); see also In re Garcia-Hernandez, 23 I & N Dec. 590 (BIA 2003) (holding that non-citizens with multiple convictions are eligible for the petty offense exception so long as only one conviction is a CIMT).

Mr. S█████ is not deportable because he has, at most, only one conviction for a CIMT and it occurred more than five years after his one and only admission to the United States. See INA § 237(a)(2)(A)(i)(I) (deportability ground for one CIMT within first five years after admission); INA § 237(a)(2)(A)(ii) (deportability ground for two or more CIMTs at any time after admission); see also INA § 101(a)(13)(A) (defining admission).

I hope this information is helpful. Please contact me if you need any further information.

Sincerely,

Peter Markowitz, Esq.

**SAMPLE NATURALIZATION LETTER**

October 9, 2003

Bureau of Citizenship and Immigration Services  
New York City District Office  
26 Federal Plaza  
New York, NY 10278

**RE:** [REDACTED] Y [REDACTED], A [REDACTED]  
*Applicant for USC*

To Whom It May Concern:

I am a lawful permanent resident of the United States and have a pending application for United States Citizenship. I have already submitted my application and have been fingerprinted. On my application I believe I stated that I was never arrested. This was accurate at the time I submitted the application but I was recently involved in an unfortunate incident that led to my arrest. Ultimately, the arrested resulted in my pleading guilty to the violation of Disorderly Conduct and I agreed to pay a \$100 fine. As you know, this is not a crime. I have included a certificate of disposition with this letter or your review.

I would like to briefly explain the circumstances that led to my plea. On June 8, 2003, I went to visit a friend who is incarcerated at Rikers Island Correctional Facility. During the course of my visit I gave my friend a pack of cigarettes. I was arrested because cigarettes are not allowed in the prisons.

I have never before had any contact with the criminal justice system. I have never before been arrested. I understand that to become a citizen of the United States I have to demonstrate good moral character. I am very sorry for the mistake I made in this case but hope you will see that I have demonstrated my good moral character, notwithstanding this incident, by among other things, my consistent employment at Long Island College Hospital, my consistent payment of income taxes, and my support and love for my four United States citizen children.

If you need any more information please let me know. Thank you for your time and consideration.

Sincerely,

[REDACTED]

**Robin G. Steinberg**  
*Executive Director*

**SAMPLE DEFERRED INSPECTION LETTER**

April 27, 2005

**Jenny Kronenfeld**  
*Deputy Director*

**Florian Miedel**  
*Legal Director*

**David Feige**  
*Trial Supervisor*

*Team Leaders:*  
**Peter Carter**  
**Amy Gallicchio**  
**Julia Kuan**  
**Jake Stevens**

Deportation Officer [REDACTED]  
Department of Homeland Security  
United States Customs & Border Protection  
26 Federal Plaza  
8<sup>th</sup> Floor – Room 8-804  
New York, NY 10278

RE: A [REDACTED], A [REDACTED]

Officer Mateo:

I am writing to follow up on our telephone conversation. As you know, Mr. A [REDACTED] is a Lawful Permanent Resident of the United States who was placed in deferred inspection upon returning from a trip abroad because he had pending criminal charges against him at the time of his entry. His charges were still pending at the time of his original deferred inspection appointment so the appointment was rescheduled. On April 6, 2005, Mr. A [REDACTED] entered a plea in Bronx Criminal Court resolving all charges against him. He will be sentenced on June 2, 2005. In our most recent conversation you requested that we deliver certificates of disposition to you after June 2, 2005 – which we will do. However, because the sentence imposed in this case will not change the immigration consequences I am writing to you now to provide documentation demonstrating that Mr. A [REDACTED] is not deportable.

Mr. Abreu pled guilty in two separate cases. Fortunately neither will have any immigration consequences for him. In regard to the first case (2004BX [REDACTED]), I have enclosed a copy of the certificate of disposition demonstrating that on April 6, 2005, Mr. A [REDACTED] pled guilty to misdemeanor Assault 3d Degree, NYPL § 120.00(1), and was sentenced to a conditional discharge. As you are well aware Assault 3d Degree is the lowest level assault offense in New York and, as the Board of Immigration Appeals (“BIA”) has repeatedly held, “[s]imple assault is generally not considered a crime involving moral turpitude.” Matter of Perez-Contreras, 20 I & N Dec. 615, 618 (BIA 1992). Moreover, the BIA has specifically held that New York’s Assault 3d Degree statute is not a crime involving moral turpitude (“CIMT”). See In re Baleseca-Garcia, A42 743 316, 2004 WL 2374490, (BIA 2004); see also In re Williams, A34 169 401, 2005 WL 698372 (BIA Feb. 14, 2005) (holding that Connecticut simple assault statute with identical language to NYPL 120.00(1) is not a CIMT). In addition, the Second Circuit Court of Appeals has held that a Connecticut assault statute, identical to New York’s Assault 3d Degree, is not a crime of violence. See Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003). Accordingly, Mr. Abreu’s simple assault conviction is also not a crime of domestic

violence. See INA § 237(a)(2)(E)(i) (requiring that a crime be a “crime of violence” in order to trigger deportability).

In regard to the second case (2004BX [REDACTED]), Mr. A [REDACTED] pled guilty to Criminal Contempt in the 2d Degree, NYPL § 215.50(3). He was promised a sentence of three years probation and the case was adjourned for sentencing on June 2, 2005 to allow probation time to interview the Mr. A [REDACTED]. Of course, the case is not final and we cannot submit a certificate of disposition until a sentence is imposed. Instead, I have enclosed the relevant portion of the plea minutes. In this case, this proof should suffice because Mr. A [REDACTED] will not be deportable under any possible sentence imposed by the court on June 2, 2005. The only possible ground of deportability triggered by a plea to NYPL § 215.50(3) is INA § 237(a)(2)(E)(ii) (covering certain violations of domestic violence protection orders). Section 237(a)(2)(E)(ii) makes a person deportable when a “court determines [that the person] has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury[.]” During the plea allocution, Mr. A [REDACTED] pled guilty to committing Criminal Contempt in the 2d Degree “with the understanding that the portion of the protection order the he’s admitting to violating does not involve protection against credible threat or violence, repeated harassment, or bodily injury to the person of the complainant.” Transcript Plea Allocution (Apr. 6, 2005). In addition, I have included a copy of the criminal complaint from this case showing that the only alleged violation was a technical violation of being present at a time and place forbidden by the protection order.<sup>1</sup> There is no allegation related to “credible threats of violence, repeated harassment, or bodily injury.” INA § 237(a)(2)(E)(ii). Since the record of conviction clearly demonstrates that the court found that he had not violated “the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury” he is not deportable regardless of the sentence imposed. Of course, if you would like we will also submit a certificate of disposition as soon as Mr. A [REDACTED] has been sentenced, but this document will not alter the deportability analysis.

I hope the information provided above and the documents contained herein are helpful to you. If you have any questions or need any further documentation please let me know. Thank you for your assistance.

Sincerely,

Peter Markowitz, Esq.

Encl: Certificate of Disposition (2004BX [REDACTED])  
Plea Minutes (2004BX [REDACTED])  
Criminal Complaint (2004BX [REDACTED])  
I-546 – Order to Appear for Deferred Inspection

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<sup>1</sup> In fact, the circumstance leading to this conviction (though not technically relevant to the deportability analysis) have nothing to do with “credible threats of violence, repeated harassment, or bodily injury.” Mr. A [REDACTED] was enjoined from coming near the complainant; however, that injunction was subject to family court modification. The family court authorized Mr. A [REDACTED] to pick up and drop off his child from the home of the complainant. Unfortunately, Mr. A [REDACTED] was present at the home of the complainant picking up his children 1½ hours late, thus making him in technical violation of the injunction issued.

**Robin G. Steinberg**  
*Executive Director*

**SAMPLE POST-CONVICTION ADVOCACY LETTER**

**Jenny Kronenfeld**  
*Deputy Director*

March 14, 2005

**Florian Miedel**  
*Legal Director*

Assistant District Attorney [REDACTED] H [REDACTED]  
Office of the Bronx District Attorney  
198 East 161<sup>st</sup> Street  
Bronx, New York 10451

**David Feige**  
*Trial Supervisor*

*Team Leaders:*  
**Peter Carter**  
**Amy Gallicchio**  
**Julia Kuan**  
**Jake Stevens**

**RE: People v. [REDACTED] C [REDACTED], 2002BX [REDACTED]**

Mr. H [REDACTED]:

I am the immigration attorney at The Bronx Defenders. I regularly represent clients facing deportation in immigration and federal courts. Ms. [REDACTED] S [REDACTED] has asked me to write you a letter detailing the status of Mr. [REDACTED] C [REDACTED]'s immigration situation and the fate that awaits Mr. C [REDACTED] if he is deported to Haiti.

Mr. C [REDACTED] is a citizen of Haiti and a Lawful Permanent Resident of the United States. As a result of his conviction in the above referenced case, Mr. C [REDACTED] is in immigration custody in Oakdale, Louisiana awaiting deportation. If Mr. C [REDACTED] is resentenced to a Youthful Offender status, his deportation can be stopped. Absent such a resentencing, Mr. C [REDACTED] will be deported to Haiti.

Haiti is notorious in the international community for its extraordinary mistreatment of deportees with criminal records. Once deported, Mr. C [REDACTED] will be indefinitely detained in a Haitian prison in "miserable and inhuman" conditions that the Third Circuit Court of Appeals has recently compared to "those existing on slave ships." *Auguste v. Ridge*, 395 F.3d 123, 128 (3d Cir. 2005). While incarcerated, he will be kept in conditions "unfit for human habitation," will "receive insufficient calories to sustain life," and will be subject to "pervasive . . . beatings[] with fists, sticks, and belts[.]" *In re J-E*, 23 I. & N. Dec. 291, 300-01, 307 (BIA 2002). Mr. C [REDACTED] will remain in Haitian prison subject to such treatment until someone is able to pay the substantial bribes necessary to affect his release or until he perishes. *See id.* at 293 (noting that half of reported deaths in Haitian jails were caused by starvation).

The prison conditions, in which Mr. C [REDACTED] will be placed were detailed by the Third Circuit as follows:

The prison population is held in cells that are so tiny and overcrowded that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day. Many of the cells lack basic furniture, such as chairs, mattresses, washbasins or toilets,

and are full of vermin, including roaches, rats, mice and lizards. Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two to three days. Because cells lack basic sanitation facilities, prisoners are provided with buckets or plastic bags in which to urinate and defecate; the bags are often not collected for days and spill onto the floor, leaving the floors covered with urine and feces. There are also indications that prison authorities provide little or no food or water, and malnutrition and starvation is a continuous problem. Nor is medical treatment provided to prisoners, who suffer from a host of diseases including tuberculosis, HIV/AIDS, and Beri-Beri, a life-threatening disease caused by malnutrition.

*Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005)

In addition to the “pervasive” beating of deportees in Haitian jails, *In re J-E*, 23 I. & N. Dec. at 301, the United States Department of States has observed that,

international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and kalot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates.

2001 Department of State Country Reports. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Haiti Country Reports on Human Rights Practices - 2000 (Feb. 2001), reprinted in Committees on Foreign Relations and International Relations, 107th Cong., 1st Sess., Country Reports on Human Rights Practices for 2000, 2629 (Joint Comm. Print 2001).

The crime that Mr. C [REDACTED] has been convicted of is obviously serious in nature; however, subjecting any defendant to what awaits Mr. C [REDACTED] in Haiti is a punishment beyond the pale of any penalty contemplated by our criminal justice system. Resentencing Mr. C [REDACTED] as a Youthful Offender will insure that he does not escape culpability for this incident but will also protect him from the extreme abuses that inevitably await him in Haiti. *See Matter of Miguel Devison-Charles*, Interim Decision #3435 (BIA September 12, 2000) (holding that New York Youthful Offender adjudications are not convictions for immigration purposes).

