

# **A Lawyers Obligation to Clients after Padilla v. Kentucky:** **The Collateral Consequences of Criminal Convictions**

**Chair: Frank J. Nebush, Jr., Oneida County Public Defender, Criminal Division**

*Presented by: Oneida County Bar Association  
Oneida County Assigned Counsel Program  
Oneida County District Attorney's Office  
Oneida County Public Defender, Criminal Division  
New York State Defenders Association, Inc.*

**Speakers: Joanne Macri, Esq., Director**  
*Criminal Defense Immigration Project  
New York State Defenders Association*

*Carla Hengerer, Esq., Deputy Chief Counsel  
Immigration and Customs Enforcement  
Department of Homeland Security*

**Saturday, October 22, 2011**

**Mohawk Valley Community College  
1101 Sherman Drive  
Utica, New York  
IT Building, Room 225**

**REGISTRATION: 8:30 A.M. – 9:00 A.M.**

**PROGRAM: 9:00 A.M. – 12:00 P.M.**

**MCLE Credits: (2) Professional Practice; (1) Ethics**

# **Criminal Track Seminar Series Fall, 2011**

**Sponsored by:  
Oneida County Bar Association  
Oneida County Assigned Counsel Program  
Oneida County District Attorney  
Oneida County Public Defender, Criminal Division  
New York State Defenders Association, Inc. (NYSDA)**

Commencing in the spring of 2010, the sponsors have jointly developed and presented a series of criminal practice training seminars. These programs are offered to district attorneys, public defenders, assigned counsel and government attorneys at the reduced rate of \$25 per program with no geographic restrictions. Oneida County Bar Association members who hold a Sempass are entitled to attend these programs at no cost.

This fall, the sponsors presented the 2011 Criminal Law Academy offering two consecutive Saturdays of training in criminal trial practice and 14 total CLE credits including 2 ethics credits. Since the Academy was a success, the Criminal Track Development Committee is presently developing the curriculum for the 2012 Academy and the Spring, 2012 Criminal Track Programs. NYSDA does a great job announcing the programs and they are also posted on the Oneida County Bar Association website along with vast array of CLE programs in other areas. Check out their website at:

<http://www.oneidacountybar.org>

All programs and program materials are posted on the website of the Oneida County Public Defender, Criminal Division: <http://ocgov.net/oneida/pdcriminal>

**In addition to today's program, we are pleased to present the following remaining program in our Fall, 2011 schedule**

**Saturday, November 5, 2011**

**TRIAL PRACTICE with Dominic Trunfio, Esq.  
First Chief Assistant District Attorney for Onondaga County  
Credits: 3 Skills**

**Chair: Frank J. Nebush, Jr., Esq., *Oneida County Public Defender, Criminal Division*  
9 - 12:00 Noon at Mohawk Valley Community College, IT Room #225**

**For reservations, contact Diane Godlewski at the Oneida County Bar Association office at (315)-724-4901**

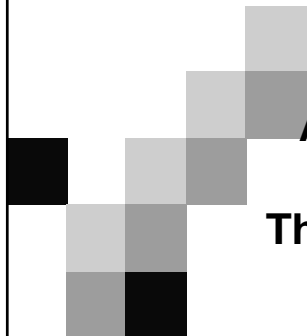
## **SPEAKERS**

**JOANNE MACRI is the Director of the Criminal Defense Immigration Project (CDIP) of the New York State Defenders Association (NYSDA). On behalf of NYSDA, Ms. Macri travels across New York State training criminal defense attorneys on the immigration consequences of New York criminal convictions. For her service, Ms. Macri was recently recognized by the New York State Bar Association's Criminal Justice Section for her Outstanding Contribution to Criminal Law Education. Ms. Macri served as a legal advisor to the New York State Immigration Pardon Panel established by former Governor David Patterson and as the former Director of the NYSDA Immigrant Defense Project as a Managing Attorney for Prisoners' Legal Services of New York. Prior to joining the staff of NYSDA, Ms. Macri served as a NYSDA Board Member. She is currently an adjunct professor at the State of New York University at Buffalo Law School where she teaches immigration law, immigration law practice and criminal/immigration law. Ms. Macri received her Honors Bachelor degree from the University of Ottawa and her Juris Doctorate from Albany Law School. She serves as a committee member of the NYSBA Immigration and Federal Litigation Subcommittee and has served on the New York City Bar Association Criminal Justice Operations Committee, the WNY AILA Chapter Subcommittees for Immigration and Customs Enforcement and Customs and Border Protection.**

**CARLA HENGERER is Deputy Chief Counsel for Immigration and Customs Enforcement (ICE) for the Department of Homeland Security in Buffalo, New York. Prior to her current position, she served as Assistant Chief Counsel for the Immigration and Customs Enforcement, Department of Homeland Security in Buffalo (formerly the Immigration and Naturalization Service (INS) and as an Immigration Inspector and Immigration Examiner with the INS. She is a graduate of SUNY Buffalo Law School.**



**NEW YORK STATE DEFENDERS  
ASSOCIATION  
CRIMINAL DEFENSE  
IMMIGRATION PROJECT**



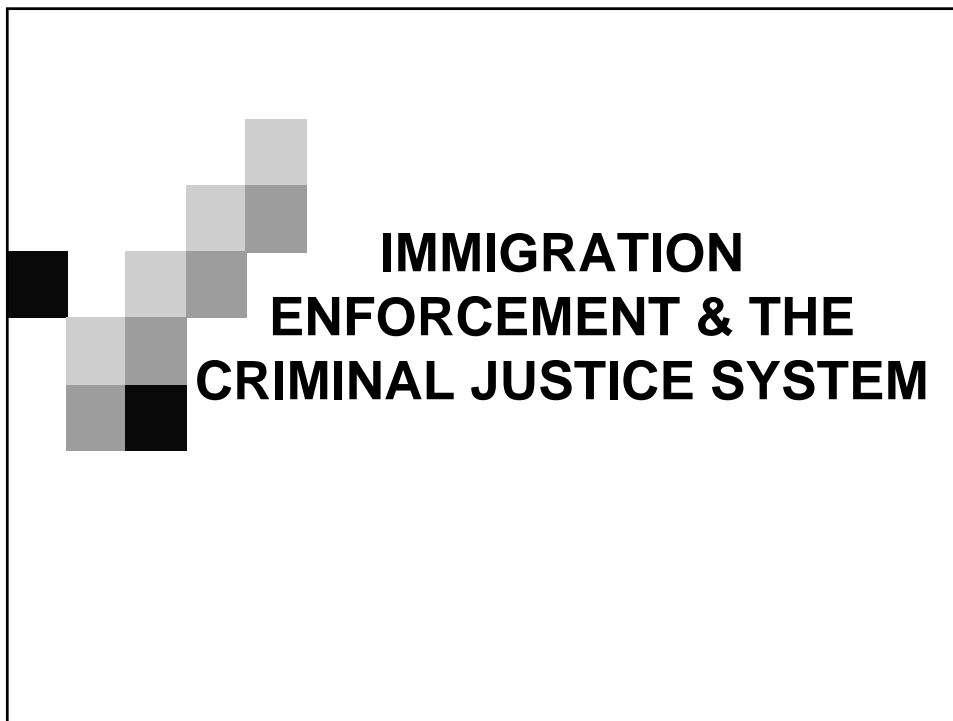
**A Lawyers Obligation to Clients  
after *Padilla v. Kentucky*:  
The Collateral Consequences of  
Criminal Convictions**

**NYSDA Criminal Defense Immigration Project  
Advanced Criminal/Immigration CLE**

**Oneida County Bar Association**

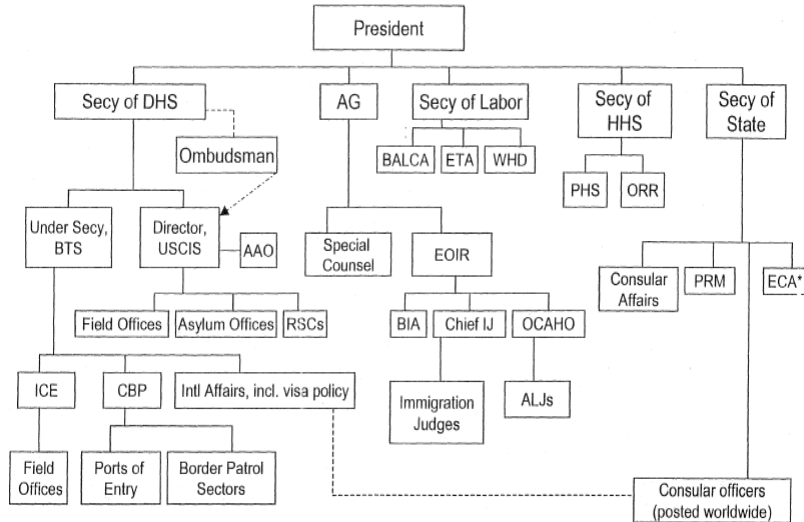
**October 22, 2011**

*The NYSDA Criminal Defense Immigration Project is sponsored in part by a grant from the New York Bar Foundation*



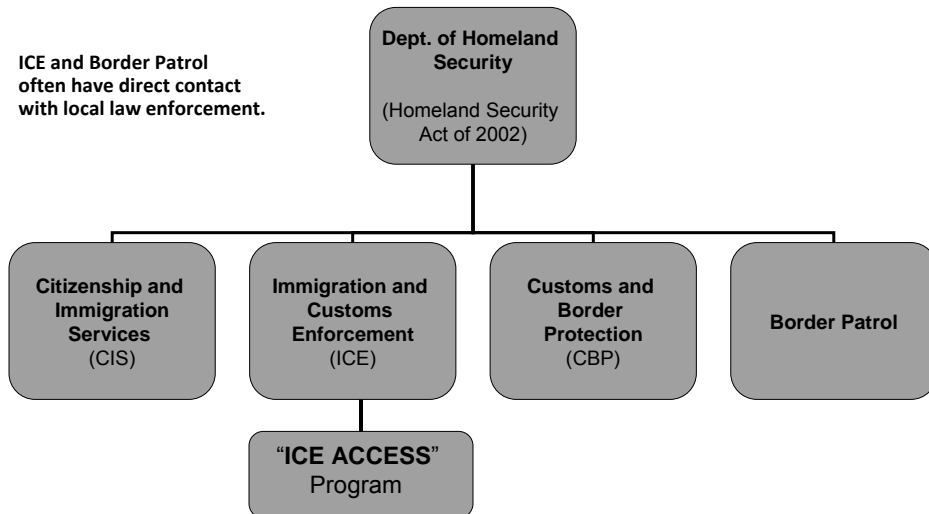
**IMMIGRATION  
ENFORCEMENT & THE  
CRIMINAL JUSTICE SYSTEM**

## Executive Branch Agencies: Immigration & Citizenship

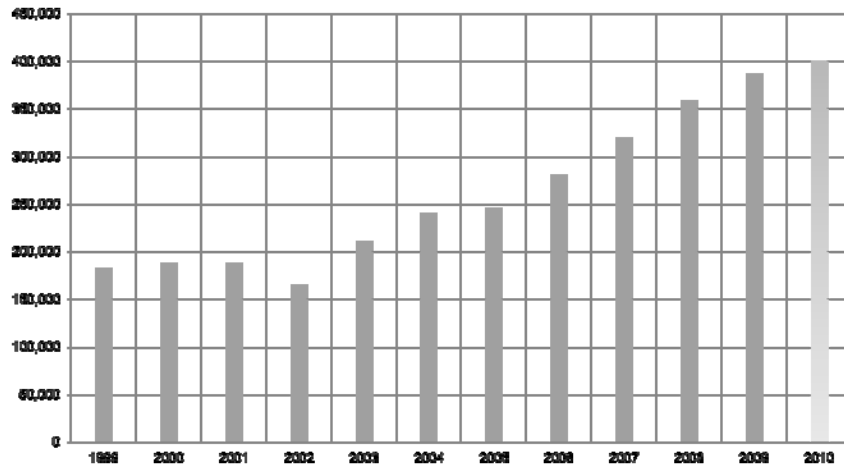


## WHO IS AUTHORIZED TO ISSUE AN ICE DETAINER?

ICE and Border Patrol often have direct contact with local law enforcement.

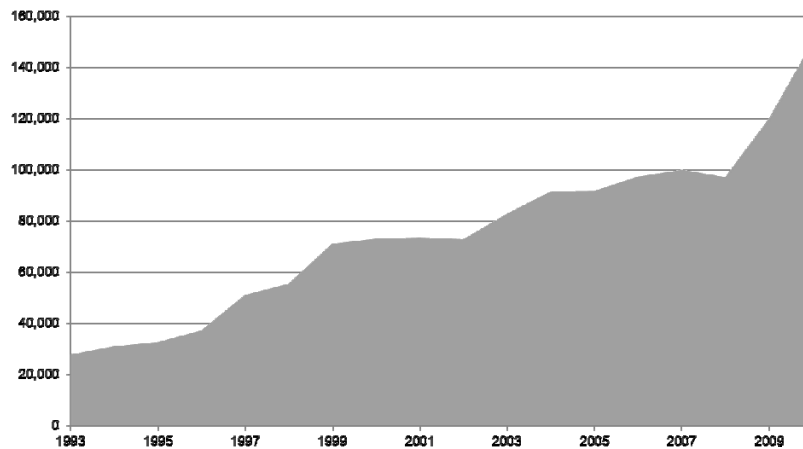


## TOTAL NUMBER OF DEPORTATIONS PER YEAR



Source: Office of Immigration Statistics/Department of Homeland Security's 2008 Yearbook of Immigration Statistics

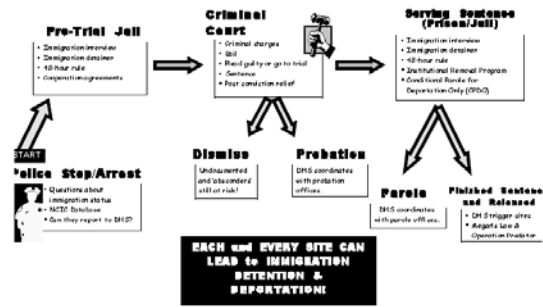
## Deportations/Removals Based on Criminal Conviction (1993 - 2010)



DHS Secretary Napolitano's October 2010 Announcement of record-breaking statistics for immigration enforcement of "criminal aliens"

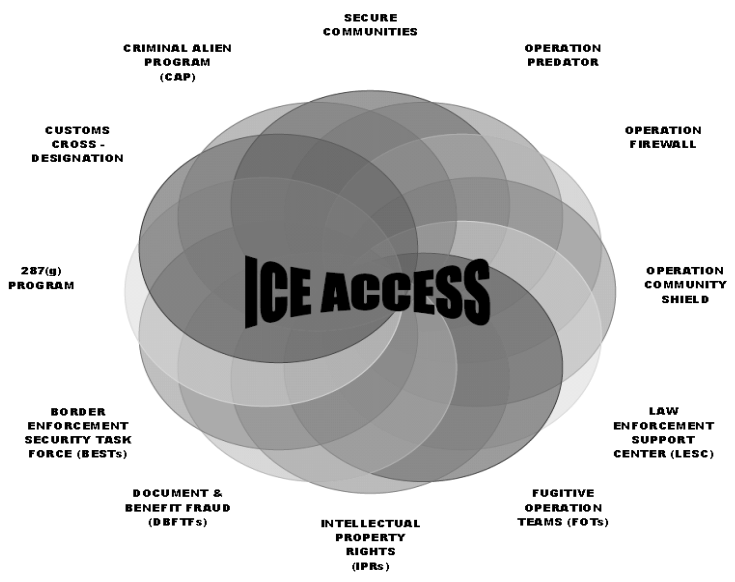
# Increasing Federal Immigration Enforcement and State and Local Collaboration