If you have any further questions or would like to see any additional documentation about criminal deportees in Haiti please let me know.

Sincerely,

Peter Markowitz, Esq.

**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

# **Appendix E**

## **Sample Criminal-Immigration Practice Updates**



## IMMIGRATION/CRIMINAL PRACTICE ALERT – 5/6/03 – (C.O.V.)

*The Second Circuit has recently issued two decisions about the definition of “crime of violence” (COV) that will dramatically reduce the immigration consequences of several New York State misdemeanors and felonies. If a crime does not fall within the definition of COV it will not be considered a “crime of domestic violence” and, in some instances, will not be considered an “aggravated felony.”*

*Chrzanoski v. Ashcroft*, --- F.3d ---, 2003 WL 1908143 (2d Cir. Apr. 22, 2003) – The court held that a conviction under a Connecticut assault statute (which is materially indistinguishable from NY PL § 120.00) was not a COV because there was no element requiring the use of force, and intentionally causing injury does not necessarily require the use of force. This reasoning applies only to misdemeanors.

*Jobson v. Ashcroft*, --- F.3d ---, 2003 WL 1908144 (2d Cir. Apr. 22, 2003) - The court held that a New York conviction for second-degree manslaughter, NY PL § 125.15(1), was not a COV for two independent reasons: (1) a crime which requires a *mens rea* lower than “intentional” cannot satisfy the definition of “crime of violence,” and (2) the minimum conduct necessary to violate the statute did not “involve a substantial risk that physical force” would be used because “passive conduct or omissions” could trigger a conviction under NY PL § 125.15(1).

### IMPACT ON MISDEMEANOR PRACTICE:

Any conviction under a statute that does not include as an element the use of force or some specific act constituting the use of force (i.e. hitting, kicking, punching, etc.) should not be considered a COV and, therefore, cannot render your client deportable for a “crime of domestic violence.” An element of “physical injury” or “serious physical injury” will not be sufficient to satisfy the definition of a COV. For example, a conviction for assault against a spouse under NY PL § 120.00 will no longer be considered a crime of domestic violence in the Second Circuit.

Likewise, if you are forced to take a year sentence on an misdemeanor assault-type charge it will not trigger the COV aggravated felony deportability ground so long as the statute does not include as an element the use of force or some specific act constituting the use of force (i.e. hitting, kicking, punching, etc.).

### IMPACT ON FELONY PRACTICE:

Any conviction under a statute that requires a *mens rea* lower than “intentional” should not be considered a COV and, therefore, should not render your client deportable for a “crime of domestic violence” or a “crime of violence aggravated felony.” In addition, a conviction under a statute that requires intentional conduct but which could be violated by passive conduct or omissions *may* not be a COV and, therefore, *may* not render your client deportable for a “crime of domestic violence” or a “crime of violence aggravated felony.”

### WARNINGS:

- Even if a conviction is not a COV it may trigger deportability or inadmissibility on another ground (i.e. “crime of moral turpitude”).
- These cases only control in the Second Circuit. If your client ends up in removal proceedings elsewhere the court may apply a broader definition of COV. Generally clients that serve no time or up-state time are most likely to have their proceedings in the Second Circuit.

## **IMMIGRATION/CRIMINAL PRACTICE ALERT – 9/9/03**

### ***PRACTICAL TIPS TO AVOID AGGRAVATED FELONIES***

As you know, aggravated felonies (“AF”) are one category of crime that may trigger deportation. While we should, of course, always strive to avoid convictions that may trigger deportation, it is particularly important to avoid AF convictions because, in most cases, these convictions render a client mandatorily deportable without any possibility of discretionary relief. AF’s also have all sorts of other nasty consequences including: a potential twenty-year prison term for illegal reentry and expedited removal procedures for non-permanent residents. While there are disadvantages for all non-citizens who are convicted of AF’s, it is particularly important to avoid AF convictions for Lawful Permanent Residents. There are twenty-one categories of AF’s, which you are free to read at your leisure. *See* 8 U.S.C. § 1101(a)(43). I wanted to quickly offer you some tips to avoid two common types of AF’s.

#### ***AGGRAVATED FELONIES TRIGGERED BY A ONE-YEAR TERM OF INCARCERATION***

*The following types of convictions will be considered AF’s if the client is sentenced to one year or more of incarceration “regardless of any suspension of the imposition or execution of that imprisonment”:*

- Theft
- Violent Crimes (see previous practice alert on recent developments in Crime of Violence case law)
- Burglary
- Counterfeiting/Forgery
- Commercial Bribery
- Obstruction of Justice (possibly including Hindering Prosecution)
- Trafficking in Vehicle ID Numbers
- Receipt of Stolen Property
- Document Fraud
- Perjury/Bribery of a Witness/Subornation of Perjury

Below is a list of strategies designed to avoid triggering the AF grounds listed above. Since this list encompasses most felonies it is necessary to be mindful of the strategies below whenever a non-citizen client is facing a sentence of one year or more.

- *Stack counts to run consecutively* – as long as no individual count results in a sentence of a year or more, a total term of incarceration of more than a year will not trigger these AF grounds.
- *Waive pre-sentence credits* – if a client has served time pre-sentence it may be possible to waive credit for that time in return for an actual sentence imposed of less than a year.
- *Waive future conduct credits* – it may be possible to waive future good conduct credits in return for an actual sentence imposed of less than a year.

#### ***AGGRAVATED FELONIES TRIGGERED BY A \$10,000 FINANCIAL INTEREST***

*The following types of convictions will be considered aggravated felonies if the record of conviction reveals that the financial interest in the crime exceeded \$10,000:*

- Crimes Involving Fraud or Deceit (\$10K loss to victim)
- Money Laundering (involving \$10K)
- Tax Evasion (\$10K loss to Government)

Below is a list of strategies designed to avoid the AF with \$10,000 triggers.

- *Keep restitution under \$10,000*
- *During plea allocution contest any allegation in complaint involving \$10,000 or more.*
- *Have client pay a portion of the loss voluntarily pre-sentence to reduce restitution under \$10,000*
- *Make written plea agreement or oral stipulation that the loss to the victim is \$10,000 or less*
- *If all else fails, make sure that the fine is labeled as “Restitution” not “Reparation” PL § 60.27*

***THESE STRATEGIES ARE DESIGNED TO GIVE CLIENTS A FIGHTING CHANCE IN SUBSEQUENT IMMIGRATION PROCEEDINGS. THEY DO NOT GUARANTEE PROTECTION FROM AN AF CHARGE***

# Immigration Practice Tips

By Alina Das, Manny Vargas, and Joanne Macri of  
NYSDA's Immigrant Defense Project (IDP)\*

## **Board of Immigration Appeals Holds that a Conviction under the First Subsection of the New York Misdemeanor Assault Statute Is a Conviction of a Crime Involving Moral Turpitude**

On July 25, 2007, the Board of Immigration Appeals held that the New York offense of misdemeanor assault is a crime involving moral turpitude triggering deportability and other adverse immigration consequences. See *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

The Board began its analysis by noting that the Immigration and Nationality Act does not define the term "crime involving moral turpitude." However, it stated that the Board has held that the term "encompasses conduct that shocks the public conscience as being 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Id.* at 240 (quoting *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999)).

After commenting that crimes committed intentionally or knowingly have historically been found to involve moral turpitude, and that crimes committed recklessly "may" also be so found, the Board reviewed its case law on assault offenses, which the Board has said may or may not involve moral turpitude.

After reviewing its case law, the Board stated:

The reasoning from these decisions reflects that at least in the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. This body of law, then, deems intent to be a crucial element in determining whether a crime involves moral turpitude.

*Id.* at 242.

\*The IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For backup assistance on individual cases, call the IDP at (212) 725-6422. We return messages. IDP is located at 3 West 29th Street, Suite 803, New York, NY 10001.

The Board then applied its case law to the assault conviction at issue in *Matter of Solon*, a 2002 conviction under Penal Law 120.00(1). Section 120.00(1) provides that "[a] person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person." The Board found that an offense under this subsection of the New York misdemeanor assault statute requires both specific intent to cause physical injury and actual physical injury. It thus distinguished a 120.00(1) offense that requires specific intent to cause physical injury from general intent simple assault offenses, which are not considered to involve moral turpitude. It also found that a section 120.00(1) offense requires more than a mere offensive touching since "physical injury," as set forth in Penal Law 10.00(9), states that the physical injury required must involve "impairment of physical condition or substantial pain," as opposed to mere "pain."

The Board concluded:

In summary, as we understand New York law, a conviction for assault in the third degree under section 120.00(1) of the New York Penal Law requires, at a minimum, (1) that the offender acts with the conscious objective to cause another person impairment of physical condition or substantial pain of a kind meaningfully greater than mere offensive touching, and (2) that such impairment of physical condition or substantial pain actually results. Thus, a conviction under this statute requires, at a minimum, intentionally injurious conduct that reflects a level of depravity or immorality appreciably greater than that associated with the crime at issue in *Matter of Sanudo*, [23 I&N Dec. 968], 971-72 (stating that the minimal conduct necessary for a battery conviction under section 242 of the California Penal Code was in the nature of a simple battery). Accordingly, we conclude that a conviction under section 120.00(1) of the New York Penal Law is a conviction for a crime involving moral turpitude.

*Matter of Solon*, 24 I&N Dec. at 245.

### **Practice Tip**

Conviction of a crime involving moral turpitude (CIMT) may trigger deportability, inadmissibility, or ineligibility for citizenship. See Chapter 3, *Representing Immigrant Defendants in New York*. As the Board of Immigration Appeals makes clear in *Matter of Solon*, federal immigration authorities will deem a conviction under subsection 1 of Penal Law 120.00 a CIMT and thus, such a conviction may trigger these adverse consequences.

Nevertheless, *Matter of Solon* provides further support for the conclusion that convictions under subsections 2 and 3 of Penal Law 120.00 will not be deemed CIMTs. For example, the Board cited its prior decision in *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), which held that if an

assault offense requires only reckless conduct, it must require a showing of “serious bodily injury” in order to be considered to involve moral turpitude. See *Matter of Solon*, 24 I&N Dec. at 242. Therefore, a conviction under Penal Law 120.00(2) should not be considered a CIMT. It also suggests that there may be alternative Penal Law dispositions covering lesser conduct that will not be deemed CIMTs. For example, the Board noted that Penal Law 120.15 (menacing in the third degree) continues to “prohibit some of the lesser conduct traditionally encompassed within common-law assault,” which has not been considered to be a CIMT. *Id.* at 244 n.5.

Thus, a New York defense practitioner should try to negotiate a plea to a subsection of the misdemeanor assault statute or a lesser or alternative offense that would not necessarily be considered a CIMT. Where a criminal statute, such as Penal Law 120.00, is divisible or ambiguous as to whether the offense involves moral turpitude, the Board will look beyond the statute only to the record of conviction in order to determine whether the offense is a CIMT. The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings. If you can keep out of the record of conviction information that establishes that your client was convicted of the portion of the statute that covers conduct that involves moral turpitude (*i.e.*, subsection 1), you may help your noncitizen client avoid removal or other negative immigration consequences. See Section 4.3 (Immigration Consequences Of Dispositions Involving Broadly Defined State Offenses—Categorical Approach And Divisibility Analysis), in *Representing Immigrant Defendants in New York*.