## IMMIGRATION IN THE CRIMINAL JUSTICE SYSTEM

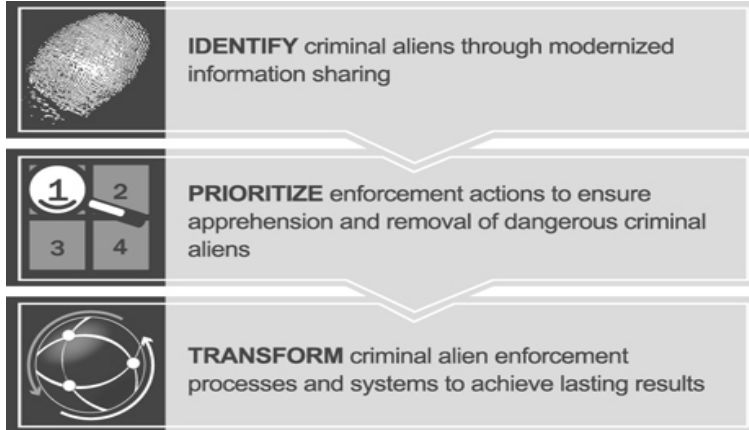


BYODA WASHINGTON MET POLICE & FBI BY FBI/DOJ

## ICE ACCESS = AGREEMENTS OF COOPERATION IN COMMUNITIES TO ENHANCES SAFETY AND SECURITY

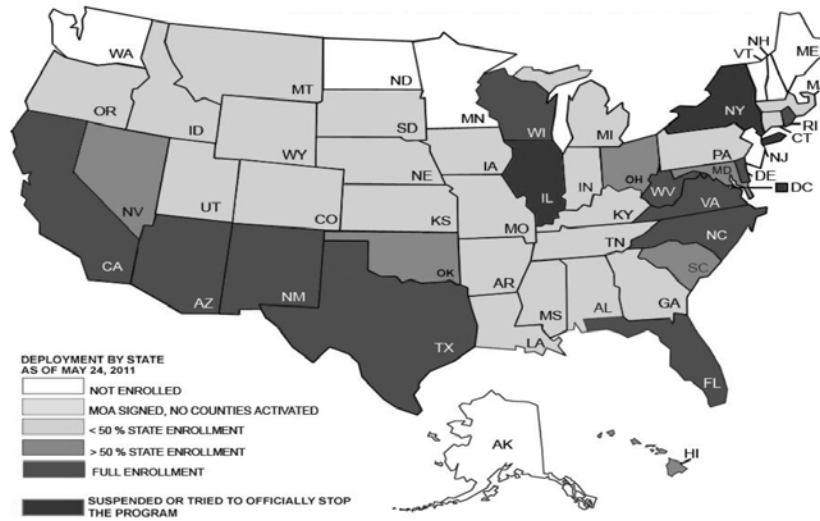


# SECURE COMMUNITIES



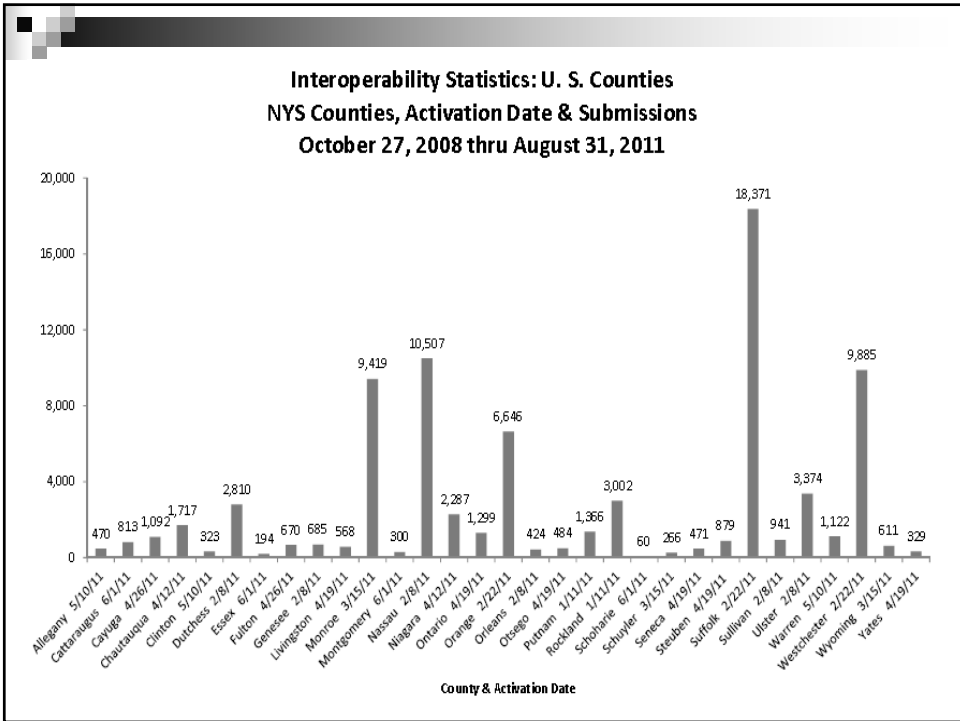
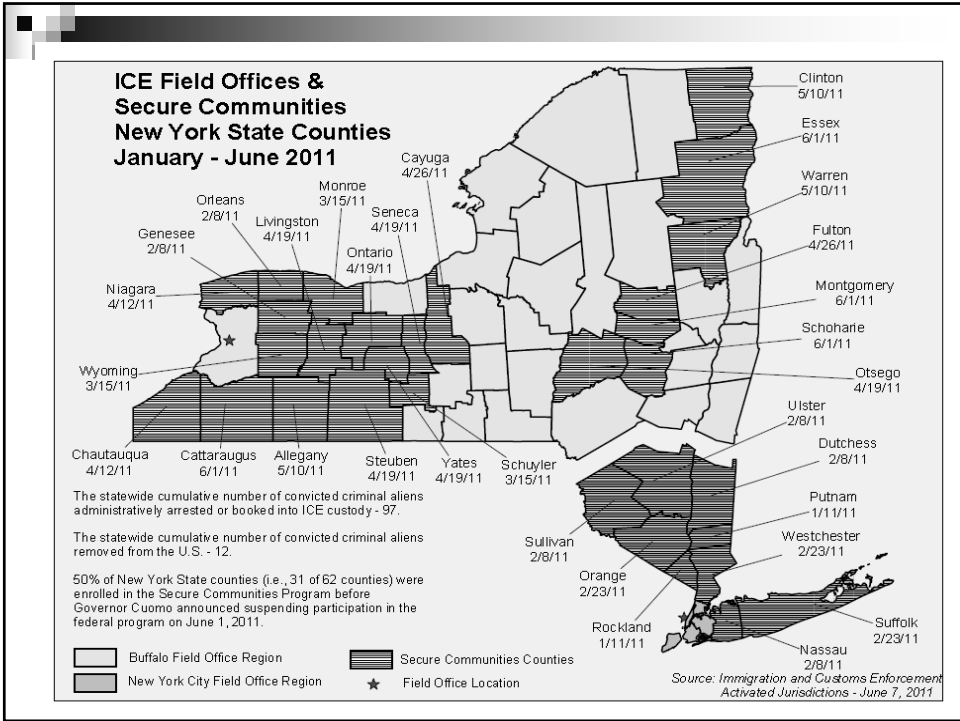
[www.ice.gov/pi/news/factsheets/secure\\_communities.htm](http://www.ice.gov/pi/news/factsheets/secure_communities.htm)

## STATUS OF SECURE COMMUNITIES PROGRAM NATIONWIDE

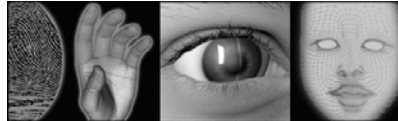


Map and grid published by Deportation Nation at <http://www.deportationnation.org/>





## FBI BIOMETRICS THE NEXT GENERATION



## ICE ENFORCEMENT PRIORITIES

LEVEL 1	LEVEL 2	LEVEL 3
"Aggravated felonies" as defined in INA Section 101(a)(43) OR 2 or more "felonies" (i.e., punishable for + 1yr imprisonment)	One felony conviction OR 3 or more "misdemeanor" convictions	Convicted of crimes punishable by less than 1 year
EXAMPLES: rape, murder, kidnapping, weapons and/or drug trafficking, robbery, burglary	EXAMPLES: theft, assault, forgery, property crimes, drug crimes, auto theft offenses	EXAMPLES: drug crimes, theft, theft of services, trademark counterfeiting,

According to ICE IDENT/IAFIS INTERPOLIBILITY STATISTICS, 7,225,393 fingerprints have been submitted for DHS verification nationwide between October 27, 2008 and March 31, 2011.



***PADILLA V. KENTUCKY:***  
**What Is Effective Assistance?**



**INEFFECTIVE ASSISTANCE  
OF COUNSEL CLAIMS**

***Padilla v. Commonwealth of Kentucky*** 599 U.S.  
\_\_\_ (2010); (Docket No. 08-651)

- 6<sup>th</sup> Amendment guarantee of effective assistance requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.

## **Life After *Padilla*: Defending In Criminal Court**

- Unique nature of deportation is “particularly severe penalty” that is intimately tied to criminal process.

Id. at 8-9.

- Preserving the client’s right to remain in the U.S. may be more important to the client than any potential jail sentence.”

Id. at 10.

## **Life After *Padilla v. Kentucky*?**

- Non-advice (silence) is insufficient (ineffective)
- Deportation is a “penalty,” not a “collateral consequence”
- “Informed consideration” of deportation consequences required during plea-bargaining
- Professional standards require counsel to determine citizenship/immigration status

## What Is Effective Assistance?

1. Investigate Facts
2. Determine client's defense goals
3. Analyze immigration consequences
4. Defend the case according to client's priorities

### STEP 1: INVESTIGATE THE FACTS

- ASK **"WHERE WERE YOU BORN?"**
- DETERMINE **IMMIGRATION STATUS** (i.e., 4 categories)
- DETERMINE **LENGTH OF TIME IN U.S.** (include info. of most recent trip abroad)
- DETERMINE **"IMMEDIATE FAMILY"** IN US
- OBTAIN INFO ON **PRIOR CRIMINAL HISTORY**
- Establish **defense goals** according to client's priorities (i.e., include immigration priorities)

## INVESTIGATE & RECORD THE FACTS

■ ASK “WHERE WERE YOU BORN?”

■ ANSWER: UNITED STATES 

■ ANSWER: NOT THE UNITED STATES?

Determine if NATURALIZED U.S. CITIZEN or  
DERIVATIVE U.S. CITIZEN


## DERIVATIVE CITIZENSHIP: CHILD CITIZENSHIP ACT OF 2000

Pursuant to INA §320, a child is a US citizen if,  
as of February 27, 2001:

■ child is UNDER 18 yrs of age and

■ One parent is a U.S. citizen (i.e., biological or  
adoptive parent if adoption completed before child  
was 16 yrs of age) and

■ The child is residing in the legal and physical  
custody of the U.S. citizen parent and

■ The child was lawfully admitted to the U.S. as an  
immigrant (i.e., admitted for LPR status). 

NOTE: If client is 18 yrs or older as of 02/27/01 – refer to Citizenship Chart







## NEWER EMPLOYMENT AUTHORIZATION



Check Alien Registration Number to Confirm Whether in Removal Proceedings

## HELPFUL INFORMATION

- NAME, DATE AND COUNTRY OF BIRTH
- ALIEN REGISTRATION NUMBER (“A” #)
- COPY OF IMMIGRATION DOCUMENTS
- PRIOR CRIMINAL HISTORY
- LAST & FIRST LAWFUL ADMISSION TO U.S.

### USES:

- **Locating Client:** ICE Locator <https://locator.ice.gov/>
- **Pending or Prior Immigration Hearing:** Immigration Court (EOIR) hotline at **1-800-898-7180**
- **Assessing Immigration Consequences:** NYS RAP Sheet (also contains prior deportation orders)

# GROUNDS FOR REMOVAL

<b>NYSDA Immigrant Defense Project</b> <b>Immigration Consequences of Convictions Summary Checklist*</b>		
<b>GROUNDS OF DEPORTABILITY</b> (Apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	<b>GROUNDS 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 <ul style="list-style-type: none"> <li>➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)</li> </ul> Conviction or <i>admitted commission</i> of a <b>Crime Involving Moral Turpitude</b> (CIMIT) <ul style="list-style-type: none"> <li>➤ 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> <li>➤ <i>Felty Offense Exception</i>—for one CIMIT if the client has no other CIMIT + the offense is not punishable &gt; 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence &gt; 6 months</li> </ul> </li> </ul> <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 CIMIT 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 of 2 or more offenses of any type + aggregate prison sentence of 5 years</b>	
<b>Crime Involving Moral Turpitude (CIMIT) Conviction</b> ➤ For crimes included, see Grounds of Inadmissibility ➤ One CIMIT 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 CIMITs committed at any time "not arising out of a single scheme"	<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: <ol 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> </ol> <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 ACDJ) is NOT a conviction</li> <li>➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction</li> </ul>	
<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 OR REMOVAL</b>		

## AGGRAVATED FELONY: SEXUAL ABUSE OF A MINOR

- Includes “**broad . . . spectrum of sexually abusive behavior**” against minors

See *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) – NY PL § 130.25, Includes **misdemeanor offense of sexual abuse of a minor**

### Examples:

NYPL §130.20(1),(2), sexual misconduct (class A) or  
NY PL §130.55 sexual abuse, (class B)

See *Matter of Small*, 23 I&N Dec. 448 (BIA 2002)

## AGGRAVATED FELONY: SEXUAL ABUSE OF A MINOR

- Includes offenses that **may not involve sexual touching**

*Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (i.e., Board of Immigration Appeals found that indecency with a child by exposure pursuant to Tex. Penal Code § 21.11(a)(2) constitutes AF SAM)

- Will likely include **review of the Record of Conviction** for most NY Penal Law sexual offenses

*Ganzhi v. Holder*, \_\_\_ F.3d \_\_\_, 2010 WL 3465604 (2d Cir. 2010) – N.Y. PENAL LAW § 130.20(1) = divisible statute requiring review of record of conviction

## **AGGRAVATED FELONY: DRUG TRAFFICING CRIMES**

- **USSC state drug offense = drug felony under federal law as punishable under CSA 18 USC § 924(c)(2)**

*See Lopez v. Gonzales, 549 U.S. 47 (2006); see also Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010)*

- **Controlled Substances Act, 18 USC § 924(c)(2)) (ex. punishes drug distribution and possession with intent to sell)**

## **AGGRAVATED FELONY: DRUG TRAFFICING CRIMES**

If a **second or subsequent drug possession offense** is prosecuted a **recidivist possession felony offense** under federal law - may be deemed an **aggravated felony drug trafficking offense**.

Therefore, a New York State second or subsequent drug possession offense may be deemed an aggravated felony if it is prosecuted as a recidivist offense and if the earlier drug possession conviction(s) are final and not on appeal.(NYPL § 70.06);  
*See Also v. Mukasey; Powell v. Mukasey, 548 F.3d 207 (2<sup>nd</sup> Cir.).*

## **AGGRAVATED FELONY: DRUG TRAFFICING CRIMES**

### **EXCEPTIONS TO AF DRUG OFFENSES:**

- Offer to sell (not penalized under federal law);
- Distribution of small amount of certain controlled substances (ex. codeine, in a larger mixture or preparation with medicinal qualities = felony misdemeanor);
- Gratuitous (Free) distribution of small amount of marijuana = federal misdemeanor

## **AGGRAVATED FELONY: EXCEPTION: “offer to sell”**

- NY sale offenses include **“offers to sell”**
- NY PL § 220.00(1) “sell” includes to “sell, exchange, give or dispose of to another, or **to offer or agree to do the same.**”
- If NY PL § 220.14 involves **“offer to sell,”** which is not an offense under the CSA, it is **not categorically a drug trafficking aggravated felony**

See *Davila v. Holder*, 2010 U.S. App. LEXIS 12230 (5<sup>th</sup> Cir. 2010) – Review of Record of Conviction required in this divisible

## **AGGRAVATED FELONY: EXCEPTION: free distribution**

- 21 USC § 841(b)(4) creates exception to felony treatment of drug sale:  
if distribution is of a “**small**” amount of **marijuana “without remuneration”**  
(= treatment as a federal misdemeanor or less pursuant to 8 21 USC § 844 and 18 USC § 3607)

## **AGGRAVATED FELONY: EXCEPTION: free distribution**

- Sale of Marijuana, 5<sup>th</sup> degree & 4<sup>th</sup> degree – case law include free transfers of small amounts of marijuana (3<sup>rd</sup>, 4<sup>th</sup> an 5<sup>th</sup> Circuits)
- NY PL § 221.40, criminal sale of marijuana in 4<sup>th</sup> degree is NOT a drug-trafficking aggravated felony if it involves distribution of a small amount of marijuana for NO remuneration. – **BE AWARE OF ROC!!!**

*See Martinez v. Mukasey, 551 F.3d 113 (2d Cir. 2008).*

## **AGGRAVATED FELONY: CRIME OF VIOLENCE + 1 year**

As defined in 18 U.S.C. § 16:

(a) an offense that has as an element the **use, attempted use, or threatened use of physical force** against the **person or property of another**, or

(b) any other offense that is a **felony** and that, by its nature, **involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.**

## **AGGRAVATED FELONY: RELATING TO EXPLOSIVE MATERIALS**

- Attempted Arson in the third degree (NY PL § 110/150.10) = Aggravated Felony as an offense described in 18 USC § 842(h) or (i), or § 844(d), (e), (f), (g), (h), or (i) (**relating to explosive materials**)

**(NOTE:** Even though the State crime lacks the jurisdictional element in the applicable Federal arson offense. BIA followed an earlier decision in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002).



## AGGRAVATED FELONY: PROSTITUTION BUSINESS OFFENSES

- Promoting Prostitution in the third degree (NY PL §§ 20.00 and 230.25) is **NOT AN AGGRAVATED FELONY** as defined in INA § 101(a)(43)(K)(i) (i.e., defines conduct relating to "the owning, controlling, managing or supervising of a prostitution business" to be an aggravated felony).
- **NOTE:** New York's definition of "prostitution" is broader than the INA's applicable definition, which includes only sexual intercourse for hire. Employing the categorical approach, the Second Circuit US Court of Appeals - "[i]f the criminal statute punishes conduct that falls outside of the INA's definition, then the crime does not constitute an aggravated felony."

See *Prus v. Holder*, 10-599-ag, 6 (2d Cir. September 28, 2011) (quoting *Richards v. Ashcroft*, 400 F.3d 125, 128 (2d Cir. 2005)).



## IMMIGRATION DETAINERS: & DEFENSE STRATEGIES



## WHAT IS AN IMMIGRATION DETAINER?

- **IMMIGRATION DETAINER** is a “hold” that will prevent a client’s release.
- Pursuant to 8 C.F.R. Sec. 287.7(a):  
*“... is a **request** that such agency **advise** the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate custody is either impracticable or impossible.” (emphasis added)*

## WHAT IS AN IMMIGRATION DETAINER?

- Pursuant to 8 C.F.R. Sec. 287.7(d):  
*“... such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.” (emphasis added)*

# AN IMMIGRATION DETAINER IS NOT...

- equivalent to a judicial warrant for arrest or criminal detainer
- a guarantee or authorization of ICE detention
- evidence that a defendant is subject to removal from the US
- evidence that a defendant is deemed a danger to the community or a flight risk
- an instrument that allows for detention beyond the requisite 48-hour period
- a tool that permits law enforcement to engage in warrantless arrests/searches or unlawful stops that are premised on ethnic and/or racial profiling
- supported by any legal standard of proof

**U.S. Department of Homeland Security** **Immigration Detainer – Notice of Action**

Subject ID: \_\_\_\_\_  
 Event No: \_\_\_\_\_  
 File No: \_\_\_\_\_  
 Date: May 18, 2010

TO: (Name and title of institution)  
 CHEMUNER COUNTY JAIL  
 14 W. MAIN STREET  
 BOX 151  
 BATAVIA, NY 04021

From: (Office address)  
 BUFFALO, NY, DOCKET CONTROL OFFICE  
 DOCKET CONTROL OFFICE BUFFALO  
 BUFFALO, NY 14202

Name of alien: \_\_\_\_\_  
 Date of birth: \_\_\_\_\_ Nationality: MEXICO Sex: M

**You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:**

Investigation has been initiated to determine whether this person is subject to removal from the United States.  
 A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on \_\_\_\_\_ (Date) \_\_\_\_\_  
 A warrant of arrest in removal proceedings, a copy of which is attached, was served on April 28, 2010 (Date) \_\_\_\_\_  
 Deportation or removal from the United States has been ordered. (Date) \_\_\_\_\_

**It is requested that you:**  
 Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sunday's and Federal holidays) to provide adequate time for DHS to assume custody of the alien. You may notify DHS by calling (716) 583-0286 during business hours or (716) 583-0286 after hours in an emergency.  
 Please complete and sign the bottom block of the duplicate of this form and return it to this office.  A self-addressed stamped envelope is enclosed for your convenience.  Please return a signed copy via facsimile to \_\_\_\_\_ (Area code and fax/telex number) \_\_\_\_\_

Return fax to the attention of \_\_\_\_\_, at \_\_\_\_\_ (Name of officer handling case) \_\_\_\_\_ (Area code and phone number)

Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.  
 Notify this office in the event of the inmate's death or transfer to another institution.  
 Please cancel the detainer previously placed by this Office on \_\_\_\_\_

(Signature of Immigration Officer) \_\_\_\_\_ DEPORTATION OFFICER (Title of Immigration Officer)

Receipt acknowledged: \_\_\_\_\_

**FORM I-247  
IMMIGRATION  
DETAINER**

Alien Registration Number or "A" #

Prior removal from The U.S. - possible federal prosecution

"notification purposes only"... "does not limit your discretion..."

ICE contact telephone number

## ADVISING NONCITIZENS IN DETENTION: The DO's and DON'T's

- **DON'T** advise person to lie to ICE.
- **DO** advise person of right to remain silent.
- **DO** advise person of right not to sign anything without consultation with an attorney.
- **DO** advise person to say to police and/or ICE, "Please talk with my attorney" or "I will not speak until my attorney is present."

## DETAINERS AND PRE-TRIAL DETENTION: PRACTICE TIPS

- Assert Fifth Amendment right against self-incrimination
- Assert right to consular assistance in accordance with the Vienna Convention on Consular Relations
- Investigate basis for stop and arrest (i.e., move to suppress)  
**NOTE:** Detainer should not be issued during *Terry* stop
- ICE detainer and/or detention cannot be used to toll or circumvent speedy trial calculations (i.e., ICE detainer does not constitute "custody" or a "proceeding")
- Advocate for prosecutorial discretion by ICE (i.e., to suspend/cancel the immigration detainer or to consider an administrative bond (*See ICE Director Morton, June 17, 2011 Memorandum on Prosecutorial Discretion*))

## **DISCRETION IN IMMIGRATION PROSECUTION**

**ICE MAY EXERCISE DISCRETION ON THE SUSPENDING AN IMMIGRATION DETENTION AND/OR PROSECUTION IF THE NONCITIZEN IS:**

- a military veteran or member of the U.S. armed forces;
- a long-time lawful permanent resident (i.e., green card holder);
- a minor or elderly person;
- a person present in the United States since childhood;
- a pregnant or nursing women;
- a victim of domestic violence; trafficking, or other serious crime;
- a person who suffers from a serious mental or physical disability; and/or
- a person with serious health conditions.

*See memorandum entitled, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" dated June 17, 2011 issued by ICE Director, John Morton.*

## **IMMIGRATION – MANDATORY DETENTION: TRIGGERING CRIMES**

A noncitizen who is inadmissible under the criminal grounds in INA 212(a)(2), including:

- Crime involving moral turpitude
- Drug conviction
- Reason to believe person is a drug trafficker
- Prostitution

## ***IMMIGRATION – MANDATORY DETENTION:***

### ***TRIGGERING CRIMES (cont.)***

A noncitizen deportable under the following categories:

- Aggravated Felony
- Conviction of 1 crime of moral turpitude committed within five years of admission if sentenced to term of imprisonment of one year or more
- Conviction of 2 crimes of moral turpitude (anytime)
- Drug offense
- Drug abuse/addiction
- Firearms offense
- Certain espionage convictions or terrorist activities

## ***Take Away Points for Criminal Defenders***

- Bail out before client enters jail to avoid detection through CAP
- Advise client to refuse an interview with ICE officials
- If ICE interviews the client, advise the client to remain silent and only ask for his/her attorney
- If a detainer has been lodged, explain how criminal bail and immigration bond interact to avoid early entry into the immigration detention system
- Be mindful of the 48 hour rule after criminal custody has terminated - request release from the jail if the 48 hour period has expired



***PADILLA-BASED***  
**OFFICE PROTOCOL**

**(CONTINUED)**



**STEP 2: DETERMINE  
CLIENT'S DEFENSE GOALS**

- Review charge and/or plea offer
- Document client's immediate goals on intake sheet
- Discuss and document long term goals (i.e., include immigration goals)
- Negotiate plea options that meet immigration goals
- Document the client's file

### **STEP 3: ANALYZE THE IMMIGRATION CONSEQUENCES**

- Determine likelihood that charge/plea will trigger deportation, inadmissibility and/or naturalization
- Determine impact of charge/plea offer or sentence on “discretionary relief from removal” or other immigration status being sought (i.e., TPS status, LPR status, eligibility for citizenship, etc.)
- Document the client’s file

### **STEP 4: PRIORITIZE CLIENT’S DEFENSE GOALS**

#### **DEFEND ACCORDING TO CLIENT’S GOALS**

(short term vs. long term goals):

- Seeking and/or Posting bail? (i.e. ICE detainer)
- Negotiate plea/sentence that is non-deportable offense (i.e., 364 days vs. 365)
- Seek plea colloquy or sentencing record that will support immigration goals
- Assist in filing a direct appeal



## **PADILLA-BASED POST-CONVICTION RELIEF**

- Select the **appropriate post-conviction** remedy
- Select a **legal grounds of invalidity** that are appropriate for the post-conviction remedy
- Determine a **suitable substitute disposition**
- Provide **sufficient client equities** that would motivate the DA and the court to vacate the conviction



## **IMMIGRATION RESOURCES:**

**Where To Get Help?**



## ATTORNEY RESOURCES

- **Seek assistance:**  
NYSDA CDIP - JOANNE MACRI  
(716) 913-3200 or (518) 465-3524; [jmacri@nysda.org](mailto:jmacri@nysda.org)

**IMMIGRANT DEFENSE PROJECT – HOTLINE**  
(Available Tues. & Thurs. 1:30 p.m.-4:30 p.m.)  
(212) 725-6422; [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)

**DEFENDING IMMIGRANTS PARTNERSHIP**  
[www.defendingimmigrants.org](http://www.defendingimmigrants.org)

- *\*Representing Immigrant Defendants in New York, 5<sup>th</sup> Edition by Manny Vargas (\*recently released by IDP)*

## Immigration/Criminal Website Resources

- **NYSDA**  
[www.nysda.org](http://www.nysda.org)
- **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 Legal Resource Center**  
[www.ilrg.org](http://www.ilrg.org)



# **New York State Defenders Association, Inc.**

***Public Defense Backup Center***

***Criminal Defense Immigration Project***

194 Washington Ave. • Suite 500 • Albany, NY 12210-2314

Telephone (518) 465-3524

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## **IMMIGRATION DETAINERS: What You Need to Know**

A Practice Advisory for Addressing Immigration Detainers Issued Against Noncitizen Defendants in New York State\*

### **❖ INTRODUCTION: MERGER OF IMMIGRATION ENFORCEMENT WITH THE CRIMINAL JUSTICE SYSTEM**

As the merger between immigration enforcement and the criminal justice system rapidly grows, so too does the number of immigrants who must contend with immigration detainers (a.k.a. “ICE holds” or “ICE detainers”) that result in referral for removal from the United States. Immigration detainers have become the primary enforcement tool ICE utilizes to identify and apprehend any noncitizens who come into any form of contact with local, state or federal law enforcement agencies. Once transferred to ICE custody, noncitizens can be referred for removal proceedings, subjected to expedited or reinstatement of removal or prosecuted for criminal-immigration related offenses (i.e., in violation of 8 U.S.C. § 1325 (illegal entry) or 8 U.S.C. § 1326 (illegal reentry)). In most instances, detainers are issued within the first twenty-four-hour period following a person’s arrest and pre-trial detention.

Although referrals for immigration enforcement from prisons has existed for many years, it was not until 2007 that Congress funded and mandated the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE)<sup>1</sup> to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.” Since that time, DHS ICE has significantly expanded its operations by entering into agreements with local law enforcement and

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\*This Practice Advisory is based on a compilation of information contained in the March 2011 advisory, “*Understanding Immigration Detainers: An Overview for State Defense Counsel*,” published by Paromita Shah of the National Immigration Project of the National Lawyers Guild, the Immigrant Legal Resource Center and the Washington Defender Association available online at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Understanding\\_Immigration\\_Detainers\\_05-2011.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Understanding_Immigration_Detainers_05-2011.pdf).

For additional support in addressing the impact of immigration detainers on specific noncitizen defendants in New York State, contact the NYSDA Criminal Defense Immigration Project at [www.nysda.org](http://www.nysda.org) or the Immigrant Defense Project at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org). The New York State Defenders Association, Criminal Defense Immigration Project wishes to thank the New York Bar Foundation for its continued support.

<sup>1</sup> The Immigration and Customs Enforcement (ICE) is a federal law enforcement agency of the U.S. Department of Homeland Security (DHS) and the largest investigative arm of the DHS with more than 20,000 employees in over 400 offices nationwide charged with identifying, apprehending, detaining and removing noncitizens from the United States.

jails under an umbrella of programs referred to as the “ICE ACCESS” initiative.<sup>2</sup> ICE ACCESS is designed to permeate the local criminal justice system by introducing 13 different programs that rely on the cooperation and collaboration of police, jails, prisons, and probation and parole officers to assist ICE in identifying and apprehending noncitizens for immigration enforcement referral. The success of this initiative was highlighted by ICE to Congress when it recently reported that, as a result of ICE ACCESS, more than half of those removed from the United States in 2010 “—upwards of 195,000—were convicted criminals, the most ever removed from our country in a single year. That’s a more than 70 percent increase in the removal of criminal aliens as compared to 2008.”<sup>3</sup> Congress has continued to support the various programs within this initiative by appropriating over 1.5 billion dollars in funding for FY 2010 to ICE ACCESS programs such as the Criminal Alien Program, Fugitive Operations, Secure Communities and the Comprehensive Identification and Removal of Criminal Aliens (SC/CIRCA).<sup>4</sup>

## ❖ WHAT IS AN IMMIGRATION DETAINER?

To successfully effectuate the ICE ACCESS programs, the DHS relies on the issuance and compliance of immigration detainers (i.e., often referred to as “immigration holds” or “ICE holds”).<sup>5</sup> Immigration detainers are administrative notices issued by ICE agents to advise local, state and federal law enforcement agencies (LEA’s) that ICE “seeks custody of the alien” who is being detained by the LEA “for the purpose of arresting and removing the alien.” See 8 C.F.R. § 287.7(a).

*The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate custody is either impracticable or impossible.*<sup>6</sup>

Furthermore, pursuant to 8 C.F.R. § 287.7(d), an LEA may maintain custody of a noncitizen for “a period not to exceed 48 hours” (i.e., excluding weekends and holidays), beyond the time that the LEA is required to release the noncitizen from detention.<sup>7</sup>

Often mischaracterized and misconstrued as equivalent in authority to a judicial warrant, an ICE detainer is “merely an administrative mechanism to assure that a person is subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act.”<sup>8</sup> Although statutory authority<sup>9</sup> for immigration detainers limits issuance to

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<sup>2</sup> “ICE ACCESS” refers to “Agreements of Cooperation in Communities to Enhance Safety and Security.” See NYSDA’s “ICE ACCESS: FACT SHEET” attached as Appendix A.

<sup>3</sup> Statement of Kumar C. Kibble, Deputy Director, U.S. Immigration and Customs Enforcement, before the House Committee on Homeland Security, Subcommittee on Border and Maritime Security: “Border Security and Enforcement - Department of Homeland Security’s Cooperation with State and Local Law Enforcement Stakeholders” delivered on May 3, 2011, Washington D.C.

<sup>4</sup> “FACT SHEET: ICE Fiscal Year 2010 Enacted Budget” dated November 5, 2009 available at <http://www.ice.gov/news/library/factsheets/#Secure%20Communities>.

<sup>5</sup> Since 2007, state cooperation and compliance in processing immigration detainers is the *sine qua non* for DHS implementation of its ICE ACCESS initiative and has allowed DHS to exceed congressional authorization for issuing detainers. See Lash, Christopher’s “*Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*,” 35 Wm. Mitchell L. Rev. 164 (2008).

<sup>6</sup> See 8 C.F.R. § 287.7(a).

<sup>7</sup> The 48-hour period begins at the time that the LEA is otherwise required to release the noncitizen (i.e., after bail is posted or criminal proceedings are terminated and/or sentencing is completed).

<sup>8</sup> See *Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990), citing *Moody v. Daggett*, 429 U.S. 78, 80 n. 2 (1976). See also *Roldan v. Racette*, 984 F.2d 85, 88 (2d Cir.1993,) in which the Second Circuit concluded that an immigration detainer solely constitutes “a notice that future INS custody will be sought at the conclusion of a prisoner’s pending confinement by another jurisdiction, and ... a request for prior notice regarding the termination of that confinement.” [emphasis added].

cases involving noncitizens charged with controlled substance violations and only at the request of an LEA who has custody of the alleged noncitizen, federal regulations<sup>10</sup> purporting to implement federal statutory authority place no limitation on the type of offenses or conditions necessary to initiate an immigration detainer.

► **PRACTICE TIP:** Be prepared to argue that an ICE detainer is only a notification request to LEA’s asking that ICE be notified upon release of the noncitizen from custody if it is referenced, mischaracterized or misconstrued during criminal proceedings. *For more details, see “Misconceptions about Immigration Detainers” (below).*

## ❖ WHO CAN ISSUE AN IMMIGRATION DETAINER?

The following individuals are authorized to issue immigration detainers:<sup>11</sup>

- DHS Border Patrol agents, including aircraft pilots;
- DHS ICE Special agents;
- DHS ICE Deportation officers;<sup>12</sup>
- DHS Immigration inspectors;<sup>13</sup>
- DHS Adjudication officers;<sup>14</sup>
- DHS supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
- Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Immigration and Nationality Act, as amended (Act) in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner.

## ❖ THE PROCESS OF ISSUING AN IMMIGRATION DETAINER

As expressly stated in 8 C.F.R. § 287.7(a), the issuance of a Form I-247, “Immigration Detainer – Notice of Action,” initiates the issuance of an ICE immigration detainer.<sup>15</sup> The Form I-247 is often issued by an ICE agent almost immediately after an individual is taken into custody by local law enforcement.<sup>16</sup> By submitting a Form I-247, Immigration Detainer, to a local law enforcement agency, the ICE agent must have a “reason to believe” that the individual is not a U.S. citizen in order to request advance notification from the local law enforcement agency of the noncitizen’s release from custody.

Most often, ICE will lodge an immigration detainer after receiving information that an individual is foreign born from a sheriff or police officer who has obtained this information at the

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<sup>9</sup> See 8 U.S.C. § 1357(d).

<sup>10</sup> See 8 C.F.R. § 287.7.

<sup>11</sup> See § 287.7(b). *Note:* Pursuant to INA Section 287(g), ICE can extend the authority to issue an immigration detainer to any law enforcement agent who has been delegated to perform certain immigration functions pursuant to the “287(g) Program” and the signing of a Memorandum of Agreement (MOA) with the designated law enforcement agent. See USC § 1357(g); INA § 287(g).

<sup>12</sup> Deportation officers presently serve within the DHS ICE office of Enforcement and Removal Operations (ERO).

<sup>13</sup> “Immigration inspectors” include DHS Customs and Border Protection officers.

<sup>14</sup> “Adjudication officers” include DHS Citizenship and Immigration Service Adjudication officers.

<sup>15</sup> See Appendix B, two samples of Form I-247; Immigration Detainer-Notice of Action dated August 10, 2010 and a proposed draft published by ICE in June 2011 available at [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

<sup>16</sup> In most county jails located throughout New York State, agents of the ICE Criminal Alien Program will issue an immigration detainer against a noncitizen within the first 24- to 72-hour period following an arrest.

time of arrest or during the jail's booking and/or classification process. ICE agents assigned to the Criminal Alien Program (i.e., as part of the ICE ACCESS initiative) will generate immigration detainers solely based on biographic information collected by local law enforcement agents during arrest, booking, detention classification or during pre- or post-trial incarceration or from probation and parole officers during supervised release. In some instances, ICE agents may arrange to meet with a noncitizen either before or after the issuance of an immigration detainer to conduct an interview for further investigation into immigration history in support of possible grounds of removal. ICE has also been known to lodge immigration detainers after reviewing jail rosters and identifying those detainees with "foreign-sounding" last names. In many of these instances, ICE will indicate on the Form I-247, Immigration Detainer – Notice of Action that "an investigation has been initiated to determine whether this person is removable from the United States" which clearly demonstrates that no final determination has been made as to the individual's immigration status or whether there is a basis for removal from the United States.<sup>17</sup>

► **PRACTICE TIP:** The proposed draft of the new Form I-247, Immigration Detainer – Notice of Action released by ICE in June 2011, if adopted, will be an electronically-generated form that will require local law enforcement to provide arrestees with a copy of the detainer when issued. A copy of this detainer form should be sought by defense counsel from his/her client as soon as possible .

► **PRACTICE TIP:** When possible, advise your client of his/her right to remain silent and his/her right not to have to sign any documents or speak to any law enforcement or immigration agents outside of the presence of counsel.

## ❖ MISCONCEPTIONS ABOUT IMMIGRATION DETAINERS

Because ICE frequently issues detainers in all types of criminal matters that are routinely met with the acquiescence of local, state and federal law enforcement agencies, it is important to educate LEA's, the prosecution and courts on understanding the legal limitations of an ICE detainer. It is common practice for ICE to issue immigration detainers against foreign-born individuals who, pending the outcome of criminal proceedings, are otherwise not subject to immigration detention or removal from the United States. (*Example: A long-time lawful permanent resident (LPR) who has no prior convictions is arrested and charged with NY PL § 120.05, Assault in the Second Degree, a class D felony. Even if ICE lodges an immigration detainer in this instance, the LPR will not be subject to immigration detention or to charges of removal unless and until he/she is convicted of a deportable offense.*) In other instances, immigration detainers are often lodged by ICE agents absent any reliable investigation, in-person immigration interviews or other reliable screening methods designed to determine immigration status and removability. In each of these instances, defense attorneys should be prepared to argue what an immigration detainer is and what it is not!

More specifically, an immigration detainer:

- is not the equivalent of a judicial warrant or a criminal detainer governed by the Interstate Agreement on Detainers Act;
- is not issued based on any standard or burden of proof;

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<sup>17</sup> See Appendix B, two samples of Form I-247, Immigration Detainer - Notice of Action. Note: There are many steps that must be taken by DHS ICE and the Executive Office for Immigration Review (i.e., immigration court review – includes the Board of Immigration Appeals which is an administrative immigration appeals court) before a final determination is reached as to removability from the United States. The issuance of an ICE immigration detainer is separate and apart from this administrative review process.

- is not an indication of undocumented or otherwise unlawful status in the United States;
- is not evidence that a noncitizen is subject to grounds of removal from the United States;
- is not evidence that a noncitizen will be ordered removed and expelled from the U.S.;
- is not evidence that a noncitizen has been deemed a danger to the community or a flight risk;
- does not guarantee nor authorize immigration detention by ICE authorities;
- does not allow for continued detention beyond the requisite time permitted by 8 C.F.R. § 287.7(d), (i.e., “a period not to exceed 48 hours, excluding Saturdays, Sundays and holidays”) for the purposes of securing transfer to immigration custody; and
- does not support warrantless arrests or other unlawful law enforcement stops.

## WHAT CAN YOU DO TO PROTECT YOUR CLIENT?

### ❖ ARREST & PRE-TRIAL DETENTION

According to the Vienna Convention on Consular Relations, when police arrest or detain a citizen of a foreign country, the law enforcement agency must inform the foreign born individual as to his/her right to speak with his/her consulate office.<sup>18</sup> Denial of consular assistance can be raised in support of challenging the voluntariness of any incriminating statements made to law enforcement at the time of arrest.<sup>19</sup> Although ICE will often arrange to interview persons during pre-trial detention and outside of the presence of his/her counsel, advising a noncitizen client of his right to remain silent will help to protect against any self-incrimination.<sup>20</sup>

► **PRACTICE TIP:** When possible, advise your client of his/her right to remain silent and to refuse to be interviewed outside of the presence of his/her counsel. Also, defense counsel should remind client of his/her Fifth Amendment right against self-incrimination.

► **PRACTICE TIP:** Provide your client with a letter that informs LEA’s and ICE that indicates that your client wishes to obtain consular assistance and that your client declines to be interviewed outside the presence of counsel. In that same letter, defense counsel should also indicate that he/she wishes to be notified and present during any examination of the client conducted by ICE pursuant to 8 C.F.R. § 292.5(b).

Defense counsel can also provide client with a Form G-28, Notice of Entry of Appearance as Attorney which allows ICE to discuss a defendant’s immigration matter with counsel but does not oblige counsel to appear before the Executive Office for Immigration Review (i.e., immigration court) on his/her client’s behalf. A Form G-28 is attached as Appendix G and is also available at <http://www.uscis.gov/files/form/g-28.pdf>.

<sup>18</sup> "If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prior or to custody pending trial or is detained in any other manner." UN Doc. A/Conf39/27; 1155 UNTS 331; 8 ILM 679 (1969).

<sup>19</sup> See *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2009). See also *Mora v. New York*, 524F.3d 183 (2d Cir. 2008).

<sup>20</sup> Even with assignment of defense counsel, ICE will conduct their interviews without informing counsel and outside of the presence of assigned counsel based on the premise that the Sixth Amendment does not require a right to counsel in civil/immigration proceedings.