### ***In a Recent Unpublished Decision, the Board of Immigration Appeals Considers Whether a New York State 2nd Degree Harassment Conviction May Constitute a Charge of Deportability as a “Crime of Domestic Violence”***

In a recent unpublished, non-precedential decision, the Board of Immigration Appeals considered whether an individual convicted of harassment in the second degree under Penal Law 240.26 would be deportable as an immigrant convicted of a “crime of domestic violence” under the Immigration and Nationality Act 237(a)(2)(E)(i), 8 U.S.C. 1227(a)(2)(E)(i). See *In re Lee*, A 47926006 (BIA June 11, 2007). In *Lee*, the Board concluded that Penal Law 240.26 is a “divisible” statute for deportability purposes, meaning that it encompasses some offenses that would be considered a “crime of domestic violence” and some that would not. The Board did not specify which sections of Penal Law 240.26 would constitute a “crime of domestic violence.” However, applying a categorical approach and examining the respondent’s record of conviction, the Board explained that it could not determine the threshold

question of which parts of the statute were implicated by the respondent’s conviction, and thus it could not conclude that the respondent’s offense involved a “crime of domestic violence.” Therefore, the Board held that the respondent was not deportable on the basis of having been convicted of a “crime of domestic violence.”

### **Practice Tip**

Although this is an unpublished decision, *In re Lee* indicates that a Penal Law 240.26 conviction may be considered a “crime of domestic violence,” which is a ground of deportation for lawfully admitted immigrants such as lawful permanent residents. Also note that the conviction may be considered a “crime involving moral turpitude.” Less risky options for these clients include an adjournment in contemplation of dismissal or a disorderly conduct conviction under Penal Law 240.20, neither of which would provide grounds for removal. However, if the client has to plead to harassment in the second degree, defense attorneys should try to keep any detail out of the record of conviction that would establish to which subsection of the harassment statute the client’s conviction pertains.

### ***New York State Legislature Passes and Governor Spitzer Signs Legislation that Authorizes Early Release for Deportation for Noncitizen Inmates Sentenced or Resentenced to Definite Terms of Imprisonment***

On July 18, 2007, New York State Governor Elliot Spitzer signed S.6228/A.3286 (Chapter 239), a technical fix bill that amends the New York Executive Law to clarify that the Board of Parole may grant discretionary early release to non-citizen inmates for purposes of turning them over to federal immigration authorities for deportation *even if the inmate was sentenced to a determinate sentence*.

Specifically, Chapter 239 amends section 259-i of the Executive Law to provide that, in addition to its authority to grant parole from an indeterminate sentence, the Board of Parole may grant release for deportation from a determinate sentence to a noncitizen who is not otherwise ineligible under existing law (*i.e.*, convicted of a violent offense). Early release remains conditioned on the prior issuance of a final deportation order and assurances from federal immigration authorities that deportation will occur promptly.

Enactment of this bill was necessary to preserve the Parole Board’s authority to release noncitizen drug offenders for deportation after the 2004 and 2005 Drug Law Reform Acts amended state law to require that drug offenders be sentenced to determinate terms of imprisonment. Also, some drug offenders who were convicted before the enactment of the Drug Law Reform Acts had been resentenced to a determinate term or are eligible to be resentenced to a determinate term. Prior to this bill,



Executive Law 259-i appeared to authorize early release for deportation only for noncitizen offenders sentenced to indeterminate sentences and eligible for parole. This created a hurdle for many noncitizens otherwise eligible for early release for deportation, especially since the overwhelming majority of noncitizen inmates granted early release purposes have been drug offenders.

The new legislation restores the possibility of early release for drug offenders sentenced to determinate terms. As the bill sponsor's memo states: "When sentences for drug offenders were changed from indeterminate to determinate terms, the legislature did not intend to render such offenders ineligible for early release for deportation only. . . . Therefore, this bill clarifies the existing law and allows inmates serving a determinate sentence who are not otherwise ineligible to be considered for parole for deportation purposes."

### ***NYSDA Publishes and Begins Distribution of Updated and Supplemented Fourth Edition of IDP Immigrant Defense Manual***

NYSDA has published and begun distribution of an updated and supplemented Fourth Edition of *Representing Immigrant Defendants in New York* (formerly *Representing Noncitizen Criminal Defendants in New York State*). The Fourth Edition includes many new and/or improved features, including the following:

- **Entire manual updated** to incorporate the many significant case law and practice developments since publication of the Third Edition, including the 2006 US Supreme Court decision in *Lopez v. Gonzales* on the breadth of the "drug trafficking crime" aggravated felony deportation category and the 2004 US Supreme Court *Leocal v. Ashcroft* decision on the breadth of the "crime of violence" aggravated felony deportation category, and other federal court and agency decisions potentially altering the immigration implications of conviction of the following NYS offenses:
  - drug possession offenses
  - DWI offenses
  - offenses involving reckless or negligent conduct generally
  - theft and burglary offenses
  - fraud and deceit offenses
  - sex abuse offenses involving minors
  - certain attempt or conspiracy offenses
- **Manual supplemented** to include new sections on analyzing immigration implications of the following:
  - convictions of broadly defined New York State offenses that cover deportable and non-deportable conduct
  - convictions of NYS accessory and preparatory offenses

- conviction appeals
- post-conviction vacatur and resentencing

- **Updated and expanded Quick Reference Chart for NYS Offenses, including quick reference practice tips** for criminal and immigration practitioners on avoiding adverse immigration consequences for noncitizen clients.
- **Over 200 pages of additional updated charts and outlines** on criminal/immigration issues to assist criminal and immigration practitioners in effective representation of noncitizen clients.
- **Updated and improved one-page Immigration Consequences of Criminal Convictions Checklist** binder insert for quick-reference courtroom use with new back page summarizing Suggested Approaches for Representing a Noncitizen in a Criminal Case.

To order a copy of the Fourth Edition, visit the IDP website at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org), or call NYSDA at 518-465-3524. ♪

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## ***Defender News*** (continued from page 3)

### ***Save the Date—NYSDA's 41st Annual Meeting at the Spa Again***

NYSDA's 41st Annual Meeting and Conference will take place on July 20-22, 2008 at the Gideon Putnam Resort in Saratoga Springs, NY. Hotel reservations can be made by calling 1-800-732-1560 or 518-584-3000 or faxing 518-584-1354.

### ***NYSDA Welcomes Susan Bryant***

In July 2007, Susan Bryant joined the NYSDA Backup Center as a staff attorney. Susan has a J.D. from St. John's University School of Law and a Masters of Science in Information Science from the University at Albany. Susan has been a law clerk for the Chief Judge of the U.S. District Court, District of Connecticut, an Honors Program trial attorney with the US Department of Justice's Civil Division, and an elder law attorney in private practice in Albany. We are delighted to have her on staff.

### ***Editorial Staff Change***

Mardi Crawford, editor of the *REPORT* for more than ten years, will be working much of the time as the Communications Officer for the New York Justice Fund, while remaining an active member of the NYSDA staff. As a result, Mardi has handed over her editorial position to Susan Bryant, NYSDA's new staff attorney.

(continued on page 47)

**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

# **Appendix F**

**Sample Follow-Up  
Immigration Interview Sheet**

# Basic Immigration Status Questionnaire

*The purpose of this questionnaire is to allow you to collect the necessary information for a meaningful consultation with an immigration attorney regarding the potential immigration consequences of a criminal case. After completing this questionnaire you can call NYSDA's Immigrant Defense Project Hot-Line any Tuesday or Thursday between 1:30 and 4:30 at 212-898-4132 for a free consultation*

_____	_____	_____
Client's Name	Date of Interview	Alien #
_____	( ) _____	_____
Client's Immigration Lawyer	Telephone Number	Client's DOB

DOCUMENTS: Xerox any immigration documents/passport.

CRIMINAL HISTORY: Rap sheets and possible current plea-bargain offenses needed before calling.

IMMIGRATION HOLD: YES NO

1. ENTRY:

Date first entered U.S.? \_\_\_\_\_ Visa Type: \_\_\_\_\_

Significant departures: Date: \_\_\_\_\_ Length: \_\_\_\_\_

Purpose: \_\_\_\_\_

Date last entered U.S.? \_\_\_\_\_ Visa Type: \_\_\_\_\_

2. IMMIGRATION STATUS:

Lawful permanent resident? YES NO

If so, date client obtained permanent resident status? \_\_\_\_\_

Other special immigration status: (refugee), (asylee), (temp. resident),

(work permit), (TPS), (Family Unity), (ABC), (undocumented),

(visa - type: \_\_\_\_\_) Date obtained? \_\_\_\_\_

Did anyone ever file a visa petition (I-130) for you? YES NO

Name and #: \_\_\_\_\_ Date? \_\_\_\_\_.

Type of visa petition? \_\_\_\_\_ Was it granted? YES NO

Did you ever file an application for permanent residency? YES NO

What result? \_\_\_\_\_

3. PRIOR DEPORTATION:

Ever been deported or gone before an immigration judge? YES NO

Date? \_\_\_\_\_

Reason? \_\_\_\_\_

Do you have an immigration court case pending? YES NO

Date? \_\_\_\_\_

Reason? \_\_\_\_\_

4. PRIOR IMMIGRATION RELIEF:

Ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?

YES NO Which: \_\_\_\_\_ Date: \_\_\_\_\_

5. RELATIVES WITH STATUS:

Do you have a U.S. citizen (parent), (spouse), (child -- DOB(s) \_\_\_\_\_), (brother) or (sister)?

Do you have a lawful permanent resident (spouse) or (parent)?

\_\_\_\_\_



6. EMPLOYMENT:

Would your employer help you immigrate? YES NO

Occupation: \_\_\_\_\_

Employer's name and number: \_\_\_\_\_

7. POSSIBLE UNKNOWN CITIZENSHIP:

Were you or your spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES NO

Were you a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship? YES NO

Have you every applied for United States citizenship? YES NO

What result? \_\_\_\_\_

8. POSSIBLE V.A.W.A. CLAIM:

Have you been abused by your spouse or parents? YES NO

9. POSSIBLE PERSECUTION BASED CLAIM:

In what country were you born? \_\_\_\_\_

Would you have any fear about returning? YES NO

Why? \_\_\_\_\_

CLIENT: \_\_\_\_\_ Referred by: \_\_\_\_\_ Date: \_\_\_/\_\_\_/\_\_\_

AKAs: \_\_\_\_\_ External referral type/defender (if diff. than referrer) \_\_\_\_\_

Type of inquiry: **DOB:** \_\_\_/\_\_\_/\_\_\_ CCA elig. = 2 / 27 / 83 18 bday = \_\_\_ / \_\_\_ / \_\_\_  M  F **Ethn.** \_\_\_\_\_  Hisp. **NYSID:** \_\_\_\_\_

Plea consult **A #** \_\_\_\_\_ **SSN:** \_\_\_\_\_ **B & C:** \_\_\_\_\_

Removal proceeding  Citizenship application **Location:**  In  Out **Detainer?**  Y  N **Facility:** \_\_\_\_\_

Adjustment of status  Other application **Bond amt./ROR** \_\_\_\_\_ **Docket No.:** \_\_\_\_\_

Other: \_\_\_\_\_

Explanation of problem: \_\_\_\_\_ **NCD:** \_\_\_\_\_ **Part:** \_\_\_\_\_ **On for:** \_\_\_\_\_  
**NCD:** \_\_\_\_\_ **Part:** \_\_\_\_\_ **On for:** \_\_\_\_\_  
**NCD:** \_\_\_\_\_ **Part:** \_\_\_\_\_ **On for:** \_\_\_\_\_

**Immigration Status:** \_\_\_\_\_  
 Nat. / PF Citiz. / Language \_\_\_\_\_

- In-Status Visa Holder \_\_\_\_\_
  - EWI (date of entry: \_\_\_/\_\_\_/\_\_\_)
  - Visa Overstay (Expired: \_\_\_\_\_)
  - Asylee/Refugee (Date Granted: \_\_\_\_\_)
  - Post-final order
  - Other: \_\_\_\_\_
- \_\_\_/\_\_\_/\_\_\_ **LPR** (date residency granted)  
 (First Lawful entry to U.S.: \_\_\_/\_\_\_/\_\_\_)  
 I-130 I-140 amm. ref/as  
 CPR (I-751 pending / due \_\_\_\_\_)
  - Pending adjustment (filed \_\_\_\_\_)  
 (decision \_\_\_\_\_)
  - Pending natz (filed \_\_\_\_\_)
  - Natz/AOS interview date: \_\_\_\_\_