Because ICE detainers do not often rely on any substantiating evidence or investigation into a defendant's immigration status and/or removability from the United States, it is recommended that defense counsel investigate how the immigration detainer was lodged.<sup>21</sup> It is also recommended that an evaluation of the client's (1) immigration status; (2) any basis for removability and/or (3) any options for relief from removal be investigated prior to the bail hearing, when possible. Gathering this information in the early stages of meeting with your client will provide for effective representation and will also be useful in requesting that ICE lift an immigration detainer on behalf of those individuals who are not subject to removal.

- For instance, if the defendant is a **U.S. citizen**, defense counsel should gather any supporting documents, (i.e., such as a birth certificate, passport, supporting affidavit of U.S. birth or other detailed explanation if citizenship is derived or acquired from a U.S. citizen parent or grandparent<sup>22</sup>) in support of demanding that an ICE detainer be lifted.
- If the defendant is a **lawful permanent resident** who, pending the outcome of criminal proceedings, is not otherwise deportable.<sup>23</sup>
- If the defendant is a **refugee** or **asylee** (i.e., granted asylum in the United States) and is otherwise not inadmissible to the United States. ICE cannot terminate the refugee status of an alien properly admitted to the US because he/she is subsequently convicted of a crime or accused of committing a criminal offense in the US.<sup>24</sup>
- Despite your client's noncitizen immigration status, he/she may be deserving of **ICE prosecutorial discretion** based on substantial equities or other humanitarian considerations. ICE has the authority to lift an immigration detainer and/or to defer or abandon immigration prosecution.<sup>25</sup>

► **PRACTICE TIP:** When your client is advised of an immigration detainer, defense counsel should obtain the contact information listed for the ICE agent responsible for the immigration detainer which can be found on the Form I-247, Immigration Detainer – Notice of Action. Contact the supervising ICE agent listed on the Form I-247 or the ICE ERO Field Office Director (FOD) as listed at <http://www.ice.gov/contact/ero/> to request that the immigration detainer be lifted for legal or discretionary reasons.

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<sup>21</sup> Defense Counsel should investigate any allegations of racial and/or ethnic profiling by local or state LEA that has resulted in the subsequent immigration detainer – especially in cases involving low-level offenses that would normally not result in an arrest and pre-trial detention.

<sup>22</sup> ICE Director, John Morton, issued a memorandum dated November 19, 2009, entitled, "Superseding Guidance on Reporting and Investigating Claims of US Citizenship," which lays out ICE protocol when encountering a suspected US citizen attached as Appendix C.

<sup>23</sup> In examples across New York State, ICE has often lodged a detainer against non-removable individuals so as to track their release from pre-trial detention.

<sup>24</sup> However, if a refugee defendant has been in the US for more than one year and has not yet applied for lawful permanent resident (i.e., green card) status, ICE has the authority to take the refugee into custody for inspection and examination under oath to determine if he/she is admissible and eligible to adjust status to a lawful permanent resident.

<sup>25</sup> For more details on ICE prosecutorial discretion, see ICE Director, John Morton's recently issued memorandum dated June 17, 2011, entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" attached as Appendix D and available at [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

## ❖ IMMIGRATION DETAINERS AND RIGHT TO A SPEEDY TRIAL

The mere presence of an immigration detainer should not deny your client his/her Sixth Amendment right to a speedy trial and should not impact speedy trial calculations or qualify as an exception for tolling the relevant NY CPL § 30.30 period. Although the prosecution may try to argue that the speedy trial clock should be tolled if the noncitizen defendant is transferred to immigration custody pending criminal proceedings, defense counsel should be prepared to argue that it remains within the authority of the prosecutor and the court to request that ICE produce an individual for criminal proceedings.

► **PRACTICE TIP:** Defense counsel should guard against the prosecution asserting that a defendant's ICE custody tolls the speedy trial clock and arranging with ICE for the transfer of a noncitizen defendant as a means of avoiding NY CPL §30.30 speedy trial requirements. File a motion to dismiss arguing that an ICE detainer cannot be used to toll or to circumvent speedy trial requirements.

## ❖ THE IMPACT OF IMMIGRATION DETAINERS ON BAIL

There is no U.S. or New York State constitutional right to the entitlement of bail. However, there is a constitutional right to a "reasonable" bail where bail is to be set.<sup>26</sup> In addition, pursuant to NY CPL § 530.20(1), the court must set recognizance or bail for a defendant who is charged with less than a felony. The purpose of bail is to insure the defendant's return to court. Bail cannot be used as either "preventative detention or pretrial punishment."<sup>27</sup> The determination of whether to seek and to post bail or to be released on personal recognizance should be incorporated into an overall defense strategy that considers the immigration consequences resulting from a noncitizen's pre-trial release, plea, conviction and/or sentencing.<sup>28</sup>

Efforts should be made by defense counsel to (1) determine the potential immigration consequences that can arise from a pending criminal matter (i.e. which includes, but is not limited to seeking and posting bail or release on personal recognizance); (2) devise a defense strategy that takes those consequences into account and (3) tailor an outcome that lessens those consequences, when possible, as recently mandated by the U.S. Supreme Court.<sup>29</sup>

► **PRACTICE TIP:** Whenever possible, defense counsel should arrange for bail prior to any scheduled court appearance (i.e., permissible pursuant to NY CPL § 150.30 with an E felony or lower offense (i.e., often referred to as a "stationhouse" or "pre-arraignment" bail). Release of a noncitizen following an arrest will reduce or delay the chances of referral for immigration enforcement.

<sup>26</sup> See US Const amend VIII; NY Const Art 1 § 5.

<sup>27</sup> *People v. Silvestri*, 132 Misc. 2d 1015, 506 N.Y.S.2d 251 (Sup 1986).

<sup>28</sup> For more details, refer to the "*Impact of Immigration Detainers on Bail Determinations*" reference chart attached as Appendix E.

<sup>29</sup> The Supreme Court issued a landmark decision on March 31, 2010 regarding the Sixth Amendment right to counsel. *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct. 1473 (2010). See also NYSDA Advisory, "Life After *Padilla v. Kentucky*: What Defense Attorneys Should Know" attached as Appendix F.



► **PRACTICE TIP:** Defense counsel should be prepared to educate the court and/or prosecution on understanding the limitations of an immigration detainer. (*See Misconceptions About Immigration Detainers, supra*).

**CAUTION:** Attorneys should be aware that some county jails in New York State may either discourage the posting of bail or refuse to accept a bail posted by a noncitizen defendant because an immigration detainer has been lodged by ICE. Even if the jail’s refusal to accept bail is out of good intentions (i.e., to prevent the defendant from posting bail that is likely not to result in his/her release from incarceration), a jail’s refusal to accept a payment for bail is in violation of the client’s constitutional right to be released and is in direct violation of a court’s order.

► **PRACTICE TIP:** When possible, defense counsel should assessment whether a noncitizen defendant may be eligible for posting an immigration bond prior to posting bail, seeking release on personal recognizance and subsequent transfer to immigration detention.

► **PRACTICE TIP:** When possible, defense counsel should explore the immigration consequences of seeking and posting bail or release on personal recognizance with a noncitizen client prior to the bail hearing. For instance, defense counsel should explore whether disclosing a noncitizen defendant’s immigration status during bail proceedings will confer a benefit or impose further detriment and/or possible self-incrimination.

► **PRACTICE TIP:** When possible, defense counsel should consider negotiating a bond with ICE authorities after an immigration detainer has been lodged against a noncitizen defendant when substantial equities or humanitarian consideration exists.

## ❖ **IMPACT OF IMMIGRATION DETAINERS AT PRELIMINARY HEARINGS/ARRAIGNMENT**

The principal function of the preliminary hearing is to assure that a felony defendant is not held in continuing confinement without a preliminary showing that reasonable cause exists to believe that the defendant committed a felony.<sup>30</sup> However, a preliminary hearing need not be held if the defendant is being held in view of bail on other charges or is being held on an immigration detainer.<sup>31</sup>

**CAUTION:** It is often common practice to plead guilty to an offense in order to resolve a criminal matter and secure release from custody quickly. However, this common practice may be detrimental if your client is a noncitizen.

<sup>30</sup> See NY CPL §§ 180.70 (1), 180.10.

<sup>31</sup> *Angell on Behalf of Brown v. Ferris*, 227 A.D.2d 475, 643 N.Y.S.2d 124 (2<sup>d</sup> Dept. 1996).

► **PRACTICE TIP:** When possible, defense counsel should caution noncitizen defendants against pleading guilty at arraignment unless counsel and client are certain of the immigration consequences of the conviction. Consider filing a notice of appeal on behalf of a client who insists on pleading guilty at arraignment despite the immigration consequences that will result from the conviction.

## ❖ IMMIGRATION DETAINERS AND GUILTY PLEAS

In *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct. 1473 (2010), the Supreme Court held that, pursuant to the Sixth Amendment, criminal defense counsel has a duty to provide affirmative and competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.<sup>32</sup> Absent such advice, the noncitizen client may raise a claim of ineffective assistance of counsel.

► **PRACTICE TIP:** In accordance with the Supreme Court’s mandate in *Padilla v. Kentucky*, defense counsel must clearly explain any potential immigration consequences to a noncitizen client that may result from a guilty plea, plea *nolo contendere* or other court admission before any entry is made by the client on the court record.

► **PRACTICE TIP:** Defense counsel should allow the noncitizen client time to seek the advice of an immigration attorney or legal expert prior to submission of any guilty plea, plea *nolo contendere* or other court admission.

## ❖ IMPACT OF IMMIGRATION DETAINERS ON SENTENCING, IMPRISONMENT AND CUSTODY TRANSFERS

Many immigrants in New York State face unintended and unexpected negative immigration consequences, including detention, removal, and ineligibility for citizenship, as a result of being convicted of even minor criminal offenses. These consequences become significantly apparent at the time of sentencing when the issuance of an immigration detainer becomes determinative of the type of criminal sanctions imposed. This creates a two-tier criminal justice system that distinguishes between the treatment of citizens and noncitizen

Although the ICE immigration detainer specifically indicates that it is not intended to limit decisions on “custody classifications....and other matters,<sup>33</sup>” the reality is that an ICE detainer will limit a noncitizen’s ability to engage in sentencing alternatives to incarceration, judicial diversion and other treatment programs and post-conviction services which include access to probation supervision, halfway houses, early release and work release programs and other rehabilitation and treatment options.

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<sup>32</sup> For general information on the criminal grounds for removal, refer to the “*Immigration Consequences of Convictions Summary Checklist*” attached as Appendix G.

<sup>33</sup> See two samples of Form I-247, Immigration Detainer - Notice of Action attached as Appendix B.

For instance, although the New York criminal justice system provides access to innovative diversion programs and problem-solving courts as an alternative to incarceration, many immigrants are barred from engaging in such rehabilitative measures because of the immigration detainers ICE has lodged against them. In fact, most noncitizens (i.e., including longtime lawful permanent residents of New York State) are often barred from seeking judicial diversion drug court programs because they are not citizens of the United States. Those few noncitizen New York residents who are offered the benefit of judicial diversion are often required to make an admission or offer a plea of guilty to the underlying criminal drug offense before being allowed to participate in the program – thereby, entering into a “conviction” of the underlying drug offense for immigration purposes.<sup>34</sup>

► **PRACTICE TIP:** When possible, advocate for pre-plea judicial diversion programs (i.e., as offered pursuant to NY CPL § 216.05(4), on behalf of noncitizen defendants. Be prepared to argue that noncitizen defendants and citizens are not treated equally when both must submit to post-plea diversion programs (i.e., U.S. citizens will not face the harsh penalty of removal that results from post-plea diversion).

► **PRACTICE TIP:** Defense counsel should advise noncitizen defendants that a sentence to a term of probation may result in an immigration detainer being lodged against them followed by a referral to ICE authorities by probation officers, (i.e., since 2008, the New York State Office of Probation and Correctional Alternatives has referred undocumented persons sentenced to probation to ICE authorities for transfer to immigration custody following the issuance of an ICE detainer).

► **PRACTICE TIP:** Defense counsel should be prepared to argue that the immigration detainer is not intended to interfere with discretionary decisions relating to sentencing alternatives, classification determinations, treatment and other rehabilitation programs. Defense counsel should also point out that many of these programs are cost-effective and have been proven to reduce recidivism and should be equally afforded to all persons, irrespective of citizenship.

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<sup>34</sup> Pursuant to Section 101(a)(48) of the Immigration and Nationality Act (“INA”), a “conviction” for immigration purposes includes:

- [A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where:
- (i) 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
  - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Although NY CPL § 216.05(4) allows for a guilty plea or admission to be waived prior to entering a judicial drug diversion program, most New York State courts continue to require that noncitizen defendants admit to the underlying offense before being offered judicial diversion as an alternative to incarceration. A noncitizen defendant who is required to enter a plea of guilty before entering into a court-ordered substance abuse treatment or other intervention program, is found to be “convicted” for immigration purposes of the underlying offense even in cases where no formal sentence or criminal conviction results upon successful completion of the rehabilitative judicial diversion program.

## ❖ CHALLENGING THE IMMIGRATION DETAINER

Although federal regulation and the Form I-247, Immigration Detainer – Notice of Action expressly state that a noncitizen cannot be held on an immigration detainer beyond a 48-hour period (i.e., excluding Saturdays, Sundays and holidays), there are still several county jails and prisons within New York State that repeatedly violate the federal regulation.<sup>35</sup> Defense counsel must consult with his/her noncitizen client to determine whether transfer to immigration custody within the requisite time period is within the best interest of the client.<sup>36</sup>

Generally, courts have held that they lack jurisdiction to adjudicate any state habeas corpus petition or a writ of mandamus action to remove an unexpired immigration detainer because the detainer is not considered to constitute "custody."<sup>37</sup> However, the Second Circuit has recognized custody in a future jailor where "there is a reasonable basis to apprehend that the jurisdiction that obtained a consecutive sentence will seek its enforcement."<sup>38</sup> Although direct challenges to immigration detainers are rare, most recently, the City of New York agreed to settle a civil law suit seeking damages on behalf of a former detainee of Rikers Island Correctional Facility who sought compensation for his continued detention on an immigration detainer that extended 35 days beyond the period of time permitted by federal regulation pursuant to 8 C.F.R. § 287.7(d).<sup>39</sup>

► **PRACTICE TIP:** Defense counsel should be prepared to notify the jail of any violation of 8 C.F.R. § 287.7 by providing written notice of the alleged federal regulation violation accompanied by a copy of the regulation but only when it is determined that such notification serves the best interest of the client.

► **PRACTICE TIP:** If written notice does not result in the noncitizen's immediate release from custody or transfer to immigration detention, filing a state writ of habeas corpus rendering the continued detention illegal and mandating the immediate release of the noncitizen from the jail is recommended. In addition, the noncitizen may also seek damages for the amount of time unlawfully detained in a civil suit against the jail.

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<sup>35</sup> 8 C.F.R. § 287.7(d). See also two samples of Form I-247, Immigration Detainer - Notice of Action attached as Appendix B.

<sup>36</sup> See a sample letter seeking release of a noncitizen addressed to a New York State county jail accompanied by a copy of 8 C.F.R. § 287.7 attached as Appendix H.

<sup>37</sup> See *Cuomo v. Barr*, 7 F.3d 17 (2<sup>nd</sup> Cir. 1993)[court denied mandamus, declaratory and injunctive relief to State on action to compel INS to pick up defendants from state jails].

<sup>38</sup> See *Simmonds v. I.N.S.*, 326 F.3d 351, 355 (2<sup>nd</sup> Cir. 2003) (quoting *Frazier v. Wilkinson*, 842 F.2d 42, 45 (2<sup>nd</sup> Cir. 1988)).

<sup>39</sup> See *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009). Mr. Harvey was represented by the NYU Law School Immigrant Rights Clinic who successfully assisted Mr. Harvey in settling this litigation for a compensatory award of \$145,000.



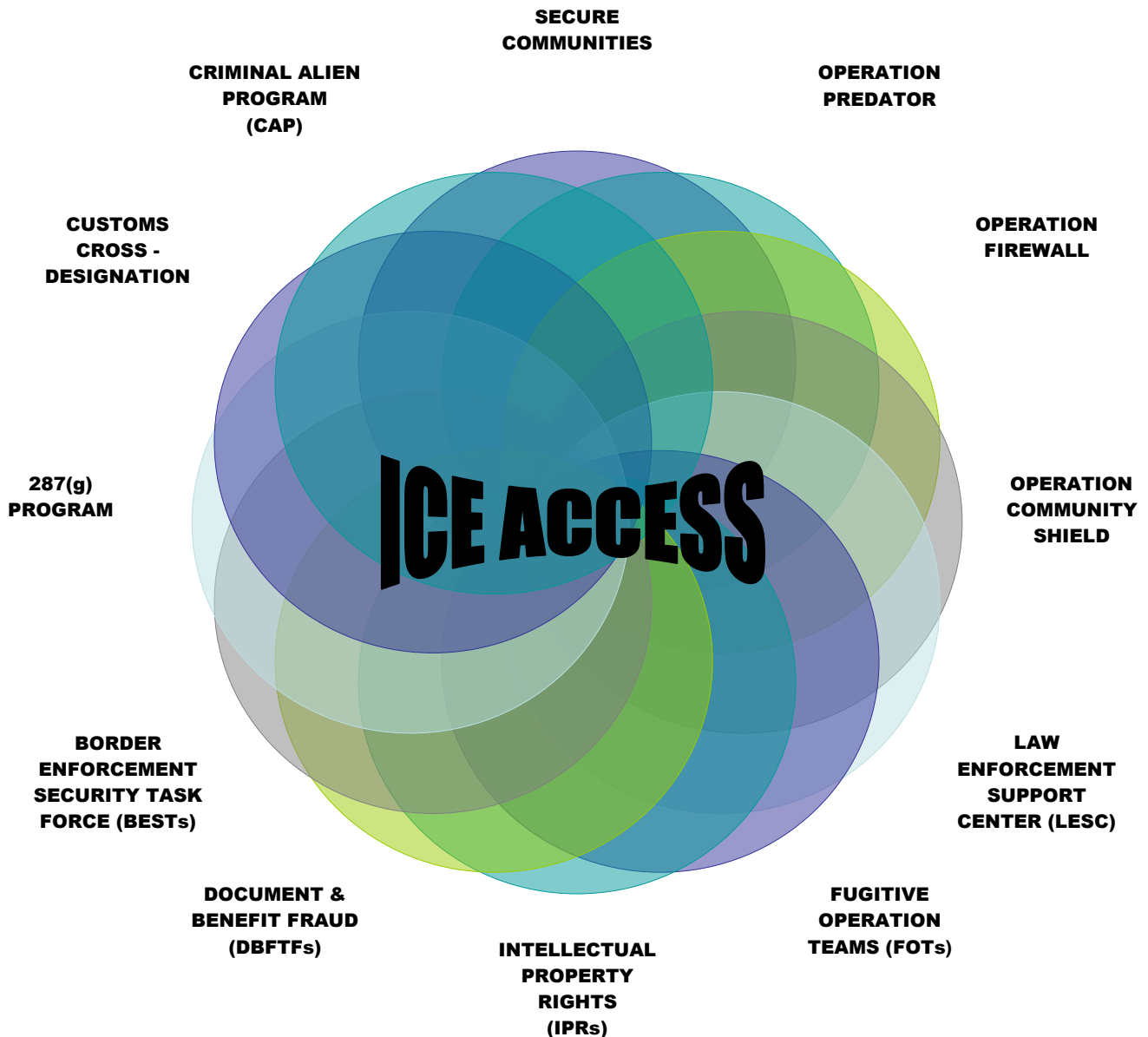
# THE FACTS ABOUT "ICE ACCESS"

## What is ICE ACCESS?

**ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS):**  
A series of different programs and services designed to enhance the cooperation of local law enforcement agencies with ICE in enforcing immigration laws.

## Incentive for participation in ICE ACCESS?

- ▶ Equitable Sharing in Asset Forfeiture
- ▶ Increased Jurisdiction & Legal Enforcement Authority
- ▶ Increased Resources (Advanced Enforcement Technology/Infosharing)



## APPENDIX A

# ICE ACCESS

## **287(g) PROGRAM: DELEGATION OF IMMIGRATION AUTHORITY**

Deputizes state and local officers to enforce immigration laws as authorized by section 287(g) of the Immigration and Nationality Act. State, county and municipal enforcement agencies are cross-designated immigration officers pursuant to memorandums of agreement entered into with ICE and some immigration training.

## **BORDER ENFORCEMENT SECURITY TASK FORCES (BESTs)**

Agencies working cooperatively to identify and dismantle criminal organizations posing threats to border security. BEST teams now appear in Arizona, California, Texas, and Washington with plans to expand to Buffalo, New York.

## **CRIMINAL ALIEN PROGRAM (CAP)**

Focuses on identifying criminal aliens who are incarcerated in federal, state and local facilities. Secures final order of removal prior to termination of a criminal sentence to avoid release into the community.

## **CUSTOMS CROSS-DESIGNATION**

Section 1401(I) of Title 19 of the United States Code allows for deputizing federal, state, and local officers into customs officers to enforce U.S. customs laws. This cross-designation is available to those who participate in ICE task force operations.

## **DOCUMENT AND BENEFIT FRAUD TASK FORCES (DBFTFs)**

Investigate document and benefit fraud with local, state and other federal agency cooperation. Illicit proceeds are often seized and subject to equitable sharing of asset forfeiture. DBFTFs are located in Atlanta, Baltimore, Boston, Chicago, Dallas, Denver, Detroit, Los Angeles, Miami, New York, Newark, Philadelphia, Phoenix, St. Paul, San Francisco, Tampa, and Washington, DC.

## **FUGITIVE OPERATION TEAMS (FOTs)**

Teams of ICE and state and local enforcement agencies identify, locate, apprehend, process, and remove fugitive aliens (ranging from those of high priority who have been convicted of serious crimes to those who have been previously ordered removed but have failed to depart the US). The goal of FOTs is to ensure that the number of aliens deported equals the number of final orders of removal issued by immigration courts in any given past, present or future year.

## **INTELLECTUAL PROPERTY RIGHTS (IPRs)**

ICE's National Intellectual Property Rights Coordination Center enforces laws prohibiting the flow of counterfeit goods into U.S. commerce. The goal is to pursue illegal proceeds derived from the manufacture and sale of counterfeit merchandise.

## **LAW ENFORCEMENT SUPPORT CENTER (LESC)**

Collaboration in which local, state and federal law enforcement agencies gain 24-hours-a-day, 7-days-a-week access to immigration status and identity information on aliens suspected, arrested, or convicted of criminal activity. LESK also provides assistance and information to corrections and court systems. ICE makes LESK records available electronically through the Immigration Alien Query screen on the International Justice and Public Safety Network.

### **OPERATION COMMUNITY SHIELD**

Initiated in February 2005 to focus enforcement on violent gangs. ICE uses its broad authority, both criminal and administrative, to conduct investigations and enforce violations allegedly committed by gangs and individual gang members.

### **OPERATION FIREWALL**

ICE Financial, Narcotics and Public Safety Division and the U.S. Customs and Border Protection Office of Field Operations, Tactical Operations Division developed a joint Bulk Cash Smuggling (i.e., smuggling of bulk currency out of the US) initiative that commenced operations in August 2005.

### **OPERATION PREDATOR**

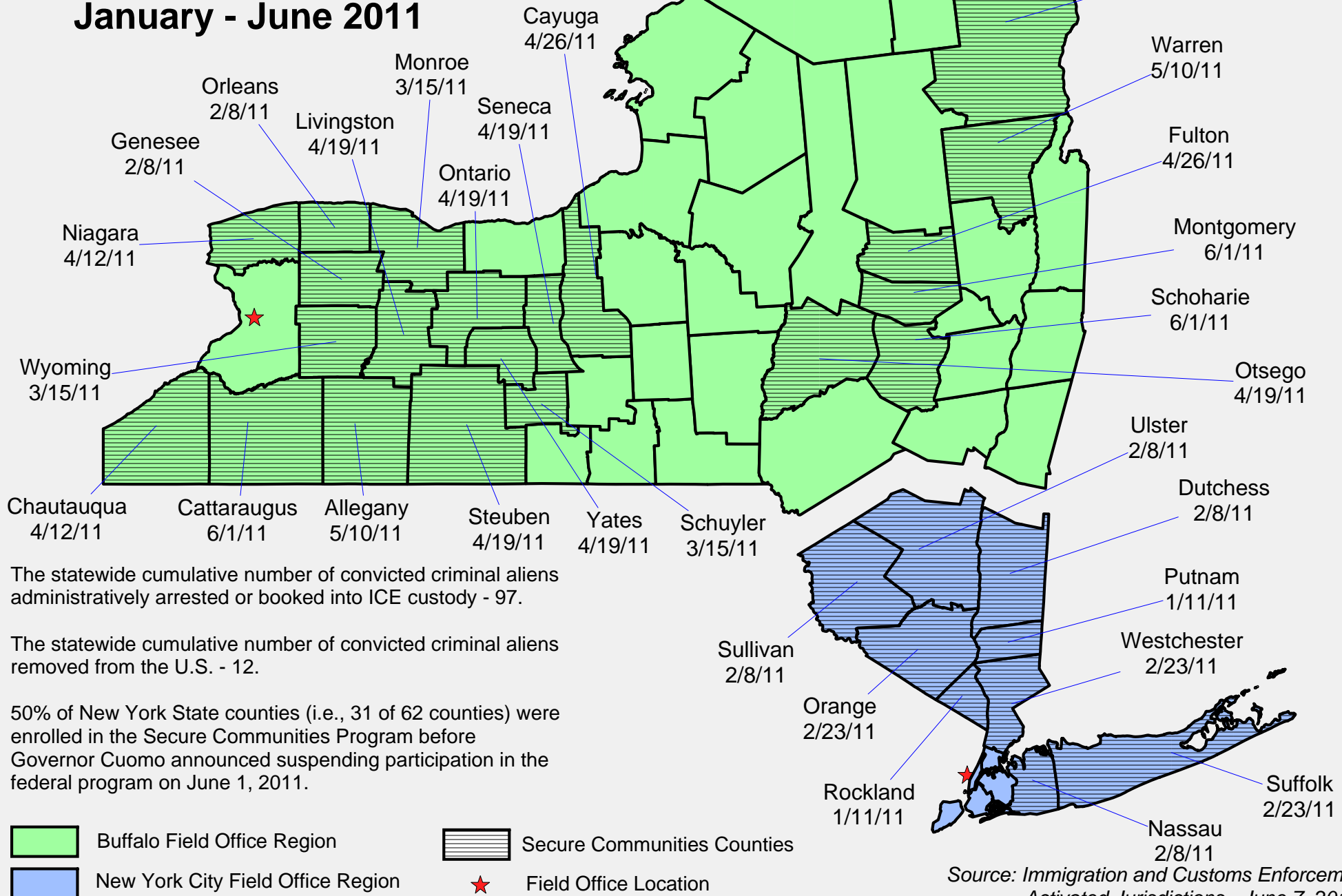
Program designed to identify, investigate, and deport sex offenders. Originally designed to investigate and remove child predators, Operation Predator has expanded to include all sex offenders.

### **\*\* SECURE COMMUNITIES**

Program through which ICE assists communities in identifying and removing high-risk criminal aliens held in state and local prisons through information sharing and technology. The cornerstone of this initiative is to share biometric data with federal, state and local enforcement agencies to ensure screening of all foreign-born detainees.

\*\* New York State Governor Andrew Cuomo temporarily suspended the state's participation in the Secure Communities Program on June 1, 2011. The U.S. Department of Homeland Security expects Secure Communities to be implemented nationwide by 2013.

# ICE Field Offices & Secure Communities New York State Counties January - June 2011



The statewide cumulative number of convicted criminal aliens administratively arrested or booked into ICE custody - 97.

The statewide cumulative number of convicted criminal aliens removed from the U.S. - 12.

50% of New York State counties (i.e., 31 of 62 counties) were enrolled in the Secure Communities Program before Governor Cuomo announced suspending participation in the federal program on June 1, 2011.

Source: Immigration and Customs Enforcement Activated Jurisdictions - June 7, 2011



DEPARTMENT OF HOMELAND SECURITY  
U.S. Immigration and Customs Enforcement  
**IMMIGRATION DETAINER - NOTICE OF ACTION**

File No: \_\_\_\_\_

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

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

**MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS**

Name of Alien: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Nationality: \_\_\_\_\_ Sex: \_\_\_\_\_

**THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:**

- Initiated an investigation to determine whether this person is subject to removal from the United States.
- Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on \_\_\_\_\_ .  
(Date)
- Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on \_\_\_\_\_ .  
(Date)
- Obtained an order of deportation or removal from the United States for this person.

***(This action does not limit your discretion to make decisions related to this person's custody classification, work and quarter assignments, or other matters.)***

**IT IS REQUESTED THAT YOU:**

- Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling \_\_\_\_\_ during business hours or \_\_\_\_\_ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.
- Provide a copy to the subject of this detainer.
- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.
- Consider this request for a detainer operative only upon the subject's conviction.
- Cancel the detainer previously placed by this Office on \_\_\_\_\_ .  
(Date)

\_\_\_\_\_  
(Name and title of Immigration Officer)

\_\_\_\_\_  
(Signature of Immigration Officer)

**TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:**

Please provide the information below, sign, and return to the Department using the envelope enclosed for your convenience or by faxing a copy to \_\_\_\_\_. You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking or Inmate # \_\_\_\_\_ Date of latest criminal charge/conviction: \_\_\_\_\_  
Last criminal charge/conviction: \_\_\_\_\_  
Estimated release date: \_\_\_\_\_

**Notice:** Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

\_\_\_\_\_  
(Name and title of officer)

\_\_\_\_\_  
(Signature of Officer)

### NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice from DHS informing law enforcement agencies that DHS intends to assume custody of you after you otherwise would be released from custody. DHS has requested that the law enforcement agency which is currently detaining you maintain custody of you for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) beyond the time when you would have been released by the state or local law enforcement authorities based on your criminal charges or convictions. **If DHS does not take you into custody during that additional 48 hour period, not counting weekends or holidays, you should contact your custodian** (the law enforcement agency or other entity that is holding you now) to inquire about your release from state or local custody. **If you have a complaint regarding this detainer or related to violations of civil rights or civil liberties, please contact the ICE Joint Intake Center at 1-877-2INTAKE (877-246-8253). If you believe you are the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center at (802) 872-6020.**

### NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) de EE. UU. ha emitido una orden de detención inmigratoria en su contra. Mediante esta orden, se notifica a los organismos policiales que el DHS pretende arrestarlo cuando usted cumpla su reclusión actual. El DHS ha solicitado que el organismo policial local o estatal a cargo de su actual detención lo mantenga en custodia por un período no mayor a 48 horas (excluyendo sábados, domingos y días festivos) tras el cese de su reclusión penal. **Si el DHS no procede con su arresto inmigratorio durante este período adicional de 48 horas, excluyendo los fines de semana o días festivos, usted debe contactarse con la autoridad estatal o local que lo tiene detenido** (el organismo policial u otra entidad a cargo de su custodia) para obtener mayores detalles sobre el cese de su reclusión. **Si tiene alguna queja que se relacione con esta orden de detención o con posibles infracciones a los derechos o libertades civiles, comuníquese con el Joint Intake Center (Centro de Admisión) del ICE (Servicio de Inmigración y Control de Aduanas) llamando al 1-877-2INTAKE (877-246-8253). Si cree que ha sido víctima de un delito, infórmele al DHS llamando al Centro de Apoyo a los Organismos Policiales (Law Enforcement Support Center) del ICE, teléfono (802) 872-6020.**

### Avis au détenu

Le département de la Sécurité Intérieure [Department of Homeland Security (DHS)] a émis, à votre rencontre, un ordre d'incarcération pour des raisons d'immigration. Un ordre d'incarcération pour des raisons d'immigration est un avis du DHS informant les agences des forces de l'ordre que le DHS a l'intention de vous détenir après la date normale de votre remise en liberté. Le DHS a requis que l'agence des forces de l'ordre, qui vous détient actuellement, vous garde en détention pour une période maximum de 48 heures (excluant les samedis, dimanches et jours fériés) au-delà de la période à la fin de laquelle vous auriez été remis en liberté par les autorités policières de l'État ou locales en fonction des inculpations ou condamnations pénales à votre rencontre. **Si le DHS ne vous détient pas durant cette période supplémentaire de 48 heures, sans compter les fins de semaines et les jours fériés, vous devez contacter votre gardien** (l'agence des forces de l'ordre qui vous détient actuellement) pour vous renseigner à propos de votre libération par l'État ou l'autorité locale. **Si vous avez une plainte à formuler au sujet de cet ordre d'incarcération ou en rapport avec des violations de vos droits civils, veuillez contacter le centre commun d'admissions du Service de l'Immigration et des Douanes [ICE - Immigration and Customs Enforcement] [ICE Joint Intake Center] au 1-877-2INTAKE (877-246-8253). Si vous croyez être la victime d'un crime, veuillez en aviser le DHS en appelant le centre d'assistance des forces de l'ordre de l'ICE [ICE Law Enforcement Support Center] au (802) 872-6020.**

### AVISO AO DETENTO

O Departamento de Segurança Nacional (DHS) emitiu uma ordem de custódia imigratória em seu nome. Este documento é um aviso enviado às agências de imposição da lei de que o DHS pretende assumir a custódia da sua pessoa, caso seja liberado. O DHS pediu que a agência de imposição da lei encarregada da sua atual detenção mantenha-o sob custódia durante, no máximo, 48 horas (excluindo-se sábados, domingos e feriados) após o período em que seria liberado pelas autoridades estaduais ou municipais de imposição da lei, de acordo com as respectivas acusações e penas criminais. **Se o DHS não assumir a sua custódia durante essas 48 horas adicionais, excluindo-se os fins de semana e feriados, você deverá entrar em contato com o seu custodiante** (a agência de imposição da lei ou qualquer outra entidade que esteja detendo-o no momento) para obter informações sobre sua liberação da custódia estadual ou municipal. **Caso você tenha alguma reclamação a fazer sobre esta ordem de custódia imigratória ou relacionada a violações dos seus direitos ou liberdades civis, entre em contato com o Centro de Entrada Conjunta da Agência de Controle de Imigração e Alfândega (ICE) pelo telefone 1-877-246-8253. Se você acreditar que está sendo vítima de um crime, informe o DHS ligando para o Centro de Apoio à Imposição da Lei do ICE pelo telefone (802) 872-6020.**

### THÔNG BÁO CHO NGƯỜI BỊ GIAM GIỮ

Bộ An Ninh Nội Địa (DHS) đã có thông báo giam giữ quý vị vì lý do di trú. Thông báo giam giữ vì lý do di trú là thông báo của DHS tới các cơ quan thi hành luật pháp về việc DHS có ý định giam giữ quý vị sau khi quý vị hết hạn tạm giam. DHS đã yêu cầu cơ quan thi hành luật pháp hiện đang giam giữ quý vị tiếp tục giam giữ quý vị trong không quá 48 giờ đồng hồ (trừ các ngày thứ Bảy, Chủ nhật và ngày lễ) sau thời gian lễ ra quý vị đã được giới chức thi hành luật pháp của địa phương hoặc tiểu bang thả ra dựa trên bản án hoặc bản cáo trạng của quý vị. **Nếu DHS không tiếp nhận giam giữ quý vị trong thời gian 48 giờ đó, không tính các ngày cuối tuần hoặc ngày lễ, quý vị nên liên lạc với nơi giam giữ quý vị** (cơ quan thi hành luật pháp hoặc tổ chức khác hiện đang giam giữ quý vị) để hỏi xem bao giờ cơ quan địa phương hoặc tiểu bang ngừng giam giữ quý vị. **Nếu quý vị có khiếu nại về thông báo giam giữ này hoặc liên quan tới các trường hợp vi phạm dân quyền hay tự do dân quyền, vui lòng liên lạc với ICE Joint Intake Center tại số 1-877-2INTAKE (877-246-8253). Nếu quý vị tin rằng quý vị là nạn nhân tội phạm, vui lòng báo cho DHS biết bằng cách gọi Trung Tâm Trợ Giúp Thi Hành Luật Pháp của cơ quan ICE tại số (802) 872-6020.**

### 对被拘留者的通告

美国国土安全部 ( DHS ) 已发出对你的移民监禁令。移民监禁令是美国国土安全部用来通告执法当局，表示美国国土安全部意图在你可能从当前的拘留被释放以后继续拘留你的通知单。美国国土安全部已经向当前拘留你的执法当局要求，根据对你的刑事起诉或判罪的基础，在本当由州或地方执法当局释放你时，继续拘留你，为期不超过 48 小时 ( 星期六、星期天和假日除外 )。如果美国国土安全部未在不计周末或假日的额外 48 小时期限内将你拘留，你应该联系你的监管单位 ( 现在拘留你的执法当局或其他单位 )，询问关于你从州或地方执法单位被释放的事宜。如果你对于这项拘留或关于违反民权或公民自由权有任何投诉，请联系美国移民及海关执法局联合接纳中心 ( ICE Joint Intake Center )，电话号码是 1-877-2INTAKE (877-246-8253)。如果你相信你是犯罪被害人，请联系美国移民及海关执法局的执法支援中心 ( ICE Law Enforcement Support Center )，告知美国国土安全部。该执法支援中心的电话号码是 (802) 872-6020。

File No:
Date:

TO: (Name and title of Institution)	FROM: (Office Address)
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Name of Alien: \_\_\_\_\_  
 Date of Birth: \_\_\_\_\_ Nationality: \_\_\_\_\_ Sex: \_\_\_\_\_

**You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:**

- Investigation has been initiated to determine whether this person is subject to removal from the United States.
- A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)
- A warrant of arrest in removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)
- Deportation or removal from the United States has been ordered.

**It is requested that you:**

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

- Under Federal regulation 8 CFR § 287.7, DHS requests that you maintain custody of this individual for a period not to exceed 48 hours (excluding Saturdays, Sundays, and Federal holidays) to provide adequate time for DHS to assume custody of the alien. Please notify this Office at least 30 days prior to this inmate's release by calling \_\_\_\_\_ during business hours or \_\_\_\_\_ after hours in an emergency.  
(Area code and phone number) (Area code and phone number)
- Please complete and sign the bottom block of the duplicate of this form and return it to this office.
  - A self-addressed stamped envelope is enclosed for your convenience.
  - Please return a signed copy via facsimile to \_\_\_\_\_  
(Area code and facsimile number)
 Return fax to the attention of \_\_\_\_\_, at \_\_\_\_\_  
(Name of officer handling case) (Area code and phone number)
- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death or transfer to another institution.
- Please cancel the detainer previously placed by this Office on \_\_\_\_\_.