**CRIMINAL CASE INFO:** Incident Date(s): \_\_\_\_\_ c/w = \_\_\_\_\_

**Charges:** \_\_\_\_\_ **Offer/Likely Disposition:** \_\_\_\_\_

**Priors:** \_\_\_\_\_

**ADVICE:** \_\_\_\_\_

<b>Close date</b> _____ <b>Notes:</b>    <input type="checkbox"/> Entered in Pika _____	<b>A</b> <input type="checkbox"/> Counsel and Advice	<b>E</b> <input type="checkbox"/> Client withdrew
	<b>B</b> <input type="checkbox"/> Brief Service	<input type="checkbox"/> Deport avoided
	<b>L</b> <input type="checkbox"/> Plea Consult <input type="checkbox"/> Favorable Δ *	<input type="checkbox"/> RETAINED AND FILE OPENED
	<b>P</b> <input type="checkbox"/> Plea consult + Addit. Advice & Counsel	
	<b>Q</b> <input type="checkbox"/> Other _____	

<p><b><u>FAMILY INFO:</u></b></p> <p>Single Baby m/d Married Widowed Sep. Div. Fiance/e Dom. Ptrn.  <b>Status:</b> LPR / USC / permiso / undoc</p> <p><b><u>Kids</u></b>  blood# _____ status/age _____</p> <p>adopt/step# _____ status/age _____</p> <p><b><u>Siblings#</u></b> _____ status _____</p> <p><b>Mother</b> a/d? Nat USC--date _____  USC born / LPR / permiso / undoc</p> <p><b>Father</b> a/d? Nat USC--date _____  USC born / LPR / permiso / undoc</p> <p><b>If parent/s USC/s, is R legitimate?</b></p> <p><b>US grandparent</b> a/d/paternal/maternal <b>I?</b>  Conferred USC to R's parent Y N <b>I?</b></p> <p><u>Extended family in U.S.:</u></p>	<p><b>ADDRESS &amp; CONTACT INFO.:</b></p> <p>Phone: (    ) _____ W / H</p> <p>Cell: (    ) _____</p> <hr/> <p><b>Family contacts:</b></p>  <p><b>Atty. contact:</b></p>
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<p><b><u>PRESENCE: Entries/Absences</u></b></p> <p>____/____/____  ____/____/____  ____/____/____  ____/____/____  ____/____/____  ____/____/____  ____/____/____  ____/____/____  ____/____/____</p> <p><b>2. Unlawful US Presence</b>(after 4/1/97)<b>I?</b>  Is 10 yr. bar applicable? Y/N</p> <p>Absences &gt; 180 days continuous? Y N <b>I?</b>  Absences &gt; 180 days aggregate? Y N <b>I?</b>  Absences &gt; 90 days? Y N <b>I?</b></p> <p><b>3. Prior order/Prior CIS/ICE/INS contact?</b>  ____ open NTA (date: _____)</p>	<p><b><u>ELIGIBILITY</u></b>[Check/circle specifics]</p> <p><b>1. Y N I? IJ Bond</b> 8 CFR 236.1(c)(5)  ____ Ineligible: Arr/Rein/FinalOrd I?  ____ mandatory detention <b>I?</b>  ____ Pre-10/98 release  ____ 1 CIMT sent. &lt; 1yr <b>I?</b></p> <p><b>2. Y N I? Citizenship</b>  ____ <b>R is US born I?</b> POB _____  ____ <b>Acquired I?</b>  <b>I?</b> Residence before R's birth  <b>I?</b> Adopted, 18 yrs after 2/27/01  ____ <b>Derived I?</b>  ____ Only 1 parent naturalize  ____ R&gt;18@time par natlz  ____ adopted  ____ CCA</p> <p><b>3. Y N I? Asylum</b>  ____ no fear ____ no on account of  ____ no persecutor ____ R is persecutor  ____ firm resettl. ____ Safe 3<sup>rd</sup> ctry  ____ AF ____ PSC  ____ missed 1 yr deadline to apply  ____ Extraord. Circ. <b>I?</b>  ____ Changed country conditions <b>I?</b></p> <p><b>4. Y N I? Withholding</b>  ____ PS Crime <b>I?</b> ____ &gt;5 yr sent <b>I?</b>  ____ drug traffic. PSC <b>I?</b></p> <p><b>5. Y N I? CAT</b>  ____ PS Crime <b>I?</b> ____ &gt;5 yr sent <b>I?</b>  ____ drug traffic. PSC <b>I?</b>  ____ Tort--Is torturer public official?</p> <p><b>6. Y N I? LPR Cancellation</b>  ____ no 5 yrs w/LPR <b>I?</b> ____ Agfelony  ____ no 7 yrs after lawful admsn <b>I?</b>  ____ Time cut by crime/NTA <b>I?</b>  ____ Prior Relief granted <b>I?</b></p> <p><b>7. Y N I? 212(c)</b>  ____ LPR <b>I?</b>  ____ 7 yrs unrelinq. dom. when apply  ____ AF served &gt; 5 yrs <b>I?</b> Pre 90 conv.  ____ plea taken &lt; 4/24/96 <b>I?</b>  ____ appeal for trial conviction <b>I?</b></p>	<p><b>8. Y N I? Adjustment (Future Y N )</b>  <b>I-130</b>  ____ no visa immed avail <b>I?</b>  ____ inadm + no waiver (212h) <b>I?</b>  ____ didn't file bef 4/30/01 <b>I?</b>  ____ <b>Asylee</b> ____ <b>Refugee</b>  ____ unwaiv. inadm grnd (209c) <b>I?</b>  ____ no longr meets refugee def <b>I?</b>  ____ &lt;1 yr in U.S. since status <b>I?</b>  ____ 207 refug admsn termntd <b>I?</b></p> <p><b>9. Y N I? NACARA</b>  ____ Adjust? admissible <b>I?</b> (Cuba/Nic)  ____ Susp: 7 yrs <b>I?</b>; gmc <b>I?</b>; old 241  deport grounds <b>I?</b> (ES/GT/Eeu)</p> <p><b>10. Y N I? 10yr/3yr Cancel. (VAWA)</b>  ____ No 10year OR 3 yrs cont presence  ____ No Required Family  ____ Ag Felony Conviction anytime  ____ No GMC (101f) 3/10 yrs TIME  ____ 212a2 Admsn or convctin;  ____ 240Ac Bars for 10-year Cancellation  ____ Prior relief Grant</p> <p><b>11. Y N I? Registry</b>  ____ no cont. pres in U.S. since 1/1/72 <b>I?</b>  ____ no GMC at time of hearing <b>I?</b></p> <p><b>12. Y N I? Vol Dep/WAA</b></p> <p><b>13. Y N I? Termin/Admin Closure</b>  ____ not d'able ____ not inadm'ble ____ ABC  ____ not alien ____ USC ap filed ____ other</p> <p><b>14. Y N I? ISSUE ON APPEAL</b></p> <p><b>15. Y N I? OTHER (waiver, TPS, etc)?</b></p> <p><b>16. Y N I? MTN REOPEN</b></p> <hr/> <p>Applicable grounds of deport/inadm.:</p> <p><b>212</b> _____</p> <p><b>237</b> _____</p> <p><b>AF:</b> _____</p>
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**EQUITIES/OTHER NOTES:**  
 Employed FT PT     On the books Y/N     Disability     Unempl.     WEP     Retired     Student    FT PT

# FAMILY INTAKE

Personal & Confidential

Completed by: \_\_\_\_\_

Date: \_\_\_\_\_

**FAMILIES FOR FREEDOM (FFF)** is a human rights organization for immigrants facing deportation. We are **NOT** part of the government. We are **NOT** lawyers. We are the family members of deportees/detainees, trying to help one another and change the laws. The information you provide here will **NOT** be shared with anyone else without your permission.

## About YOU

1. Name: \_\_\_\_\_ 2. Date of Birth: \_\_\_\_\_ 3. Gender: \_\_\_\_\_

4. Home #: \_\_\_\_\_ 5. Work #: \_\_\_\_\_ 6. Cell/Other#: \_\_\_\_\_

7. Home Address: \_\_\_\_\_  
\_\_\_\_\_

8. E-mail: \_\_\_\_\_ 9. Relationship to person in Deportation: \_\_\_\_\_

10. You were born in (country): \_\_\_\_\_ 11. You are a citizen of (list all countries): \_\_\_\_\_

12. Languages you speak: \_\_\_\_\_ 13. Would you like to join our mailing list? \_\_\_\_\_

## About the PERSON IN DEPORTATION

13. A#: \_\_\_\_\_

14. Name: \_\_\_\_\_ 15. Date of Birth: \_\_\_\_\_ 16. Gender: \_\_\_\_\_

17. You were born in (country): \_\_\_\_\_ 18. You are a citizen of (list all countries): \_\_\_\_\_

19. Date entered the US: \_\_\_\_\_ 20. Immigration Status *at entry*: \_\_\_\_\_

21. Current Location (Riker's, NYS Prison, immigration facility, free): \_\_\_\_\_

22. *If in immigration detention:* Date taken \_\_\_\_\_  
From where? \_\_\_ Riker's \_\_\_ Prison \_\_\_ Home \_\_\_ Airport \_\_\_ Other (\_\_\_\_\_)  
If from criminal custody, did Immigration take more than 48 hours to get you? Yes / No

23. Ordered deported in the past? \_\_\_ No \_\_\_ Yes (details: \_\_\_\_\_)

24. Current Immigration Status of: Person in deportation \_\_\_\_\_ Spouse: \_\_\_\_\_  
Children: \_\_\_\_\_ Siblings: \_\_\_\_\_  
Parents: \_\_\_\_\_

**more →**

## CRIMINAL HISTORY

25. Do you have prior convictions?  No  Yes. If YES, please provide the following details about EACH conviction:

Arrest Date	Conviction Date	State	Section (e.g. NYPL § 220.10)	Sentence	Plea OR Trial

(continue on back for additional convictions):

26. Name and contact information of last criminal defense attorney: \_\_\_\_\_

27. Are any convictions on appeal? \_\_\_\_\_

28. Were you ever an informant for the government? \_\_\_\_\_

## DEPORTATION CASE

29. Next hearing date (if applicable): \_\_\_\_\_

30. Do you have the **Notice to Appear (NTA)**?  Yes  No      31. Date **NTA** issued: \_\_\_\_\_

32. Charged as:  deportable  inadmissible      33. Charged with: \_\_\_\_\_

34. Immigration Judge decision & date: \_\_\_\_\_

35. Board of Immigration Appeal decision & date: \_\_\_\_\_

36. Federal Court action (check all):  Circuit Courts (details: \_\_\_\_\_)

District Courts (details: \_\_\_\_\_)

37. Do you have an immigration attorney? Yes / No      38. Name & Contact Info: \_\_\_\_\_

39. **Notes** (include any fear of persecution back home; family concerns; problems with attorneys; and questions)

### CASEWORKER NOTES

Help Given

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Next Steps

**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

# **Appendix G**

## **Sample New Attorney Training Outline**

## WHAT A CRIMINAL DEFENSE LAWYER NEEDS TO KNOW ABOUT IMMIGRATION LAW

NYSDA,  
Immigrant Defense Project  
Queens, New York  
May 8, 2008

## Queens Immigrant Census Data

- In 2000, Queens had **1,028,339 foreign-born residents** out of a total population of 2,229,379 residents (Source: *The Newest New Yorkers*, 2000, New York City Department of City Planning).
- This represented **46.1 percent** of the total population of Queens.
- Although many immigrants become U.S. citizens; those who have not remain at risk of negative immigration consequences no matter how long they've been here.

## Training Session Agenda and Goals

- See Agenda -- Training is intended to provide a general introduction geared to New York criminal defense lawyers to the increasingly important issue of the potential immigration consequences of criminal charges for your immigrant clients
- Specific goals are:
  - Help you figure out how to determine potential immigration consequences for your noncitizen clients;
  - Help you identify ways to avoid or minimize adverse immigration consequences for your noncitizen clients; and
  - Help you fulfill your professional responsibilities in this area.
- Question and Answer period at end

## Why Does a Defense Lawyer Need to Pay Attention to the Potential Immigration Consequences

## Negative Immigration Consequences Have Become Much More Harsh and Certain in Recent Years

- **Increasingly harsh immigration laws that particularly affect non-citizens with criminal dispositions;**
- **Increased federal enforcement of these laws; and**
- **Increased state and local collaboration.**

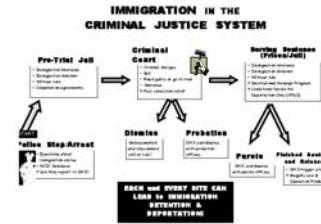
## Increasing Harshness of the Potential Immigration Consequences of a Criminal Case

- **Removal proceedings after criminal case;**
- **Mandatory immigration detention after criminal sentence;**
- **Bars to hardship waivers, asylum, or other removal relief during removal proceedings;**
- **Limited judicial review;**

## Increasing Harshness of the Potential Immigration Consequences of a Criminal Case (cont.)

- Bars to lawful return to US after removal;
- Enhanced criminal liability for unlawful return to US; and
- Bar to U.S. citizenship – for several years or permanently.

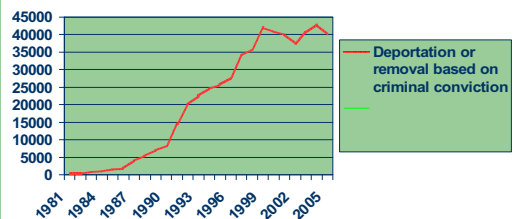
## Increasing Federal Immigration Enforcement and State and Local Collaboration



## Deportation/Removal Stats

- **In 1982:** US deported **413** non-citizens based on criminal conviction(s)
- **In 2005:** US deported over **40,000** non-citizens based on criminal conviction(s) (and many others deported subsequent to a criminal arrest even if the stated basis for deportation was other reason)

## Deportations/Removals Based on Criminal Conviction (1981 - 2005)



## What Does this All Mean for your Noncitizen Client and Your Professional Responsibility to Such a Client?

-- “. . . depending on the jurisdiction, it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. (ABA Standards for Criminal Justice Pleas of Guilty (3d ed.), commentary to Standard 14-3.2(f) (Collateral consequences))

-- More later on defense lawyers’ professional responsibilities in this area

## Quick Overview of Immigration Law Provisions Relating to Crimes



## Difference that a Defense Lawyer Can Make – Case Study

- Your client, Mr. X, was arrested last month after being stopped in an alleged stolen car in which the police state they found a firearm and a small amount of marihuana. He is charged with felony grand larceny, Class A misdemeanor possession of a weapon (firearm), and Class B misdemeanor possession of marihuana.
- Mr.X entered the United States on January 1, 2000 as a lawful permanent resident.
- Mr. X has one prior arrest from last year, which resulted in a marihuana possession violation only.
- If you could get it, would a plea to the marihuana Class B misdemeanor with little or no jail time be the best deal for this client?

## RESOURCE FOR DEFENSE LAWYERS

- See “Immigration Consequences of Convictions Summary Checklist” in training handout materials

## Deportability v. Inadmissibility (1)

### Deportability

- Applies to non-citizens lawfully “admitted” to the US

### Inadmissibility

- Applies to non-citizens seeking lawful admission (or re-admission) to the US

## Immigration status – Major categories:

1. Lawful permanent resident (LPR, or “green card” holder)
2. Refugee or asylee
3. Temporary visitor (on student, business, or other visa)
4. Undocumented status (e.g., crossed the border without inspection or overstayed temporary visa admission)

## Deportability v. Inadmissibility (2)

### Deportability

- > LPRs in the US should focus primarily on avoiding deportability.

### Inadmissibility

- > Non-LPRs (including refugees, asylees, visitors or undocumented) planning to seek admission or re-admission in the future should focus primarily on avoiding inadmissibility.
- > LPRs who may travel outside the US in the future will also want to avoid inadmissibility.

## What Triggers Deportation for a Lawfully Admitted Client?

1. Controlled substance offense (exception for one-time possession of 30 grams or less of marihuana)
2. One or two crime(s) involving moral turpitude (CIMT)
3. Firearm offense
4. Crime of domestic violence, stalking, crime against children, or violation of protection order
5. Aggravated felony!

## Controlled Substance Offense Deportability

Deportable for conviction of “a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in 21 USC 802)” (with sole exception for “a single offense involving possession for one’s own use of 30 grams or less of marijuana”)

8 USC 1227(a)(2)(B)(i); INA 237 (a)(2)(B)(i).

## Crime Involving Moral Turpitude (CIMT) Deportability

Deportable for:

- Conviction of 1 CIMT committed within 5 years of admission if punishable by one year or more in prison (NY Felony or Class A Misdemeanor); or
- Conviction of 2 CIMTs not arising out of a single scheme of criminal misconduct, regardless of actual or potential sentence.

8 USC 1227(a)(2)(A)(i); INA 237 (a)(2)(A)(i).

## Moral Turpitude Analysis - What offenses involve moral turpitude?

- Statute does not define what is a crime involving moral turpitude.
- Whether a crime involves moral turpitude depends on the elements of the offense, not the name of the offense.

## Moral Turpitude Analysis (2)

Under case law, moral turpitude offenses include:

- crimes with intent to steal or to defraud as an element (e.g., theft offenses, burglary to commit theft, and forgery offenses)
- crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by a reckless act (e.g. murder, rape, and certain manslaughter and assault offenses)
- most sex offenses, e.g., prostitution

## Firearm Offense Deportability

Deportable for conviction “under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 USC 921(a)).”

8 USC 1227(a)(2)(A)(i); INA 237 (a)(2)(A)(i).

## Crime of Domestic Violence Deportability

Deportable for conviction of any “crime of violence” against a person committed by:

- Current or former spouse;
- Individual with whom person shares a child in common;
- Individual now or before cohabiting with person as a spouse;
- Individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
- Any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the US or any State, Indian tribal government, or unit of local government.

8 USC 1227(a)(2)(E)(i); INA 237 (a)(2)(E)(i).

## Other Domestic-Related Deportable Offenses (2)

Deportable for conviction of:

- Crime of stalking
- Crimes against children
  - child abuse
  - child neglect
  - child abandonment

8 USC 1227(a)(2)(E)(i); INA 237 (a)(2)(E)(i).

## Other Domestic-Related Deportable Offenses (3)

Deportable for:

- Violation of protection order

Includes criminal or civil determination that individual “has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.”

8 USC 1227(a)(2)(E)(ii); INA 237 (a)(2)(E)(ii).

## Aggravated Felony Deportability

- Deportable for:

Conviction of an “aggravated felony”  
8 USC 1227(a)(2)(A)(iii); INA 237 (a)(2)(A)(iii).

- A misdemeanor can be an aggravated felony. *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000).
- A crime need not be committed “with aggravation” for it to be an aggravated felony.

“Aggravated felony” is defined at 8 USC § 1101(a)(43), INA § 101(a)(43) to include:

- Murder, rape, or sexual abuse of a minor
- Drug trafficking
- Firearms trafficking
- Crime of violence with prison sentence of at least one year
- Theft or burglary offense with prison sentence of at least one year
- Offense involving fraud or deceit with loss to victim(s) exceeding \$10,000
- Other offenses listed at 8 USC § 1101(a)(43)

## Aggravated Felony Thresholds

Congress used varied thresholds for when offense meets aggravated felony definition:

- > conviction alone (e.g., murder)
- > conviction + sentence (e.g., theft + sentence of a year or more)
- > conviction + other characteristic (e.g., fraud + loss exceeds \$10,000)

8 USC § 1101(a)(43), INA § 101(a)(43)

## Aggravated Felony Usually Means Mandatory Deportability

In general, the “aggravated felony” ground of deportability is the most important ground for your LPR client to avoid.

### Some reasons why:

- > Bars almost all forms of relief from removal available from an immigration judge so that deportation is a near certainty
- > Triggers mandatory detention without bond
- > Permanently bars return to the US after deportation

## What Triggers Inadmissibility for a Client Seeking Lawful Admission?

1. Controlled substance offense  
(no exceptions!)
2. Crime involving moral turpitude (CIMT)
3. Prostitution
4. 2 or more offenses w/ aggregate sentence of 5 years or more

## Controlled Substance Offense Inadmissibility

- *CSO Inadmissibility ground* -- Any conviction or admission of “a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (with only possible waiver for “a single offense of simple possession of 30 grams or less of marijuana”)

8 USC 1182(a)(2)(A)(i)(II); INA 237 (a)(2)(A)(i)(II).

## Crime Involving Moral Turpitude (CIMT) Inadmissibility

- Conviction of 1 CIMT triggers inadmissibility
- Subject to petty offense exception -- for 1 CIMT if maximum possible penalty does not exceed one year of imprisonment (New York Misdemeanor or Violation) and actual penalty does not exceed six months of imprisonment

8 USC 1182(a)(2)(A)(i)(I) & (ii)(II); INA 237 (a)(2)(A)(i)(I) & (ii)(II).

## What Triggers Ineligibility for Naturalization as a U.S. Citizen?

See INA Bars on Finding of “Good Moral Character” at 8 USC 1101(f), INA 101(f)

## “Good Moral Character” Finding for Requisite Period is Barred at 8 USC 1101(f), INA 101(f) for:

- Conviction, or admission, during such period of:
  - a crime involving moral turpitude not under petty offense exception
  - a controlled substance offense
  - certain other inadmissibility offenses
- Confinement to a penal institution during such period for 180 days or more
- Conviction at any time of an aggravated felony

## What Constitutes a “Conviction” for Immigration Purposes?

See INA definition of “conviction” at 8 USC 1101(a)(48)(A), INA 101(a)(48)(A);

"Conviction" Is Defined at 8 USC 1101(a)(48)(A), INA 101(a)(48)(A) to include:

1. Formal judgment of guilt entered by a court; or
2. If adjudication of guilt has been withheld, where:
  - a. A judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and
  - b. The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

## What New York dispositions may be deemed "convictions"? (1)

### "Conviction"

- Formal judgment of guilt in adult criminal court (including juvenile offender conviction)
- Diversion, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT (see "Immigrants and Pleas in Problem-Solving Courts")

### Not "conviction"

- Adjudgment in contemplation of dismissal
- Diversion, drug treatment or family counseling IF NO PLEA OR ADMISSION OF GUILT
- Family court disposition
- Youthful offender disposition (even though entered in adult court)

## What New York dispositions may be deemed "convictions" (2)

### "Conviction"

- Conviction on collateral challenge
- Disposition vacated/expunged in the interest of justice

### Not "conviction"

- Conviction on direct appeal?
- Disposition vacated based on legal defect in criminal case

## What Makes Your Client Ineligible for Relief from Removal?

For criminal bars, see

- "Immigration Consequences of Convictions Summary Checklist" for:
  - Criminal bars for LPR Cancellation of Removal
  - Criminal bars for Asylum/Withholding of Removal
- "Forms of Relief to Prevent Removal" for eligibility criteria for these & other forms of relief from removal

## Possible Strategies for Avoiding or Minimizing Potential Negative Immigration Consequences

## Difference that a Defense Lawyer Can Make – Return to Case Study

- Your client, Mr. X, was arrested last month after being stopped in an alleged stolen car in which the police state they found a firearm and a small amount of marijuana. He is charged with felony grand larceny, Class A misdemeanor possession of a weapon, and Class B misdemeanor possession of marijuana.
- Mr. X entered the United States on January 1, 2000 as a lawful permanent resident.
- Mr. X has one prior arrest from last year, which resulted in a marijuana possession violation only.
- Client tells you avoiding deportation is very important to him.
- If you could get it, would a plea to the marijuana Class B misdemeanor with little or no jail time be the best deal for this client?