\_\_\_\_\_  
(Signature of DHS Officer) (Title of DHS Officer)

**Receipt acknowledged:**


Date of last conviction: \_\_\_\_\_ Latest conviction charge: \_\_\_\_\_  
 Estimated release date: \_\_\_\_\_  
 Signature and title of official: \_\_\_\_\_



**U.S. Immigration  
and Customs  
Enforcement**

**NOV 19 2009**

**MEMORANDUM FOR:** Field Office Directors  
Special Agents in Charge  
Chief Counsels

**FROM:** John Morton   
Assistant Secretary

**SUBJECT:** Superseding Guidance on Reporting and Investigating Claims  
to United States Citizenship

This memorandum supersedes the guidance issued on November 6, 2008, entitled "Superseding Guidance on Reporting and Investigating Claims to United States Citizenship." This guidance is intended to ensure claims to U.S. citizenship receive immediate and careful investigation and analysis.

While performing their duties, U.S. Immigration and Customs Enforcement (ICE) officers, agents, and attorneys, may encounter aliens who are not certain of their status or claim to be United States citizens (USC). As the Immigration and Nationality Act (INA) provides numerous avenues for a person to derive or acquire U.S. citizenship, ICE officers, agents, and attorneys, should handle these matters with the utmost care and highest priority. While some cases may be easily resolved, because of the complexity of citizenship and nationality law, many may require additional investigation and substantial legal analysis. As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a USC. Consequently, investigations into an individual's claim to U.S. citizenship should be prioritized and Office of Investigations (OI) and Detention and Removal Operations (DRO) personnel must consult with the Office of the Principal Legal Advisor's (OPLA) local Office of the Chief Counsel (OCC) as discussed below.

**Claims at the Time of Encounter**

When officers and agents encounter an individual who they suspect is without lawful status but claims to be a USC, the situation will fall into one of three categories: 1) evidence indicates the person is a USC; 2) some evidence indicates that the individual may be a USC but is inconclusive; and 3) no probative evidence indicates the individual is a USC. If evidence indicates the individual is a USC, ICE should neither arrest nor place the individual in removal proceedings. Where there is *some* probative evidence that the individual is a USC, officers and agents should consult with their local OCC as soon as practicable. After evaluating the claim, if the evidence of U.S. citizenship outweighs evidence to the contrary, the individual should not be taken into custody. The person may, however, still be placed in removal proceedings if there is reason to believe the

**Subject: Superseding Guidance on Reporting and Investigating Claims to United States Citizenship**

individual is in the United States in violation of law. Finally, where no probative evidence of U.S. citizenship exists and there is reason to believe the individual is in the United States in violation of law, the individual may be arrested and processed for removal. In all cases, any uncertainty about whether the evidence is probative of U.S. citizenship should weigh against detention.

**Claims by Individuals Subject to an NTA**

Agents and officers must fully investigate the merits of any claim to citizenship made by an individual who is subject to a Notice to Appear (NTA), whether the claim was made before or after the NTA was served on the individual. Such investigations should be prioritized and OI and DRO personnel should consult with their local OCC as soon as practicable when investigating such claims. In addition, OI and DRO, along with their local OCC, must jointly prepare a memorandum examining the claim using the attached template. A notation should be made in the Enforce Alien Removal Module (EARM) and a copy of the memorandum should be placed in the alien's A-file. The memorandum should also be saved in the General Counsel Electronic Management System (GEMS) and notated using the designated GEMS barcode.

**Claims by Detained Individuals**

If an individual already in custody claims to be a USC, an officer must immediately examine the merits of the claim and notify and consult with his or her local OCC. If the individual is unrepresented, an officer must immediately provide the individual with the local Executive Office for Immigration Review (EOIR) list of pro bono legal service providers, even if one was previously provided.

DRO and OPLA must also jointly prepare and submit a memorandum examining the claim and recommending a course of action to the HQDRO Assistant Director for Operations at the "USC Claims DRO" e-mailbox and to the HQOPLA Director of Field Operations at the "OPLA Field Legal OPS" e-mailbox. Absent extraordinary circumstances, this memorandum should be submitted no more than 24 hours from the time the individual made the claim. HQDRO and HQOPLA will respond to the field with a decision on the recommendation within 24 hours. A notation should be made in EARM and a copy of the memorandum and resulting decision should be placed in the alien's A-file. The memorandum and resulting decision should also be saved in GEMS and notated using the designated GEMS barcode.

If the individual's claim is credible on its face, or if the investigation results in probative evidence that the detained individual is a USC, the individual should be released from detention. Any significant change in circumstances should be reported to the "USC Claims DRO" e-mailbox and the "OPLA Field Legal Ops" e-mailbox.

**Examination of the Merits**

Interviews with detainees making such claims must be conducted by an officer or agent in the presence of and/or in conjunction with a supervisor. Interviews will be recorded as sworn statements and must include all questions needed to complete all fields on a Record of Deportable



**Subject: Superseding Guidance on Reporting and Investigating Claims to United States  
Citizenship**

Alien, Form I-213. In addition, the sworn statement must include additional probative questions designed to elicit information sufficient to allow a thorough investigation of the person's claim of citizenship. Additional steps to be taken may include vital records searches, family interviews, and other appropriate investigative measures. Officers and agents should also work with their local United States Attorney's Office to ensure that any statement includes information sufficient to use in prosecuting appropriate cases under 18 U.S.C. § 911, should it ultimately come to light that the individual intentionally made a false claim to U.S. citizenship.

**State and Local Officers with Authority under INA § 287(g)**


Field Office Directors (FODs) and Special Agents in Charge (SACs) shall ensure that all state and local officers with delegated immigration authority pursuant to INA § 287(g) within their area of responsibility understand and adhere to this policy. FODs and SACs are expected to thoroughly investigate all USC claims made by individuals encountered by 287(g) designated officers.



U.S. Immigration  
and Customs  
Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors  
All Special Agents in Charge  
All Chief Counsel

FROM: John Morton  
Director 

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil  
Immigration Enforcement Priorities of the Agency for the  
Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

**APPENDIX D**



*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement<sup>1</sup>. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

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<sup>1</sup> The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director<sup>2</sup> and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

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<sup>2</sup> Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

### Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

communication with represented individuals<sup>3</sup> and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

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<sup>3</sup> For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.



## IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

<u>IMMIGRATION STATUS</u>	REQUEST BAIL?	REQUEST RELEASE ON PERSONAL RECOGNIZANCE (ROR)?	POST BAIL?	PROSECUTORIAL DISCRETION?
<p><b>Lawful Permanent Resident (LPR)</b></p>	<p>Yes.</p>	<p>Depends.</p> <p>Seek ROR if client has <u>no</u> prior convictions that fall within the category of *deportable criminal grounds for removal.</p> <p>If client has prior convictions, assess whether client is subject to removal for any prior *deportable criminal grounds for removal and advise client accordingly before seeking ROR.</p> <p>Also assess whether prior convictions make client subject to <b>MANDATORY DETENTION</b>.</p> <p><b>MANDATORY DETENTION:</b> If the client has been previously convicted of the following criminal deportation grounds for</p>	<p>Depends.</p> <p>Post bail if client has <u>no</u> prior convictions that are considered deportable criminal grounds for removal.</p> <p>If client has prior convictions that are deportable criminal grounds for removal, an assessment should be made as to whether client is subject to mandatory detention before bail is posted and client should be advised accordingly.</p> <p>If client is not subject to mandatory detention but is still deportable for prior convictions, the client should be advised of his/her right to seek an immigration bond from ICE and/or the immigration court upon transfer to immigration custody.</p> <p><b>MANDATORY DETENTION:</b></p>	<p>Yes.</p> <p>Especially if the client falls within the specific categories highlighted by ICE Director, John Morton in his memorandum on Prosecutorial Discretion issued on June 17, 2011:</p> <ul style="list-style-type: none"> <li>• a military veteran or member of the U.S. armed forces;</li> <li>• a long-time lawful permanent resident (i.e., green card holder);</li> <li>• a minor or elderly person;</li> <li>• a person present in the United States since childhood;</li> <li>• a pregnant or nursing women;</li> <li>• a victim of domestic</li> </ul>

*\*This chart is intended only to provide suggested approaches for criminal defense attorneys when planning a defense strategy that will avoid unintended immigration consequences for noncitizen clients. Selected defense strategy will depend on the individual circumstances of each noncitizen client. For more information or legal assistance, please contact the NYSDA Criminal Defense Immigration Project at (518) 465-3524; (716) 913-3200; the Immigrant Defense Project at (212) 725-6422; [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org) or the Defending Immigrant Partnership at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).*

*The NYSDA Criminal Defense Immigration Project is sponsored in part by a grant from the New York State Bar Foundation*

# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

		<p>removal which has resulted in his/her release from any period of confinement after October 8, 1998, he/she may be subject to immigration mandatory detention with no eligibility for an immigration bond:</p> <ul style="list-style-type: none"> <li>* Two Crimes Involving Moral Turpitude (CIMT) at any time after your admission in the United States;</li> <li>* An aggravated felony;</li> <li>* A controlled substance offense;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>* A Firearms offense.</li> </ul> <p><i>*See Immigration Consequences Checklist</i></p> <p><b>REMINDER:</b> ICE may issue a detainer despite the absence of any prior grounds for removability.</p> <p><b>IMPORTANT:</b> THE PRESENCE OF AN ICE DETAINER DOES NOT GUARANTEE THAT YOUR CLIENT WILL BE TRANSFERRED TO ICE CUSTODY.</p>	<p>If the client has been previously convicted of the following criminal deportation grounds for removal which has resulted in his/her release from any period of confinement after October 8, 1998, he/she may be subject to immigration mandatory detention with no possibility of an immigration bond:</p> <ul style="list-style-type: none"> <li>* Two Crimes Involving Moral Turpitude (CIMT) at any time after your admission in the United States;</li> <li>* An aggravated felony;</li> <li>* A controlled substance offense;</li> <li>* A Firearms offense.</li> </ul> <p><b>NOTE:</b> In some instances, a client may not wish to post bail because ICE custody will deprive him/her of access to family and/or counsel. These concerns should be discussed with client prior to the posting of bail. (i.e., Some NYS detainees have been previously assigned to remote immigration facilities located in El Paso, TX, Oakdale, LA and York, PA upon transfer to ICE custody).</p>	<p>violence; trafficking, or other serious crime;</p> <ul style="list-style-type: none"> <li>• a person who suffers from a serious mental or physical disability; and/or</li> <li>• a person with serious health conditions.</li> </ul> <p><b>Note:</b> Prosecutorial discretion may be considered by ICE even if the LPR client is subject to mandatory detention provisions.</p>
<p><b>Nonimmigrant</b> (i.e., on valid, unexpired nonimmigrant status)</p>	<p>Yes.</p>	<p>(same as above)</p>	<p>(same as above)</p>	<p>Yes. If applicable.</p> <p><b>NOTE:</b> If prosecutorial discretion is not available or is not necessary and if the</p>

# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

				<p>nonimmigrant client has no prior convictions, he/she may seek permission for “voluntary departure” (i.e., permission to lawfully and voluntarily depart the United States prior to or during removal proceedings). Voluntary departure can be granted, as a matter of discretion, by ICE before commencement of a removal hearing or by an immigration judge during removal proceedings.</p> <p>If voluntary departure is sought, arrangements should be made with defense counsel, in advance of the client’s voluntary departure to seek resolution of any pending criminal matter that, left unresolved, may result in a bench warrant and subsequent inadmissibility to the United States.</p>
<p><b>Nonimmigrant</b> (i.e., visa overstay)</p>	<p>Yes.</p>	<p>Depends.</p> <p>There is an increased likelihood that an ICE detainer will be lodged if the expiration of the nonimmigrant status is reported to law enforcement.</p> <p>Defense counsel should inquire as to whether any “warrants” have been issued/lodged against</p>	<p>Depends.</p> <p>Post bail if an ICE detainer has not been previously lodged.</p> <p>If client has no prior convictions, an immigration detainer may still be lodged because of the overstay of nonimmigrant status. As a result, the client should be made aware that posting bail may result in transfer to ICE custody if an immigration</p>	<p>Yes. If applicable.</p> <p>If your client has no prior convictions that fall within the criminal grounds of removability, the client should be reminded of his/her right to seek an immigration bond from DHS ICE and/or from the immigration court.</p>



# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

		<p>the client before seeking ROR.</p> <p>If there is no ICE detainer, ROR should be sought.</p> <p>If an ICE detainer has been lodged but the client has no prior convictions, ROR should be sought <u>only</u> after the client is advised of and agrees to the potential for transfer to immigration custody upon release.</p> <p>If an ICE detainer has been lodged and the client has prior convictions that are <u>not</u> *deportable criminal grounds for removal, ROR may be sought, but <u>only</u> after the client is advised of and agrees to the potential for transfer to immigration custody upon release. <i>(In this instance, the client may still be eligible for an immigration bond upon transfer to ICE custody).</i></p> <p>However, if the client has prior convictions that are considered *deportable criminal grounds for removal, ROR <u>should only be sought after</u> the client is advised of and agrees to the potential for transfer to immigration custody</p>	<p>detainer has been previously lodged. The client should also be advised that he/she may be placed in an immigration facility that is located in remote areas of the U.S.</p> <p>However, because of an overstay of nonimmigrant status, there is a likelihood that an immigration detainer is lodged prior to any release from criminal custody. If this is the case, the client should be advised that posting will likely result in his/her transfer to ICE custody.</p> <p><b>NOTE:</b> Before bail is posted, however, the client should be made aware that transfer to ICE custody may result in assignment to an immigration facility in a remote location.</p> <p><b>IMPORTANT: MANDATORY DETENTION:</b> If the client has been previously convicted of the following criminal deportation grounds for removal which has resulted in his/her release from any period of confinement after October 8, 1998, he/she may be subject to immigration mandatory detention:</p> <ul style="list-style-type: none"> <li>* Two Crimes Involving Moral Turpitude (CIMT) at any time after your admission in the United States;</li> <li>* An aggravated felony;</li> <li>* A controlled substance offense; or</li> <li>* A Firearms offense.</li> </ul>	<p>In instances where no prior conviction exists, ICE may agree to post a bond following an arrest for a low-level offense if the client is released ROR or on criminal bail.</p>
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# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

		<p>upon release.</p> <p>NOTE: Before ROR is sought, client should be advised of transfer to immigration custody <u>without the possibility of bond</u> if client's prior convictions make him/her subject to <b>MANDATORY DETENTION.</b></p> <p><i>(See above for applicable criteria subjecting nonimmigrants to Mandatory Detention.)</i></p>		
Asylee or Refugee	Yes.	<p>Depends.</p> <p>If client has no prior convictions, request ROR.</p> <p>If client has prior convictions, assess whether he/she is subject to *inadmissible criminal grounds for removal and discuss possible transfer to ICE custody, if bail is granted and posted.</p> <p><i>*See Immigration Consequences Checklist</i></p> <p>Also assess whether client's prior convictions make client subject to <b>MANDATORY DETENTION.</b></p> <p><b>MANDATORY DETENTION:</b></p>	Depends.	<p>Post bail if client has <u>no</u> prior convictions that are considered *inadmissible criminal grounds for removal.</p> <p><i>(Exception: a refugee client who has not sought to adjust his status to that of a U.S. lawful permanent resident (i.e., green card holder) <u>after</u> 1 year of his lawful admission to the US should be advised, before posting bail, that he/she may still be transferred to ICE detention for a determination of his ability to adjust his status even after his bail is posted.)</i></p> <p>If client has prior convictions that are *inadmissible criminal grounds for removal, an assessment should be made as to whether client is subject to mandatory detention before bail is posted</p>

# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

		<p>If the client has been previously convicted of the following criminal inadmissible grounds for removal which has resulted in his/her release from any period of confinement after October 8, 1998, he/she may be subject to immigration mandatory detention with no eligibility for an immigration bond:</p> <ul style="list-style-type: none"> <li>* One CIMT (which may be waived as a petty offense if you have no prior criminal history, the offense was not punishable by more than one year in jail and you did not serve more than six months in jail);</li> <li>* Controlled substance offense;</li> <li>* Drug trafficking offense;</li> <li>* Two or more offenses with aggregate sentence of 5 years of incarceration;</li> <li>* Prostitution; or</li> <li>* Domestic violence or violation of protection order.</li> </ul> <p><b>NOTE:</b> Mandatory Detention criteria applicable to refugees, asylees, undocumented aliens and those seeking admission to the United States differ from the criteria outlined for lawful permanent residents and nonimmigrants.</p>	<p>and client should be advised accordingly.</p> <p><b>MANDATORY DETENTION:</b></p> <p>If the client has been previously convicted of the following criminal inadmissible grounds for removal which has resulted in his/her release from any period of confinement after October 8, 1998, he/she may be subject to immigration mandatory detention with no eligibility for an immigration bond:</p> <ul style="list-style-type: none"> <li>* One CIMT (which may be waived as a petty offense if you have no prior criminal history, the offense was not punishable by more than one year in jail and you did not serve more than six months in jail);</li> <li>* Controlled substance offense;</li> <li>* Drug trafficking offense;</li> <li>* Two or more offenses with aggregate sentence of 5 years of incarceration;</li> <li>* Prostitution; or</li> <li>* Domestic violence or violation of protection order.</li> </ul> <p><i>*See Immigration Consequences Checklist</i></p> <p>If client is not subject to mandatory detention but is still inadmissible for prior convictions, the client should be advised of his/her right to seek an immigration bond from ICE and/or the immigration court upon transfer to immigration custody.</p>	
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# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

		<p><b>IMPORTANT: Refugees</b> may also be subject to transfer to immigration custody if a refugee has not sought to adjust his/her status to a lawful permanent resident after 1-year of his/her admission to the U.S. as a refugee.</p> <p>If the refugee client has not sought to apply for a green card within 1 year of arriving to the US as a refugee, ICE may continue with the transfer to immigration custody in order to assess the refugee's ability to adjust status to a lawful permanent resident.</p>		
<p><b>Undocumented</b> (i.e., entered US without lawful inspection)</p>	<p>Depends.</p> <p>If an ICE detainer has not yet been issued, client should be advised that requesting bail may result in the lodging of an immigration detainer if the client's undocumented status is reported to the custodial law enforcement agency.</p>	<p>Depends.</p> <p>ROR should be sought if no immigration detainer has been previously lodged.</p> <p>However, if an ICE detainer has been lodged, client should be advised that ROR will likely result in transfer to ICE custody because of his/her undocumented status in the U.S.</p>	<p>Depends.</p> <p>If no ICE detainer has been lodged, the client should be encouraged to post bail.</p> <p>If an ICE detainer has been lodged against the client, a determination should be made as to whether he has prior convictions that subject him to *inadmissible criminal grounds for removal and whether those grounds also subject the client to mandatory detention. If the client is subject to mandatory detention, posting bail will result in the client's transfer to immigration custody where he/she will be subject to mandatory detention without eligibility of immigration bond.</p>	<p>Yes. If applicable.</p> <p>Prosecutorial discretion is especially important to address the needs of any U.S. citizen children who are under the care of an undocumented parent that is identified as the sole care giver.</p> <p>When possible, assessments of possible relief from removal should be determined prior to any resolution of bail.</p>

# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

			<p><b>MANDATORY DETENTION:</b>                  If the client has been previously convicted of the following criminal inadmissible grounds for removal which has resulted in his/her release from any period of confinement after October 8, 1998, he/she may be subject to immigration mandatory detention with no eligibility for an immigration bond:</p> <ul style="list-style-type: none"> <li>* One CIMT (which may be waived as a petty offense if you have no prior criminal history, the offense was not punishable by more than one year in jail and you did not serve more than six months in jail);</li> <li>* Controlled substance offense;</li> <li>* Drug trafficking offense;</li> <li>* Two or more offenses with aggregate sentence of 5 years of incarceration;</li> <li>* Prostitution; or</li> <li>* Domestic violence or violation of protection order.</li> </ul> <p><i>*See Immigration Consequences Checklist</i></p>	
<p><b>Previously Ordered Deported/Removed but failed to appear for removal (i.e., a “fugitive”)</b></p>	<p>Depends.</p> <p>Client should be advised that a request for bail may result in a record of his failure to appear for removal/deportation.</p>	<p>Depends.</p> <p>Request ROR but only if no immigration detainer has been lodged against the client.</p> <p>If a detainer has been lodged, client should be advised that ROR will result in transfer to ICE</p>	<p>Depends.</p> <p>If an ICE detainer has been lodged, posting bail will result in the client’s transfer to immigration custody for the purposes of preparing for his removal from the United States.</p> <p>If client wishes to post the bail and be</p>	<p>Yes. If applicable.</p> <p>Prosecutorial discretion is especially important to address the needs of any U.S. citizen children who are under the care of a previously removed parent that is identified as the sole care giver.</p>

# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

	<p>Requesting bail may also result in the lodging of an immigration detainer if law enforcement is made aware of the prior order of removal.</p> <p><i>Note: Prior orders of removal are usually recorded on a client's RAP sheet.</i></p> <p>The client should be advised that, when an ICE detainer is lodged, any granting and posting of bail will result in the client's immediate transfer to immigration custody for the purposes of securing his/her removal from the United States.</p> <p>NOTE: If the court or prosecution are concerned that bail will result in removal of the client, recommend that a <b>departure-control order</b> be requested by the District Attorney's office to prevent the</p>	<p>custody for the purposes of securing his/her removal from the United States.</p> <p><b>IMPORTANT:</b> Client will not be placed into removal proceedings upon transfer to ICE custody but will, instead, be detained and prepared for removal from the U.S. However, where applicable, the client is permitted to raise a credible fear of persecution when he/she is transferred to ICE custody awaiting removal from the U.S. See 8 CFR 1208.31</p>	<p>removed from the U.S., defense counsel should determine whether criminal proceedings may be resolved or terminated prior to client's removal from the U.S. to avoid subsequent inadmissibility because of an outstanding bench warrant.</p> <p>Client may also seek to remain in criminal custody if he/she is attempting to reopen any prior deportation/removal proceedings that resulted in the outstanding order.</p> <p><b>IMPORTANT:</b> Where applicable, a client is permitted to raise a credible fear of persecution when he/she is transferred to ICE custody awaiting removal from the U.S. See 8 CFR 1208.31</p>	
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# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

	removal of a noncitizen defendant or witness whose presence is essential to a criminal proceeding. <i>See 8 C.F.R. 215.2</i>			
<p><b>Previously Ordered Deported/Removed and on an ICE Order of Supervision</b></p> <p><b>(note: ICE post-removal order release is reserved for individuals who cannot be removed from the US but should not be subjected to indefinite immigration detention)</b></p>	Yes.	<p>Depends.</p> <p>Client should be advised that he/she may be subjected to an interview with ICE to determine whether he/she should be returned to immigration custody before ROR.</p> <p><b>IMPORTANT:</b> Defense counsel should remind client of his/her right against self-incrimination and may consider being present at the time of any ICE interview with client prior to ROR.</p> <p><b>NOTE:</b> If an immigration detainer is lodged, defense counsel may consider contacting ICE prior to seeking release on bail or ROR to determine whether the underlying pending offense will result in a termination of supervised release.</p>	<p>Depends.</p> <p>Client should be advised that he/she may be subjected to an interview with ICE to determine whether he/she should be returned to immigration custody before posting bail.</p> <p><b>IMPORTANT:</b> Defense counsel should remind client of his/her right against self-incrimination and may consider being present at the time of any ICE interview with client prior to being released on bail.</p> <p><b>NOTE:</b> If an immigration detainer is lodged, defense counsel may consider contacting ICE prior to seeking release on bail or ROR to determine whether the underlying pending offense will result in a termination of supervised release.</p>	<p>Yes. If applicable.</p> <p>Because client is unable to be removed from the U.S., prosecutorial discretion may not be required if release on post-removal-order supervision is continued by ICE.</p>
<p><b>Previously Ordered Removed &amp; Subsequent Illegal Re-entry</b></p>	<p>Depends.</p> <p>Client should be advised that a request for bail may involve</p>	<p>Depends.</p> <p>Client should be advised that a request for ROR may involve discussion of his prior removal</p>	<p>Depends.</p> <p>Client should be advised that posting bail will likely result in his transfer to ICE custody where a determination may be</p>	<p>Yes. If applicable.</p> <p>Although prosecutorial discretion may be considered at any stage of an immigration</p>

# IMPACT OF IMMIGRATION DETAINERS ON BAIL DETERMINATIONS

	<p>discussion of his prior removal and illegal re-entry to the U.S. Client should be cautioned on the possibility of federal criminal prosecution for illegally re-entry and advised of his/her Fifth Amendment right against self-incrimination.</p> <p><b>TIP:</b> Client should be advised of his right to refuse to speak to any law enforcement or ICE agent outside of the presence of counsel and to have access to his/her Consulate.</p> <p><b>Note:</b> An individual may be subject to criminal prosecution for illegally entry pursuant to 8 U.S.C. 1325 or illegal reentry after deportation pursuant to 8 U.S.C. 1326.</p>	<p>and illegal re-entry to the U.S. Client should be cautioned on the possibility of federal criminal prosecution for illegally re-entry and advised of his/her Fifth Amendment right against self-incrimination.</p> <p><b>TIP:</b> Client should be advised of his right to refuse to speak to any law enforcement or ICE agent outside of the presence of counsel and to have access to his/her Consulate.</p> <p><b>Note:</b> An individual may be subject to criminal prosecution for illegally entry pursuant to 8 U.S.C. 1325 or illegal reentry after deportation pursuant to 8 U.S.C. 1326.</p>	<p>made, in cooperation with the U.S. Attorney's office, to determine whether the client should be charged with criminal federal prosecution.</p> <p>If the client is not federally charged with a crime for illegal re-entry or illegal re-entry after deportation, the client's removal order will be reinstated and the client will be prepared for removal from the United States.</p> <p><b>IMPORTANT:</b> Where applicable, the client is permitted to raise a credible fear of persecution when he/she is transferred to ICE custody awaiting removal from the U.S. See 8 CFR 1208.31</p>	<p>matter, it is more likely that, in this instance, prosecutorial discretion will be exercised only when circumstances have significantly changed since the client's prior order of removal from the United States.</p>
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# New York State Defenders Association, Inc.

## *Public Defense Backup Center*

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## **Life After *Padilla v. Kentucky*: What Defense Attorneys Should Know**

The Supreme Court issued a landmark decision on March 31, 2010 regarding the Sixth Amendment right to counsel. In *Padilla v. Kentucky*, 599 U.S. \_\_\_ (2010), the Supreme Court held that, pursuant to the Sixth Amendment, criminal defense counsel has a **duty to provide affirmative and competent advice** to a noncitizen defendant regarding the immigration consequences of a guilty plea. **Absent such advice**, the noncitizen client may raise a **claim of ineffective assistance of counsel**.

### ❖ **UNDERLYING FACTS OF *PADILLA V. KENTUCKY***

The defendant, Mr. Jose Padilla resided in the U.S. as a lawful permanent resident (i.e., “green card holder”) for at least 25 years. He faced deportation charges and removal from the U.S. following a guilty plea to the transportation of a large quantity of marijuana. Once in removal, Mr. Padilla filed a post conviction relief motion claiming ineffective assistance of counsel because his criminal defense attorney provided him with affirmative misadvice on the potential immigration consequences of deportation that resulted from his guilty plea. In addition, Mr. Padilla claimed that his Sixth Amendment right to effective assistance of counsel was violated when his attorney failed to provide competent advice on how his guilty plea would negatively impact his U.S. immigration status.

Mr. Padilla’s claims were rejected by the Kentucky Supreme Court which held that the Sixth Amendment guarantee of effective assistance does not extend to advice about the immigration consequences of a guilty plea because those consequences are deemed merely “collateral.”

The Supreme Court, however, disagreed with the Kentucky Supreme Court and held that competent defense counsel would have advised Mr. Padilla that his drug conviction for transportation of a controlled substance would have subjected him to deportation and removal from the United States. The Court recognized the dramatic changes that have evolved over the last 90 years involving the immigration consequences of criminal convictions and concluded that the “drastic measure” of deportation is now inevitable for most noncitizens convicted of a crime and that “[a]ccurate legal advice for noncitizens accused of crimes has never been more important” *Padilla*, slip. op. at 6.

## ❖ KEY POINTS FROM THE *PADILLA V. KENTUCKY* DECISION:

- **SIXTH AMENDMENT GUARANTEES AFFIRMATIVE, COMPETENT ADVICE ON IMMIGRATION CONSEQUENCES**

The Sixth Amendment guarantee of effective assistance requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. *Padilla v. Kentucky*, 599 U.S. \_\_\_ (2010).

- **SIXTH AMENDMENT GUARANTEES OF EFFECTIVE ASSISTANCE OF COUNSEL INCLUDES TAKING STEPS TO PRESERVE DISCRETIONARY RELIEF FROM DEPORTATION AND REMOVAL**

The duty of effective assistance of counsel pursuant to the Sixth Amendment includes providing affirmative, competent advice and seeks ways of **preserving discretionary relief from deportation** for a noncitizen defendant.

“[P]reserving the possibility of discretionary relief from deportation...would have been one of the principle benefits sought by defendants deciding whether to accept a plea offer or instead of proceed to trial.” *Padilla*, slip. op. at 10.

- **DEPORTATION AS A “PENALTY”**

Deportation is no longer recognized as a collateral consequence of a criminal conviction.

“Deportation is a “penalty” and an “integral part – indeed sometimes the most important part – of the penalty that may be imposed on noncitizens.” *Id.* at 6.

- **NO ADVICE (SILENCE) IS INSUFFICIENT**

The Court expressly rejected option of limiting application of *Strickland* to claims of affirmative misadvice recognizing that:

[a] “holding limited to affirmative misadvice...would give counsel an incentive to remain silent on matters of great importance...when answers are readily available.” *Id.* at 13.

- **“INFORMED CONSIDERATION” OF DEPORTATION CONSEQUENCES NECESSARY IN PLEA NEGOTIATIONS**

The Court recognized the benefits and importance of considering the immigration consequences during plea negotiations between defense counsel and the prosecution.

- **EFFECTIVE ASSISTANCE SHOULD INCORPORATE PROFESSIONAL STANDARDS**

The Court cited to professional standards of the American Bar Association and the National Legal Aid and Defender Association in establishing the duty to (1) be informed of a client’s immigration status, (2) investigate possible immigration consequences of a guilty plea and sentence and (3) advise on possible immigration consequences of a guilty plea and sentence.

## ❖ WHAT CONSTITUTES EFFECTIVE ASSISTANCE OF COUNSEL?

### STEP ONE: CREATE AN OFFICE POLICY, PROCEDURE OR PROTOCOL TO ADDRESS NONCITIZEN REPRESENTATION

- Design & Implement a Screening Method to Identify the Immigration Status of All Clients – Consult “Protocol for the Development of a Public Defender Immigration Service Plan” written by Peter Markowitz, NYSDA and IDP and published at [www.nysda.org](http://www.nysda.org) and [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)
- Create and Follow an Immigration Worksheet When Representing a Noncitizen Client – See attached sample Immigration Worksheet
- Schedule a Consultation with an Immigration Expert Before Accepting Any Plea Offers – See “Helpful Resources” below
- Obtain Helpful Advisory Opinions In Support of a Plea that Lessens or Eliminates Potential Immigration Consequences
- Document Advice Offered to Noncitizen Client
- Consider Assisting Your Client in Filing a Direct Appeal or Post Conviction Remedy

### STEP TWO: PROVIDING EFFECTIVE ASSISTANCE TO A NONCITIZEN CLIENT

- **Investigate The Facts:**
  - a. Identify client’s Immigration Status – obtain client’s Alien Registration Number (8 or 9 digit number assigned by immigration authorities beginning with the letter “A”), if available
  - b. Identify if client at risk for removal from the United States – includes anyone who is NOT a United States citizen!
  - c. Learn of client’s U.S. Family Ties – obtain information relating to U.S. immigration status of grandparents, parents, spouse, partner and children
  - d. Inquire into client’s length of residence in the United States – including any dates of departures from the U.S. since first arrival
  - e. Determine client’s duration of immigration status in the United States – determine if client has any upcoming expiration dates of status
  - f. Determine if there is any lodged ICE/immigration Detainer Against Your Client
  - g. Review client’s Criminal History – note any prior or pending charges, dates of convictions and sentences) and record present charges and any plea or sentencing offers

#### **Hint: Helpful Questions To Ask:**

*Where were you born?* - Ask to see a passport, birth certificate or naturalization certificate. If client is born in the U.S., Puerto Rico or Guam, he/she is a United States citizen.

*When did you first come to the United States?*

*How did you enter the United States?*

*What is your immigration status in the United States?*

- **Determine Your Client’s Goals for Representation:**

- a. Prioritize client’s goals and represent your client according to his/her defense priorities.
- b. Keep those goals in mind when negotiating a plea and advising your client of any potential negative immigration consequences:

- **Avoid conviction that triggers deportation:**

- a. Preserve eligibility to get future immigration benefits (i.e., lawful permanent resident or “green card” status, citizenship, Temporary Protected Status, obtaining a special immigrant visa – U visa (victim of crime), T visa (victim of trafficking) or a battered spouse eligible for VAWA relief)
- b. Preserve ability to ask immigration judge to stay in U.S.
- c. Get your noncitizen client released from jail ASAP to avoid ICE detainer and transfer Immigration consequences not a priority for your client
- d. Client seeks expedited transfer to ICE for removal from the US

- **Analyze immigration consequences:**

- a. Determine likelihood that charge/plea will trigger deportation
- b. Determine likelihood that charge/plea will trigger inadmissibility
- c. Determine impact of charge/plea offer or sentence on “discretionary relief” or other immigration status (i.e., how will charge/plea or sentence impact TPS status, LPR status or future eligibility for citizenship, etc.)

**Helpful Hint:** See attached ***NYSDA Immigrant Defense Project: Immigration Consequences of Convictions Summary Checklist*** and “Resources” listed below.

- **Strategize and Prioritize Your Client’s Defense Goals:**

- a. Seek assistance on immigration analysis
- b. Advocate for a plea that lessens or eliminates the potential for removal from the United States
  - Negotiate to non-deportable offense;
  - Sterilize record of conviction;
  - Obtain sentence of less than 365 (or 180 for CIMT) days;
  - File an appeal of conviction/sentence;
  - Get client out of jail before an immigration detainer is lodged;
- c. Educate the courts and district attorney’s office on the unintended immigration consequences (i.e., provide an advisory letter/opinion during any plea negotiations)

## ❖ WHERE TO GET HELP?

### LEGAL ASSISTANCE OR CONSULTATION:

New York State Defenders Association – Criminal Defense Immigration Project  
JOANNE MACRI  
(716) 913-3200 or (518) 465-3524  
[jmacri@nysda.org](mailto:jmacri@nysda.org)

Immigrant Defense Project - Hotline  
(Available Tues. & Thurs. 1:30 p.m.-4:30 p.m.)  
(212) 725-6422  
[www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)

### HELPFUL RESOURCES:

IDP Practice Advisory: **Duty of Criminal Defense Counsel Representing Immigrants After Padilla v. Kentucky** (April 6, 2010) available at  
[http://www.immigrantdefenseproject.org/docs/2010/10-Padilla\\_Practice\\_Advisory.pdf](http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf)

DIP National Practice Advisory: **Steps to Representing a Noncitizen Defendant Under Padilla v. Kentucky** available at  
<http://defendingimmigrants.org/http://defendingimmigrants.org/>

Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at  
[www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

NYSDA IDP: **Quick Reference Chart for New York Offenses** (2006), available at  
[www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

Defending Immigrant Partnership: **Representing Noncitizen Criminal Defendants: A National Guide** (2008), available for free downloading at  
<http://defendingimmigrationlaw.com>

### HELPFUL WEBSITES:

New York State Defenders Association; [www.nysda.org](http://www.nysda.org)

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 Legal Resource Center [www.ilrg.org](http://www.ilrg.org)

# NON CITIZEN CLIENT: IMMIGRATION WORKSHEET

Attorney: \_\_\_\_\_

CLIENT INFORMATION		
NAME	CASE NO.	Date

CLIENT'S IMMIGRATION STATUS		
Lawful Permanent Resident? <input type="checkbox"/>		If yes, issuance/ expiration dates? /
Refugee or Granted Asylum? <input type="checkbox"/>		If so, when?
Undocumented (entered illegally)? <input type="checkbox"/>		If yes, when?
Temporary Protected Status? <input type="checkbox"/>		If yes, when?
Previously ordered Deported? <input type="checkbox"/>		If yes, when?
Other status? <input type="checkbox"/>		If yes, explain.

CUSTODY STATUS		
Client in custody?	YES <input type="checkbox"/> NO <input type="checkbox"/>	If yes, where?
ICE Detainer Lodged?	YES <input type="checkbox"/> NO <input type="checkbox"/>	

CRIMINAL HISTORY (TYPE OF CONVICTED OFFENSE, DATE & SENTENCING DETAILS-INCLUDING DIVERSION, OR OTHER DEFERRED SENTENCE INCLUDING YOUTHFUL OFFENDER STATUS, ETC.)

CURRENT PLEA NEGOTIATIONS	
CURRENT CHARGE(S)?	Plea Offer?
CURRENT CHARGE(S)?	Plea Offer?

CLIENT'S FAMILY HISTORY				
FAMILY MEMBERS	US CITIZEN	Lawful Permanent Resident	Undocumented (Illegal Entry)	Living in the US?
SPOUSE				
PARTNER				
CHILDREN				
MOTHER				
FATHER				
GRANPARENTS				

<b>CLIENT GOALS:</b>	<b>(CHECK)</b>
Release from custody and avoid immigration detainer?	<input type="checkbox"/>
Avoid being referred to the immigration court for removal proceedings?	<input type="checkbox"/>
Preserve eligibility for lawful permanent resident status or naturalization?	<input type="checkbox"/>
Preserve ability to seek a waiver from removal before an immigration judge?	<input type="checkbox"/>
Interested in being referred for removal from the United States as soon as possible?	<input type="checkbox"/>
Other goals?	