## Case Study (LPR client) - Analysis

Client is LPR so you want to focus on avoiding deportability or, at least, mandatory deportability – What is best plea?

- CPM 5 Marihuana possession – CSO /// In addition, government will argue that drug trafficking AF since it is second possession offense and thus this plea could trigger mandatory deportation (even if reduced to a violation!)
- CPW 4 (Firearm) – FO
- Grand Larceny 4 – Is theft offense but is AF only if sentenced to 1 year or more /// Is CIMT but is CIMT deportable only if second CIMT

## Case Study (non-LPR client) - Analysis

Now assume your client is NOT lawfully admitted to the US, but wants to legalize his status based on his marriage to a US citizen – So you want to focus on avoiding inadmissibility – What is best plea?

- CPM 5 Marihuana possession – CSO (even if no prior marihuana violation) /// In addition, second marihuana possession violation will make client ineligible for waiver of inadmissibility)
- CPW 4 (Firearm) – Does not trigger inadmissibility
- Grand Larceny 4 – CIMT and does not qualify for petty offense exception (unless lowered to a misdemeanor).

## New York Defense Strategies

- See Representing Immigrant Defendants in New York, Chapter 5, for detailed listing of “Strategies to Avoid the Negative Immigration Consequences of a New York Criminal Case”
- Let’s consider some illustrations of such strategies focusing on using favorable aspects of recent U.S. Supreme Court decisions on the reach of certain aggravated felony categories

## Defense Concerns When Your Noncitizen Client is Facing Drug Charges

- If your client is lawfully admitted, must consider controlled substance offense deportability ground (and inadmissibility ground if client may travel outside U.S.)
- If your client is not lawfully admitted but seeking lawful admission, must consider controlled substance offense inadmissibility ground
- For any client, must also consider aggravated felony “drug trafficking” bar and other bars to relief from removal

## Controlled Substance Offense Deportability and Inadmissibility

- *Deportation ground* – Any conviction of “a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in 21 USC 802)” (with sole exception for “a single offense involving possession for one’s own use of 30 grams or less of marijuana”)
- *Inadmissibility ground* – Any conviction or admission of “a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (with only possible waiver for “a single offense of simple possession of 30 grams or less of marijuana”)

## Drug Trafficking Aggravated Felony Mandatory Removability

Controlled substance offense is also a drug trafficking aggravated felony usually triggering mandatory removal if it either:

1. Contains a trafficking element, or
2. Proscribes conduct punishable as a felony under federal law. *Lopez v. Gonzales*, 127 S. Ct. 625 (2006)(single conviction for simple possession is not an “aggravated felony” even if a felony under state law since such an offense is not a felony under federal law unless possession of flunitrazepam or possession of >5g of a substance/mixture containing crack).

## Drug Trafficking Aggravated Felony: Second possession offense is an open Issue

Problem is that second or subsequent possession offense *may* be prosecuted as a recidivist possession felony under federal law – Some courts have thus found that a state second possession offense may be deemed an aggravated felony – Therefore, whether your client's second possession offense will be so deemed may depend on where your client's removal hearing later takes place:

- In most Circuits, a second possession will be deemed an aggravated felony only if individual prosecuted as a recidivist and the prior drug conviction was admitted or proven in the state criminal proceeding
- However, in removal hearings under 2<sup>nd</sup>, 5<sup>th</sup>, and 7<sup>th</sup> Circuit caselaw, government will deem second state possession conviction to be a drug trafficking aggravated felony, even if the individual was not charged/prosecuted as recidivist.

*Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007).

## Defense Strategies When Your Client is Facing Drug Charges – Some Examples (1)

- Negotiate diversion without a guilty plea
- Offer alternate plea to free-standing accessory offense
- If a marijuana case and no prior drug convictions, plead guilty to possession of 30 grams or less of marijuana, if possible
- In some cases, plea to accompanying non-drug charge may be better

## Defense Strategies When Your Client is Facing Drug Charges – Some Examples (2)

- If cannot avoid plea to drug offense, plead to simple possession offense (except flunitrazepam or >5g of crack) instead of sale or intent to sell offense
- If possible, avoid plea to second drug possession offense
- If cannot avoid a second drug possession conviction:
  - Avoid sentencing or treatment as recidivist drug offender
  - Keep fact of prior conviction out of record
- See "Practice Advisory: Criminal Defense of Immigrants in State Drug Cases – The Impact of *Lopez v. Gonzales*"

## Defense Concerns When Your Noncitizen Client is Facing Personal Injury Offense Charges

- If your client is lawfully admitted, must consider crime involving moral turpitude deportability ground (and inadmissibility ground if client may travel outside U.S.)
- If your client is not lawfully admitted but seeking lawful admission, must consider crime involving moral turpitude inadmissibility ground
- For any client, must also consider aggravated felony "crime of violence" bar and other bars to relief from removal

## Moral Turpitude Analysis for Personal Injury Offenses

Under case law, moral turpitude offenses include:

- crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by a reckless act (e.g. murder, rape, and certain manslaughter and assault offenses)

## Crime of Violence AF

- Congress defined a "crime of violence" aggravated felony by reference to 18 USC § 16, which is in two parts:
    - § 16 (a) (force as an element)
    - § 16 (b) (felony)
- 8 USC 1103(43)(F); INA 101(a)(43)(F)

## 16(a) Crime of Violence (force as an element)

Offense must have:

- The use, attempted use, or threatened use of force as an element; and
- A sentence of incarceration of one year or more.

## 16(a) COV Interpreted

*Leocal v. Ashcroft*, 125 S. Ct. 377 (2004)

(Florida conviction for driving under the influence and causing serious bodily injury is not a crime of violence because 16(a)'s phrase "use of physical force against the person or property of another" required a higher *mens rea* than negligent or accidental conduct, which is all that the Florida statute requires).

## 16(b) Crime of Violence (felony)

- Offense is a felony; and
- There is a substantial risk that force against person or property will be used in the commission of the offense; and
- A sentence of incarceration of one year or more

## 16(b) COV Interpreted

*Leocal v. Ashcroft*, 125 S. Ct. 377 (2004)

(Florida conviction for driving under the influence and causing serious bodily injury is not a crime of violence because 16(b) requires a higher *mens rea* than negligent or accidental conduct, which is all that the Florida statute requires)

## Defense Strategies When Your Client is Facing Personal Injury Offense Charges – Some Examples (1)

- To avoid CIMT or crime of violence AF, avoid pleading to crimes where intent or knowledge is the *mens rea*
- If possible, plead to a statute where *mens rea* is only negligence or less
- If not possible, at least to try to avoid crime of violence AF, plead guilty to reckless, but not intentional, offense (but this issue is not settled in all federal courts)
- Plead to a divisible statute that includes offenses that do not satisfy the CIMT case law standards or AF crime of violence definition
- In some cases, plea to weapon possession offense may be better

## Defense Strategies When Your Client is Facing Personal Injury Offense Charges – Some Examples (2)

- If client is an LPR of more than five years, avoid two CIMTs
- To avoid crime of violence AF, avoid imposition of one year or more prison sentence (e.g., stacking defense)



## Defense Concerns When Your Noncitizen Client is Facing Property Offense Charges

- If your client is lawfully admitted, must consider crime involving moral turpitude deportability ground (and inadmissibility ground if client may travel outside U.S.)
- If your client is not lawfully admitted but seeking lawful admission, must consider crime involving moral turpitude inadmissibility ground
- For any client, must also consider aggravated felony “theft or burglary” or “fraud or deceit” bar and other bars to relief from removal

## Moral Turpitude Analysis for Property Offenses

Under case law, moral turpitude offenses include:

- crimes with intent to steal or to defraud as an element (e.g., theft offenses, burglary to commit theft, and forgery offenses)

## Theft Offense Aggravated Felony

Elements:

- Conviction for a theft offense, including receipt of stolen property; and
- Sentence of a year or more.

8 USC 1101(a)(43)(G); INA 101(a)(43)(G)

## Theft Offense AF Interpreted (1)

“Theft” includes taking or exercise of control of property without consent and with intent to deprive owner of benefits of ownership. *Gonzales v. Duenas-Alvarez*, 127 S.Ct 815 (2007).

## Fraud or Deceit Aggravated Felony

Elements:

- Conviction of a fraud or deceit offense; and
- Loss to victim or victims exceeds \$10,000

8 USC 1101(a)(43)(M); INA 101(a)(43)(M)

## Defense Strategies When Your Client is Facing Property Offense Charges – Some Examples (1)

- To avoid CIMT or AF theft or fraud grounds, avoid pleading to crimes that necessarily involve theft or fraud elements
- Plead to a divisible statute that includes offenses that do not satisfy the CIMT case law standards or AF theft or fraud elements
- If client is an LPR of more than five years, avoid two CIMTs
- In some cases, plea to weapon possession offense may be better

## Defense Strategies When Your Client is Facing Property Offense Charges – Some Examples (2)

- To avoid theft or burglary AF, avoid imposition of one year or more prison sentence (e.g., stacking defense)
- To avoid fraud or deceit AF, plead only to a count that involves \$10,000 or less, or sign a plea agreement and/or orally allocute for a sum certain that is \$10,000 or less, or keep restitution to \$10,000 or less (if necessary, pay a portion of loss voluntarily before sentencing)

## Other General Defense Strategies – Examples (1)

In addition to seeking to negotiate alternate plea and/or sentence that avoids making your client removable or, at least, mandatorily removable, other strategies might include:

- If possible, move to remove case of a juvenile offender to family court
- If removal to family court is not possible, make sure your client receives youthful offender treatment if your client is eligible
- If client is cooperating with law enforcement, or is a victim of certain crimes and assisting law enforcement, seek an informer or other special visa

## Other General Defense Strategies – Examples (2)

Other strategies might include:

- If pleading to offense that might be removable offense, avoid admissions of conduct beyond elements of offense
- If your client pled guilty without being informed of the negative immigration consequences of the plea, move to withdraw the uninformed guilty plea prior to sentencing
- If your client is pleading guilty based on an understanding that conviction will not trigger negative immigration consequences, client should so state when pleading

## Other General Defense Strategies – Examples (3)

Other strategies might include:

- If your client does not wish to plead guilty after being informed of the immigration consequences, litigate legal issues and/or go to trial even where you might not have otherwise done so
- File appeal?
- Seek post-judgment relief

See *Representing Immigrant Defendants in New York*, Chapter 5, for additional "Strategies to Avoid the Negative Immigration Consequences of a New York Criminal Case"

## Professional Responsibility

## ABA Standards for Criminal Justice Pleas of Guilty (3d ed.)

### Standard 14-3.2 Responsibilities of defense counsel

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

## ABA Standards for Criminal Justice Pleas of Guilty (3d ed.) (2)

*Commentary:* Standard 14-3.2(f) (Collateral consequences)

... defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or *Alford* plea. . .

## ABA Standards for Criminal Justice Pleas of Guilty (3d ed.) (3)

... counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client. . .

## Possible Model for Compliance/Effective Representation

### Step 1

- **Determine if Your Client is a Noncitizen and thus at Risk of Suffering Negative Immigration Consequences**
  - Critical first step
  - Need for regular office procedure to identify which of your clients are noncitizens
  - Do not make assumptions

## Assume that your client is a noncitizen if s/he was born outside the US *unless*:

1. S/he was born outside the US but had a US citizen parent or parents at birth & automatically acquired US citizenship; or
2. S/he was born outside the US of non-citizen parents but automatically derived US citizenship when the non-citizen parents (or parent) became US citizen(s) while the client was still a minor; or
3. S/he was born outside the US but lawfully immigrated to the US & later was naturalized (went through process of applying for citizenship, passing a civics test, and taking citizenship oath).

### Step 2

- **Obtain Information Needed for Assessment of Potential Immigration Consequences for a Noncitizen Client**

### Step 3

- **Determine if Your Noncitizen Client is Already Subject to Negative Immigration Consequences, or Now at Risk of Negative Immigration Consequences from Current Case**

### Step 4

- **Determine Your Noncitizen Client's Priorities and Advise and Counsel Client Accordingly**
  - See “Suggested Approaches for Representing a Noncitizen in a Criminal Case” (after “Immigration Consequences of Convictions Summary Checklist” in training handout materials)

## Where to Get Help

### Immigration Resources

## Immigration Practice Aids for Defense Lawyers

- **Training Handout Materials**
  - Two-page “Immigration Consequences of Criminal Convictions Checklist” (with “Suggested Approaches for Representing a Noncitizen in a Criminal Case” on page 2)
  - Practice Advisory: Criminal Defense of Immigrants in State Drug Cases-- The Impact of Lopez v. Gonzales (Dec. 14, 2006)
  - Practice aid entitled “Immigrants and Pleas in Problem-Solving Courts”
- ***Representing Immigrant Defendants in New York*** (Immigrant Defense Project. (212) 725-6422)

## Immigration/Criminal Expert Consultations

- **Immigrant Defense Project Hotline – (212) 725-6422**
- **NLG National Immigration Project – (617) 227-9727**

## Immigration/Criminal Website Resources

- **Immigrant Defense Project**  
[www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)
- **Defending Immigrants Partnership**  
[www.defendingimmigrants.org](http://www.defendingimmigrants.org)
- **NLG National Immigration Project**  
[www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org)



**IMMIGRANT DEFENSE PROJECT AND  
NEW YORK STATE DEFENDERS ASSOCIATION**

**PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER  
IMMIGRATION SERVICE PLAN**

# **Appendix H**

## **Sample Language Access Policy**



Legal Services for New York City  
Language Access Policy

## I. GENERAL PROVISIONS

- A. Purpose.** The purpose of this policy is to foster communication with clients in language that they fully understand, so that the highest quality legal representation can be provided.
- B. General Policy.** LSNY will provide language services as needed to ensure that limited English proficient (“LEP”) clients have meaningful access to LSNY’s services and that communications between staff and clients are not impaired as a result of the limited English proficiency of clients.
- a. **All stages of representation.** LSNY will provide legal assistance to LEP clients through free, competent language services at all stages of representation to allow effective communication between the program and the client, while minimizing delay or discomfort to the client.
  - b. **Non-discrimination.** Legal services provided to LEP clients will not be unreasonably delayed or inferior to services provided to English proficient clients.
- C. Applicability.** This policy applies to all the constituent corporations and branch offices of Legal Services for New York City, hereinafter collectively referred to as “LSNY.”
- D. Definitions.**
- a. **Limited English Proficiency (LEP) clients** are people who apply for or receive LSNY’s assistance and who are unable to speak, read, write, or understand English at a level that permits them to interact effectively with staff in the course of receiving legal services.
  - b. **Language Services** include services in the LEP client’s preferred language by staff who are competent in that language and interpreting by bilingual staff; contracted professional in-person and telephone based interpreters, volunteer community based interpreters and translation services.

## II. NOTICE OF LANGUAGE SERVICES

LSNY will post waiting room notices in multiple languages explaining that free bilingual or interpreting services are available in connection with the provision of legal services, and LSNY shall note on its website and in outreach materials that free LSNY bilingual help or interpreters will be provided as needed in connection with the provision of legal services.

### III. DETERMINING NEED FOR LANGUAGE SERVICES

- A. Client request.** Whenever a client informs LSNY that he or she is unable to speak English “very well,” as described above in Part I, D (a) and requests language services, those services shall be provided. Whenever it appears to a LSNY staff member at an initial interview that the client is not sufficiently proficient in English, either orally or in writing, to communicate effectively with a LSNY staff member, the LSNY staff member will ask in what language the client prefers to communicate. In determining whether there is a need for language services, staff must consider that the client needs to understand legal terms, concepts and procedures concerning his or her case.
- B. Staff determination.** Whenever a staff member determines that language services are needed for effective communication with a client, the staff member shall offer language services whether or not there is a request from the client. If necessary, the staff member shall inform the client that the failure to use the provided services may impair the case handler’s ability to provide quality services. If, after a staff member has offered the client a language service, the client refuses those services, this refusal must be documented in the client’s file and the staff member shall determine if he or she can continue representation of the client consistent with ethical standards.
- C. Documentation.** Staff shall document both the client’s requests and the staff determinations on the need for language assistance as follows:
- a. All staff opening files or receiving open files from other staff must ensure that the intake sheet and file notes correctly identify the primary language of the client and the need for language services for oral and written communication, where relevant.
  - b. No office should use an English default for the “language spoken” section of the intake on the case management system. If the language preferred by the client is not in the pull down menu, the category “other” should be used and the client’s language should be noted in the case notes.

### IV. PROVISION OF LANGUAGE SERVICES

- A. Bilingual Staff.** The preferred method of providing services to LEP clients is to use case handlers and support staff members who are proficient in the client’s preferred language.
- B. Language Sensitive Case Assignment.** Systems to assign LEP clients to case handlers at intake and following intake should be designed to assign clients to bilingual staff to the extent feasible, subject to controls to avoid overburdening bilingual staff, or creating significant delays in service to clients. LSNY may also balance LEP clients’ needs with the case handler’s desire to serve a varied and diverse group of clients.



### C. Interpretation

- a. **Function:** Interpreters are expected to function solely as a conduit between the advocate and the client. Advocates should not expect interpreters to communicate with the client in the absence of the advocate with the exception of in-house interpreters who ordinarily communicate directly with English-speaking clients for others. Family or friends of clients should not be used as interpreters other than as set forth below.
- b. **When required: Non-bilingual staff members** should use interpreters to communicate with LEP clients for all communications other than ministerial communications.
- c. **Court Appearances:** Advocates who do not speak an LEP client's language should bring an interpreter to hearings and other court appearances when needed to assess the accuracy of interpretation provided by the court or administrative forum. Advocates who do not speak an LEP client's language should bring an interpreter or have one available by telephone at hearings and other court appearances to facilitate communication with the client.

**D. Preferences-Interpreters.** When bilingual staff are not available to provide services, interpreting services should be provided in the following preferential order, by category:

- a. **Category 1:**
  1. *Professionally trained in-house interpreters;*
  2. *Bilingual staff with interpreter training;*
  3. *Community-based organizations or agencies* where LSNY is satisfied with the program's assurance that the interpreter is competent and trained; and
  4. *Professional interpreters (in person or by telephone)*, the selection of which shall follow office protocols for obtaining interpreter services.
- b. **Category 2:**

*Other community based organization or agency staff selected by the client.* Where LSNY staff members have concerns about using the interpreter selected by the client, the LSNY staff member shall inform the client that LSNY prefers to provide free in-house or contracted professional services.
- c. **Category 3:**

*Friends and relatives of clients.* Client's friends and relatives should not be used to interpret for other than ministerial communications except:

  1. When a LSNY staff member informs the client that LSNY strongly advises the use of free in-house or contracted professional services and
    - i. the client insists on using a friend or relative; and
    - ii. LSNY concludes that the friend or relative does not have a conflict of interest with the client, and

- iii. LSNY concludes that the friend or relative is capable of providing competent interpretation.
2. In the case of emergency.
3. When using a friend or relative as an interpreter, the LSNY staff member shall document the circumstances in the client's file.
4. When using a friend or relative as an interpreter, the LSNY staff member shall, if possible, also have a bilingual staff member present.
5. The use of minor children to interpret for other than ministerial communications is prohibited absent exceptional or emergency situations. Should a child be used as an interpreter in exceptional circumstances, this occurrence must be documented in client's file.

**E. Determining Competency of Interpretation Service Providers.** LSNY shall inquire as to the training and competency of any individual with whom LSNY arranges for volunteer assistance or contracts to provide interpreter services and LSNY shall make every effort to select and/or contract with those individuals who have the skills needed to interpret with sufficient fluency and training in modes of interpretation, translation and ethical standards.

**F. Confidentiality.** The case handler shall explain to the interpreter or translator the need for confidentiality and shall document in the client's file that this explanation has been provided. For outside vendors, including community organizations providing volunteer services, the case handler should have a signed confidentiality agreement where practical.

**G. Translation.** Consistent with the following provisions, translations shall be provided for LEP clients who are unable to adequately understand written English. Translations need not be provided to clients unable to read in their primary language, unless necessary to facilitate representation of the client or unless, upon inquiry by a LSNY staff member, the client indicates that a translation would be helpful to facilitate communication.

- a. **Vital routine documents:** LSNY will prepare and make available all vital forms in languages spoken by 1000 or more potential LEP clients. (A current list based on the 2000 census is attached to this policy.) Vital routine documents include retainers, rights and responsibilities, release forms, appointment letters and other documents used routinely for the purposes of representation. For each language group with fewer than 1000 persons, clients may receive oral interpretation of vital routine documents instead of written translation.
- b. **Signed Documents:** All documents to be signed by clients must be translated orally or in writing before the client signs the document. An affidavit of translation must be attached to each signed document which is orally translated. When a client will have to testify or appear at a hearing or interview at which the signed document will be used for

cross-examination or to determine credibility, the client should be given a translated version of the signed statement. LSNY staff will consider whether any other written materials which are produced for or are part of a case should be translated.

- c. **Judgments, Stipulations of Settlement and other vital documents:** Where feasible, documents that spell out rights or obligations should be either translated or summarized in the client's preferred language. Case handlers should work to develop standardized versions of these documents that could be used to provide this information for clients in their language.
- d. **Routine correspondence:** Where a case handler would normally send a letter to an English-speaking client, a translated letter should be sent to the LEP client.
- e. **Client documents:** Client-supplied documents should be translated into English if a LSNY staff member determines they are needed.
- f. **Community Education:** Community education materials should be available in each language where more than 5% of the population of eligible clients speaks that language unless the materials are directed to a particular client group that has language needs that differ from those of the general population. (This standard currently requires Spanish in the Bronx; Spanish, Russian and Chinese in Brooklyn; Spanish and Chinese in Queens and Manhattan; and Spanish in Staten Island.)

## V. HIRING & TRAINING

- A. **Hiring.** Second language proficiency is a preferred qualification for all jobs and may be a mandatory qualification for some positions. LSNY will aggressively recruit staff members who speak the languages of LEP groups that comprise at least five percent of the eligible population of the borough. LSNY will develop testing procedures to ensure that people hired as bilingual case handlers are competent and that individuals hired to do interpretation and translation are competent to provide these language services.
- B. **Training.** LSNY shall provide language access training to all existing staff who have regular contact with clients and to all such newly hired staff.
  - a. The training will cover this policy, protocols for use of language services, how to work with interpreters, and related topics.
  - b. LSNY shall provide training for bilingual staff who are called upon to provide interpreting assistance to other staff on the techniques used in interpreting, interpreter ethics, legal terminology and procedures and other topics as needed.
  - c. Bilingual staff who provide case handling services shall be trained and provided with appropriate dictionaries to enable them to provide legal advice and information in a language other than English.
  - d. LSNY will develop testing procedures to ensure that people who are working as bilingual case handlers are competent and that individuals providing

interpretation and translation are competent to provide these language services.

## **VI. IMPLEMENTATION**

**A. Administrative systems.** Each office shall establish administrative systems to implement this policy, including systems for assigning cases to bilingual staff, systems for assigning and rotating interpretation responsibilities, systems to address when staff members shall procure non-staff language services, and systems to ensure that language services are available on an emergency basis where necessary.

**B. Workload Adjustments.** Workload adjustments shall be made to reflect the additional work which may be required of bilingual and monolingual staff in delivering services to LEP clients or in covering for those providing those services. Any additional work responsibilities must be consistent with the collective bargaining agreement.

**C. LEP responsible staff and working group.** Each office will designate one member of the staff with LEP responsibilities to ensure that services are available. A LSNY-wide working group will be formed with, at minimum, the LEP responsible person from each office and one member from the LSNY main office to explore best practices for implementation and monitoring this policy.

### **D. Client Needs, Program Resource and Policy Review.**

- a. At least annually,** the LEP working group shall:
  1. generate intake statistics by primary language and by unit to determine the extent to which LSNY is providing services to LEP clients;
  2. tabulate the number of bilingual staff on the payroll and the number of languages spoken;
  3. tabulate the costs to procure outside language services and the extent to which services are utilized throughout the program; and
  4. review the language access policy and the supporting protocols and propose amendments as needed.
  
- b. At least every five years,** LSNY shall review available demographic data regarding the linguistic makeup of the potentially eligible client population and compare such data to the existing client base to determine if apparent disparities exist. Management and the LEP working group shall then consider whether special efforts are needed to provide greater service to underserved language groups.

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# **Appendix I**

## **IDP Immigration Consequences Checklist**

## Immigrant Defense Project

### Immigration Consequences of Convictions Summary Checklist\*

<b>GROUND OF DEPORTABILITY</b> (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	<b>GROUND OF INADMISSIBILITY</b> (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)	<b>INELIGIBILITY FOR US CITIZENSHIP</b>
<b>Aggravated Felony Conviction</b> ➤ <i>Consequences</i> (in addition to deportability): <ul style="list-style-type: none"> <li>◆ Ineligibility for most waivers of removal</li> <li>◆ Ineligibility for voluntary departure</li> <li>◆ Permanent inadmissibility after removal</li> <li>◆ Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal</li> </ul> ➤ <i>Crimes covered</i> (possibly even if not a felony): <ul style="list-style-type: none"> <li>◆ Murder</li> <li>◆ Rape</li> <li>◆ Sexual Abuse of a Minor</li> <li>◆ Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)</li> <li>◆ Firearm Trafficking</li> <li>◆ Crime of Violence + 1 year sentence**</li> <li>◆ Theft or Burglary + 1 year sentence**</li> <li>◆ Fraud or tax evasion + loss to victim(s) &gt; \$10,000</li> <li>◆ Prostitution business offenses</li> <li>◆ Commercial bribery, counterfeiting, or forgery + 1 year sentence**</li> <li>◆ Obstruction of justice or perjury + 1 year sentence**</li> <li>◆ Certain bail-jumping offenses</li> <li>◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)</li> <li>◆ Attempt or conspiracy to commit any of the above</li> </ul>	Conviction or <i>admitted commission</i> of a <b>Controlled Substance Offense</b> , or DHS has reason to believe individual is a drug trafficker ➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)  Conviction or <i>admitted commission</i> of a <b>Crime Involving Moral Turpitude (CIMT)</b> ➤ Crimes in this category cover a broad range of crimes, including: <ul style="list-style-type: none"> <li>◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery)</li> <li>◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)</li> <li>◆ Most sex offenses</li> </ul> ➤ <i>Petty Offense Exception</i> —for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months  <b>Prostitution and Commercialized Vice</b>  Conviction of <b>2 or more offenses</b> of any type + <b>aggregate prison sentence of 5 years</b>	Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years: <ul style="list-style-type: none"> <li>➤ <b>Controlled Substance Offense</b> (unless single offense of simple possession of 30g or less of marijuana)</li> <li>➤ <b>Crime Involving Moral Turpitude</b> (unless single CIMT and the offense is not punishable &gt; 1 year (e.g., in New York, not a felony) + does not involve a prison sentence &gt; 6 months)</li> <li>➤ <b>2 or more offenses</b> of any type + <b>aggregate prison sentence of 5 years</b></li> <li>➤ <b>2 gambling offenses</b></li> <li>➤ <b>Confinement</b> to a jail for an aggregate period of 180 days</li> </ul> <b>Aggravated felony</b> conviction on or after Nov. 29, 1990 (and murder conviction at any time) <i>permanently</i> bars a finding of moral character and thus citizenship eligibility
<b>Controlled Substance Conviction</b> ➤ EXCEPT a single offense of simple possession of 30g or less of marijuana	<b>CONVICTION DEFINED</b>  A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where: <ul style="list-style-type: none"> <li>(i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND</li> <li>(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed.</li> </ul> <b>THUS:</b> <ul style="list-style-type: none"> <li>➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)</li> <li>➤ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction</li> <li>➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction</li> </ul>	
<b>Crime Involving Moral Turpitude (CIMT) Conviction</b> ➤ For crimes included, see Grounds of Inadmissibility ➤ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor) ➤ Two CIMTs committed at any time “not arising out of a single scheme”		
<b>Firearm or Destructive Device Conviction</b>		
<b>Domestic Violence Conviction</b> or other domestic offenses, including: <ul style="list-style-type: none"> <li>➤ Crime of Domestic Violence</li> <li>➤ Stalking</li> <li>➤ Child abuse, neglect or abandonment</li> <li>➤ Violation of order of protection (criminal or civil)</li> </ul>		
<b>INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL</b>		
<ul style="list-style-type: none"> <li>➤ Aggravated felony conviction</li> <li>➤ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States</li> </ul>		
<b>INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL</b>		
<b>“Particularly serious crimes”</b> make noncitizens ineligible for asylum and withholding. They include: <ul style="list-style-type: none"> <li>➤ Aggravated felonies               <ul style="list-style-type: none"> <li>◆ All will bar asylum</li> <li>◆ Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding</li> <li>◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding</li> </ul> </li> <li>➤ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)</li> </ul>		

\*For the most up-to-date version of this checklist, please visit us at <http://www.immigrantdefenseproject.org>.

\*\*The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

## Immigrant Defense Project

### Suggested Approaches for Representing a Noncitizen in a Criminal Case\*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

#### 1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

#### 2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

#### 3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for **LPR status, asylum, or other relief**:

**IF your client has some prospect of becoming a lawful permanent resident** based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

**IF your client has a fear of persecution** in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (**TPS**) of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

\*References above are to sections of our manual.

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# **Appendix J**

## **NYSDA Defender Case**

### **Management System Screen Shot**



# NYSDA Defender Case Management System screen shot with immigration fields

Client Info screen with dropdown list displayed for *Immigration Status* field:

**DOE, JOHN Main Screen**

Last Name: DOE Name ID: 3464 Sex: M (MALE) SSN: 338-44-9559 15 Red Mill Road Poughkeepsie, NY 12601  
 First Name: JOHN Alt. ID: 003393 Race: L (LATINO) Interpreter: [ ]  
 MI: R. NYSID: 4483939Q DOB: 02/01/1967 Age: 41 Phone#: (845) 533-1661

Cases Client Info Aliases Quick View Outstanding Warrant (Case# 08-220)

DOB: 02/01/67 Age: 41 Immigration Status: Documented Demographics: MENTAL ILLNESS, SUBSTANCE ABUSE  
 SSN: 338-44-9559 How did you get Status: [ ]  
 Alternate ID: 003393 When: [ ]  
 NYSID: 4483939Q Length in County: [ ]  
 FBI#: [ ]  
 Sex: M MALE In School?: No  
 Ethnicity: H HISPANIC Last Grade: GED  
 Race: L LATINO Any Military: Yes  
 Interpreter: [ ] Rank: PRIVATE  
 Marital Status: MARRIED Branch: ARMY  
 Household Size: 2 Dates: 2005 - PRESENT  
 U.S. Citizen?: No Decorations/Combat: Purple Heart  
 Country Born In: Mexico Discharge Type: [ ]

Client Info screen with dropdown list displayed for *How did you get Status* field:

**DOE, JOHN Main Screen**

Last Name: DOE Name ID: 3464 Sex: M (MALE) SSN: 338-44-9559 15 Red Mill Road Poughkeepsie, NY 12601  
 First Name: JOHN Alt. ID: 003393 Race: L (LATINO) Interpreter: [ ]  
 MI: R. NYSID: 4483939Q DOB: 02/01/1967 Age: 41 Phone#: (845) 533-1661

Cases Client Info Aliases Quick View Outstanding Warrant (Case# 08-220)

DOB: 02/01/67 Age: 41 Immigration Status: Documented Demographics: MENTAL ILLNESS, SUBSTANCE ABUSE  
 SSN: 338-44-9559 How did you get Status: Green card through U [ ]  
 Alternate ID: 003393 When: [ ]  
 NYSID: 4483939Q Length in County: [ ]  
 FBI#: [ ]  
 Sex: M MALE In School?: No  
 Ethnicity: H HISPANIC Last Grade: GED  
 Race: L LATINO Any Military: Yes  
 Interpreter: [ ] Rank: PRIVATE  
 Marital Status: MARRIED Branch: ARMY  
 Household Size: 2 Dates: 2005 - PRESENT  
 U.S. Citizen?: No Decorations/Combat: Purple Heart  
 Country Born In: Mexico Discharge Type: [ ]

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# **Appendix K**

**Criminal-Immigration Resource List  
of Publications, Websites  
and Professional Organizations**

# **Criminal-Immigration Resource List of Publications, Websites, and Professional Organizations**

## **PUBLICATIONS:**

Representing Noncitizen Criminal Defendants in New York State, by Manuel D. Vargas (distributed by the Immigrant Defense Project, 3 West 29th Street, Suite 803, New York, NY 10001 / (212) 725-6422)

Immigration Law and Crimes, by Dan Kesselbrenner and Lory D. Rosenberg, under the auspices of the National Immigration Project of the National Lawyers Guild (published by West Group, 620 Opperman Drive, St. Paul, MN 55164 / (800) 328-4880)

Criminal Defense of Immigrants, by Norton Tooby with Katherine A. Brady (distributed by the The Law Offices of Norton Tooby, 516 52<sup>nd</sup> Street, Oakland, CA 94604 / (510) 601-1300)

Cultural Issues in Criminal Defense, edited by James G. Connell, III, and Rene L. Valladares, including Chapter 11, "Immigration Consequences of Criminal Convictions" by Tova Indritz (published by Juris Publishing, Inc., 9 East Carver Street, Huntington, NY 11743 / (800) 887-4064)

California Criminal Law and Immigration, by Katherine A. Brady (distributed by The Immigrant Legal Resource Center, 1663 Mission Street, Suite 602, San Francisco, CA 94103 / (415) 255-9499)

Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios, by Maria Baldini-Potermine (distributed by the Minnesota Bar Association / (612) 333-1183)

"Deportation: An Immigration Law Primer for the Criminal Defense Lawyer," by William R. Maynard (published in the June 1999 issue of NACDL's The Champion and available on the internet at <<http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument>>)

## **PROFESSIONAL ORGANIZATIONS AND WEB RESOURCES:**

### **Immigrant Defense Project**

<http://www.immigrantdefenseproject.org>  
(212) 725-6422

### **Immigrant Advocates Network**

<http://www.immigrationadvocates.org/>

**National Lawyers Guild/National Immigration Project**

<http://www.nlg.org/nip/homepage.html>

(617) 227-9727

**Defending Immigrants Partnership**

<http://defendingimmigrants.org/>

**Immigrant Legal Resource Center**

<http://www.ilrc.org>

(415) 255-9499

**NACDL Immigration Articles**

<http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument>

**Law Offices of Norton Tooby**

<http://www.ilw.com/tooby>

(510) 601-1300

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# **Appendix L**

**Pro Se Resources  
for Immigrants Facing Removal**

# **Pro Se Criminal-Immigration Resource List**

## **Immigrant Defense Project**

Know Your Rights Materials

[www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)

## **Families for Freedom**

Deportation 101 Training (co-authored with Immigrant Defense Project)

[www.familiesforfreedom.org/httpdocs/deportation101.html](http://www.familiesforfreedom.org/httpdocs/deportation101.html)

## **Florence Immigrant And Refugee Rights Project**

Pro Se Materials

[www.firrp.org](http://www.firrp.org)

## **Law Help**

[www.lawhelp.org](http://www.lawhelp.org)