<b>LIKELIHOOD THAT PLEA OR SENTENCE WILL IMPACT CLIENT'S IMMIGRATION STATUS:</b>					
<b>OFFENSE OR SENTENCE</b>	<b>DEFINITE IMPACT</b>	<b>LIKELY IMPACT</b>	<b>POSSIBLE IMPACT</b>	<b>UNLIKELY IMPACT</b>	<b>WILL NOT IMPACT</b>

<b>ELIGIBILITY OF RELIEF FROM IMMIGRATION CONSEQUENCES AVAILABLE:</b>

<b>RECOMMENDED STRATEGIES TO LESSEN IMMIGRATION IMPACT:</b>	<b>(CHECK)</b>
Secure release of client prior to ICE detainer being lodged	<input type="checkbox"/>
Negotiate a lesser offense for plea bargain	<input type="checkbox"/>
Negotiate a reduced sentence	<input type="checkbox"/>
Sterilize the record of conviction	<input type="checkbox"/>
Negotiate pre-plea diversion program	<input type="checkbox"/>
File a direct appeal on behalf of the client	<input type="checkbox"/>
Withdraw plea of guilty prior to sentencing	<input type="checkbox"/>
Vacate prior conviction, judgment or sentence	<input type="checkbox"/>
Other goals?	<input type="checkbox"/>

<b>DEFENSE STRATEGIES AND ADDITIONAL NOTES:</b>

<b>AVAILABLE RESOURCES:</b>	<b>(CHECK)</b>
NYSDA CDIP – Joanne Macri      Tel. (716) 913-3200 <input type="checkbox"/>	Fax (518) 465-3249 <input type="checkbox"/> Email <a href="mailto:jmacri@nysda.org">jmacri@nysda.org</a> <input type="checkbox"/>
Immigrant Defense Project      Tel (212) 725-6422 <input type="checkbox"/>	Website <a href="http://www.immigrantdefenseproject.org">www.immigrantdefenseproject.org</a> <input type="checkbox"/>
Defending Immigrants Partnership	Website <a href="http://www.defendingimmigrants.org">www.defendingimmigrants.org</a> <input type="checkbox"/>
Other Resources <input type="checkbox"/>	

# NYSDA CRIMINAL DEFENSE IMMIGRATION 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 [www.nysda.org](http://www.nysda.org) or contact NYSDA directly at 518-465-3524.

\*\*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.]



# NYSDA CRIMINAL DEFENSE IMMIGRATION PROJECT

## Lista de control del resumen de consecuencias de las condenas en materia de inmigración\*

MOTIVOS DE DEPORTACIÓN (se aplican a no ciudadanos admitidos legalmente, como un residente permanente legal (lawful permanent resident, LPR), es decir, el poseedor de la tarjeta verde)	MOTIVOS DE INADMISIBILIDAD (se aplican a no ciudadanos que intentan ser admitidos legalmente, incluidos los LPR que salen de los EE. UU.)	INELEGIBILIDAD PARA OBTENER LA CIUDADANÍA DE LOS EE. UU.
<p>Condena por delito agravado</p> <ul style="list-style-type: none"> <li>➤ Consecuencias (además de la deportación):                             <ul style="list-style-type: none"> <li>• Inelegibilidad para la mayoría de las exenciones de deportación</li> <li>• Inelegibilidad para salida voluntaria</li> <li>• Inadmisibilidad permanente luego de la deportación</li> <li>• Somete al cliente a hasta 20 años de prisión, en caso de que vuelva a ingresar a los EE. UU. ilegalmente luego de haber sido deportado</li> </ul> </li> <li>➤ Delitos que se contemplan (posiblemente, incluso si no es un delito grave):                             <ul style="list-style-type: none"> <li>• Homicidio</li> <li>• Violación</li> <li>• Abuso sexual de un menor</li> <li>• Tráfico de drogas (puede incluirse, ya sea que se considere un delito grave o un delito menor, cualquier delito de venta o intención de venta, delito por posesión reiterada o posterior, o posesión de más de 5 gramos de crack o de cualquier cantidad de flunitrazepam)</li> <li>• Tráfico de armas</li> <li>• Delito violento + condena de 1 año**</li> <li>• Hurto o robo + condena de 1 año**</li> <li>• Fraude o evasión fiscal + pérdida ocasionada a la/s víctima/s &gt; \$10,000</li> <li>• Delitos por negocios de prostitución</li> <li>• Soborno comercial, contrabando de moneda, documentos, o falsificación + condena de 1 año**</li> <li>• Obstrucción de la justicia o perjurio + condena de 1 año**</li> <li>• Algunos delitos por quebrantar la fianza</li> <li>• Varios delitos federales y posiblemente delitos estatales análogos (lavado de dinero, diversos delitos federales por tenencia de armas, contrabando de extranjeros, incumplimiento en el registro de delinquentes sexuales, etc.)</li> <li>• Tentativa o conspiración para cometer cualquiera de los delitos anteriores</li> </ul> </li> </ul>	<p>Condena o comisión admitida por un delito por posesión de sustancias controladas, o si el Departamento de Seguridad Nacional (Department of Homeland Security, DHS) tiene motivos para creer que el individuo es traficante de drogas.</p> <ul style="list-style-type: none"> <li>➤ Sin posibilidad de aplicar la exención 212(h) (excepto que sea un único delito simple por posesión simple de 30 g de marihuana o menos)</li> </ul> <hr/> <p>Condena o comisión admitida por un delito de inmoralidad (Crime Involving Moral Turpitude, CIMT)</p> <ul style="list-style-type: none"> <li>➤ Los delitos de esta categoría contemplan una amplia variedad de delitos, que incluyen:                             <ul style="list-style-type: none"> <li>• Delitos con intención de robo o estafa (por ejemplo: hurto, falsificación)</li> <li>• Delitos en los que se provoca o se amenaza con causar daño físico por medio de un acto intencional, o se provoca o se amenaza con causar daño físico grave por medio de un acto imprudente (por ejemplo: homicidio, violación, algunos asesinatos/agresión)</li> <li>• La mayoría de los delitos sexuales</li> </ul> </li> <li>➤ Excepción por delito menor: en caso de que se produzca un CIMT, si el cliente no cometió ningún otro CIMT + el delito no es punible &gt; 1 año (por ejemplo: en Nueva York no es considerado un delito grave) + no implica una sentencia de prisión &gt; 6 meses</li> </ul> <p style="text-align: center;"><b>Prostitución y vicio comercial</b></p> <p>Condena por 2 o más delitos de cualquier clase + sentencia de prisión total de 5 años</p>	<p>La condena o el reconocimiento de los siguientes delitos impiden un fallo de buena reputación durante al menos 5 años:</p> <ul style="list-style-type: none"> <li>➤ Delito por tenencia de sustancias controladas (a menos que sea un único delito por posesión simple de 30 g de marihuana o menos)</li> <li>➤ Delito de inmoralidad (a menos que sea un único delito de inmoralidad (Crime Involving Moral Turpitude, CIMT) y que el delito no sea punible &gt; 1 año (por ejemplo: en Nueva York, no es considerado un delito grave) + no implique una sentencia de prisión &gt; 6 meses)</li> <li>➤ 2 o más delitos de cualquier clase + sentencia de prisión total de 5 años</li> <li>➤ 2 delitos por juegos de azar</li> <li>➤ Encarcelación durante un periodo total de 180 días</li> </ul> <p>Delito agravado condenado el 29 de noviembre de 1990 o después (y condena por homicidio en cualquier momento) que impide de forma permanente un fallo de buena reputación y, por consiguiente, la elegibilidad para obtener la ciudadanía.</p>
<b>DEFINICIÓN DE CONDENA</b>		
<p>Condena por tenencia de sustancias controladas</p> <ul style="list-style-type: none"> <li>➤ EXCEPTO un único delito por posesión simple de 30 g de marihuana o menos</li> </ul>	<p>Sentencia formal de culpabilidad de un no ciudadano dictada por un juzgado o, en caso de que el fallo de culpabilidad haya sido negado, cuando:</p> <ul style="list-style-type: none"> <li>(i) un juez o jurado haya encontrado culpable al no ciudadano o el no ciudadano haya realizado una declaración de culpabilidad de un delito o nolo contendere o haya admitido que existen hechos suficientes para garantizar un fallo de culpabilidad, Y</li> <li>(ii) el juez haya ordenado que se aplique alguna forma de castigo, pena o limitación a la libertad del no ciudadano.</li> </ul> <p><b>POR CONSIGUIENTE:</b></p> <ul style="list-style-type: none"> <li>➤ Un tratamiento contra las drogas o una terapia para tratar la violencia familiar ordenados por un juzgado en lugar de la encarcelación ES una condena para los fines de inmigración si se realiza una declaración de culpabilidad de un delito (incluso si posteriormente se revoca la declaración de culpabilidad)</li> <li>➤ El pronunciamiento diferido de una sentencia penal sin declaración de culpabilidad de un delito (por ejemplo: un aplazamiento para contemplar la desestimación del caso [Adjournment in Contemplation of Dismissal, ACD] en Nueva York) NO es una condena</li> <li>➤ El fallo de un delincuente juvenil (por ejemplo: un delincuente juvenil en Nueva York) NO es una condena</li> </ul>	
<p>Condena por delitos de inmoralidad (CIMT)</p> <ul style="list-style-type: none"> <li>➤ Para conocer los delitos que se incluyen, consulte los Fundamentos de Inadmisibilidad</li> <li>➤ Un CIMT cometido durante los primeros 5 años luego de haber sido admitido a los EE. UU. y por el que se le pueda aplicar una pena de 1 año o más (por ejemplo: en Nueva York, puede ser un delito menor de Clase A)</li> <li>➤ Dos CIMT cometidos en cualquier momento y "que no surjan de un mismo plan delictivo"</li> </ul>		
<p>Condena por posesión de armas o dispositivos de destrucción</p> <p>Condena por violencia familiar u otros delitos relacionados con asuntos familiares, incluidos:</p> <ul style="list-style-type: none"> <li>➤ Delito por violencia familiar</li> <li>➤ Acoso</li> <li>➤ Abuso, negligencia o abandono de menores</li> <li>➤ Violación de una orden de protección (penal o civil)</li> </ul>		
<b>INELEGIBILIDAD PARA LA CANCELACIÓN DE LA DEPORTACIÓN DE UN LPR</b>		
<ul style="list-style-type: none"> <li>➤ Condena por delito agravado</li> <li>➤ Delito contemplado en los Fundamentos de inadmisibilidad si se ha cometido dentro de los primeros 7 años de residencia después de ser admitido en los Estados Unidos</li> </ul>		
<b>INELEGIBILIDAD PARA OBTENER ASILO O CANCELACIÓN DE LA DEPORTACIÓN BASADA EN AMENAZA CONTRA LA VIDA O LA LIBERTAD EN EL PAÍS DE DEPORTACIÓN</b>		
<p>Los "delitos particularmente graves" hacen que los no ciudadanos no cumplan con los requisitos para obtener asilo o cancelación de la deportación. Se incluyen:</p> <ul style="list-style-type: none"> <li>➤ Delitos agravados                             <ul style="list-style-type: none"> <li>• Todos impedirán el asilo</li> <li>• Los delitos agravados con una sentencia total de 5 años de prisión impedirán la cancelación</li> <li>• Los delitos agravados que impliquen tráfico ilegal de sustancias controladas impedirán presuntamente la cancelación</li> </ul> </li> <li>➤ Otros delitos graves: sin definición establecida por la ley (para obtener un ejemplo de jurisprudencia, consulte el apéndice F)</li> </ul>		

*Lea al dorso →*

\*Para obtener ayuda sobre casos particulares, los abogados defensores y demás abogados pueden llamar a la línea directa del 518-465-3524.

Para obtener las actualizaciones de la lista de control y otros recursos legales, visite <http://www.nysda.org>.

\*\*El requisito de 1 año hace referencia a una sentencia de prisión en suspenso o efectiva de 1 año o más. (La libertad vigilada o libertad condicional en Nueva York sin una sentencia en suspenso no se considera parte de la sentencia de prisión por fines de inmigración).

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## What do the terms “In custody” and “Not in custody” mean?

- **“In custody”** means the individual is currently in one of ICE’s detention facilities. The ODLS will provide the name of the detention facility where the detainee is located and information about contacting or visiting that facility. The ODLS will also provide the contact information for the DRO office responsible for the detainee’s case.



- **“Not in custody”** means the individual was released from ICE custody within the last 60 days and is not in one of ICE’s detention facilities. This means the detainee may no longer be in the United States, or may have been released from ICE custody.

## Who is not in the ODLS?

The ODLS does not provide location information about everyone in ICE custody. Safety, security, and agency discretion prevent some

individuals from appearing in the ODLS. For example, juveniles (detainees under the age of 18) do not appear in the system. Also, some individuals may not be entered into the ODLS immediately after they are detained, depending on processing and upload time.

## I have found who I am looking for. Now what do I do?

If you have found the detainee you are looking for, you should contact the facility using the information provided to confirm the detainee is there since the information in the ODLS could be up to 8 hours old.

If you decide to visit the detainee, you should contact the detention facility ahead of time in order to confirm their visiting hours and rules. You will also need to bring government-issued photo identification if you visit the facility.

## I still have more questions. Where should I go?

There are more frequently-asked questions (FAQs) on the ODLS website: <http://www.ice.gov/locator>.



06/2010



How Do I Locate Someone in Immigration Detention?

# Online Detainee Locator System

[www.ice.gov/locator](http://www.ice.gov/locator)



## What is the Online Detainee Locator System?

The Online Detainee Locator System (ODLS) is a public system available on the Internet that allows family members, legal representatives, and members of the public, to locate immigration detainees who are in ICE detention. To use the ODLS, please visit <http://www.ice.gov/locator>.

Previously, the only way to determine a detainee's location was by contacting an ICE Office of Detention and Removal Operations (DRO) office. As part of detention reform, ICE has deployed the ODLS so that family members and attorneys can locate detainees more easily online, 24 hours a day, seven days a week. The system is also available in Spanish, with more languages to come.

The screenshot shows the U.S. Immigration and Customs Enforcement website's Online Detainee Locator System. It features a search interface with two main sections: "Search by A-Number" and "Search by Biographical Information".

**Search by A-Number:** This section includes a text input field for the A-Number (with a note that it should be nine digits long, e.g., 012345678), a dropdown menu for "Country of Birth", and "Search" and "Clear" buttons.

**Search by Biographical Information:** This section includes input fields for "First Name" and "Last Name", a dropdown menu for "Country of Birth", and a date selector for "Date of Birth" (Month, Day, Year). It also has "Search" and "Clear" buttons.

Additional elements include a "Quick Links" sidebar with links like "About the Detainee Locator / FAQ", "ICE DRO Field Offices", and "ICE Detention Facilities". A "Helpful Info" section explains the system's purpose and limitations, such as not searching for records of persons under the age of 18.

## How does a family member or an attorney conduct a search to find an immigration detainee?

You can search the ODLS in two ways:

### 1. By Alien Registration Number (A-Number) and country of birth.

The best way to search the system is by using the detainee's A-Number and country of birth. The A-Number is the nine-digit identification number that is assigned to a person who applies for immigration benefits or is subject to immigration enforcement proceedings. The nine-digit A-Number may begin with zeros. A-Numbers are unique and are assigned one per person. The A-Number can be found in the top right corner of the Notice to Appear (NTA), Form I-862. Along with the A number, you need to input the detainee's country of birth, or

### 2. By last name, first name, and country of birth.

If you do not have the detainee's A-Number, you can search the system using a detainee's first and last name and country of birth. If you are unsuccessful in your search, consider entering variations of the detainee's name.

The screenshot shows the search results page of the U.S. Immigration and Customs Enforcement website. It displays a table of search results with the following columns: Name, Country of Birth, Year of Birth, Status, Current Detention Facility, and State.

Name	Country of Birth	Year of Birth	Status	Current Detention Facility	State
1. CARLOS H HELU	Mexico	1980	<a href="#">Not In Custody</a>		AZ
2. CARLOS VICTOR HELU	Mexico	1952	In Custody	<a href="#">FLORENCE SPC</a>	AZ
3. CARLOS HELU	Mexico	1976	In Custody	<a href="#">FLORENCE SPC</a>	AZ
4. CARLOS HELU	Mexico	1965	In Custody	<a href="#">BERGEN COUNTY JAIL</a>	NJ
5. CARLOS HELU	Mexico	1970	In Custody	<a href="#">POLK CO JAIL</a>	OR
6. CARLOS HELU	Mexico	1954	In Custody	<a href="#">BEDFORD COUNTY JAIL</a>	PA
7. CARLOS HELU	Mexico	1965	In Custody	<a href="#">LACKAWANA CNTY JAIL_PA</a>	PA
8. CARLOS HELU	Mexico	1956	In Custody	<a href="#">PORT ISABEL SPC</a>	TX
9. CARLOS HELU	Mexico	1976	In Custody	<a href="#">POLK COUNTY JAIL</a>	TX

## Do I have to know exactly how to spell a detainee's name?

Yes. The ODLS performs an exact-match search. This means that in order to find a detainee, you must enter the person's exact A-Number or their first and last name as it appears on his or her detention record. If you accidentally type an individual's information incorrectly, the system may not give you the correct result.

For example, a search for "Robert Smith" will not return a detention record for "Robert Smyth" or "Bob Smith."

When you search using an A-Number, only one record will appear in the results, because every person has a unique A-Number. However, when you search using a person's name, many records may appear in the results if a lot of detainees share the same name and country of birth. When many records appear, look for the detainee's year of birth, which will also be listed in the results, or search using the detainee's A-Number.

## What should I do if I still can't find anything after a search?

The ODLS only has information for detainees who are currently in ICE custody or who were released from ICE custody within the last 60 days. If you are unable to locate a detainee in the ODLS who is in ICE custody or was released from ICE custody within the last 60 days, please contact the appropriate ICE DRO field office. <http://www.ice.gov/about/dro/contact.htm> provides a list of the various DRO field offices and their contact information.



## ¿Qué significan las frases “Bajo custodia” y “Fuera de custodia”?

- **“Bajo custodia”** significa que la persona actualmente se encuentra en uno de los centros de detención del ICE. El ODLS proporcionará el nombre del centro de detención donde se encuentra el detenido, así como información para poder comunicarse con el centro o visitarlo. El ODLS también brindará la información de contacto de la oficina DRO responsable del caso del detenido.



- **“Fuera de custodia”** significa que la persona fue liberada de la custodia del ICE dentro de los últimos 60 días, y no se encuentra en uno de los centros de detención del ICE. Esto significa que el detenido quizá ya no se encuentra en los Estados Unidos, o tal vez ha sido liberado de la custodia del ICE.

## ¿Quiénes no aparecen en el ODLS?

EL ODLS no proporciona información acerca de la ubicación de todas las personas bajo custodia del ICE. Las

cuestiones de seguridad, protección y la discreción de la agencia evitan que algunas personas aparezcan en el ODLS. Por ejemplo, los menores de edad (detenidos menores de 18 años) no aparecen en el sistema. Además, algunas personas quizá no sean ingresadas al ODLS inmediatamente después de ser detenidas, dependiendo del tiempo de procesamiento y carga de los datos.

## He encontrado a la persona que busco, ¿qué debo hacer ahora?

Si encontró al detenido que buscaba, debe comunicarse con el centro utilizando la información proporcionada para confirmar que el detenido se encuentra allí, ya que la información en el ODLS podría tener una antigüedad de hasta 8 horas.

Si decide visitar al detenido, debe comunicarse con el centro de detención en forma anticipada para poder confirmar sus horarios y normas de visita. Para visitar el centro, también deberá llevar una identificación con fotografía emitida por el gobierno.

## Aún deseo realizar más preguntas. ¿Adónde debo dirigirme?

Puede acceder a más preguntas frecuentes (FAQs) en el sitio web de ODLS en <http://www.ice.gov/locator>.



¿Cómo localizo a alguien bajo detención migratoria?

# Sistema Localizador de Detenidos en Línea (Online Detainee Locator System)

[www.ice.gov/locator](http://www.ice.gov/locator)

## ¿Qué es el Sistema Localizador de Detenidos en Línea?

El Sistema Localizador de Detenidos en Línea (ODLS, por sus siglas en inglés) es un sistema público disponible en Internet que permite que los familiares, representantes legales y miembros del público en general puedan localizar a personas bajo detención migratoria que han sido arrestadas por el ICE. Para utilizar el sistema ODLS, sírvase visitar el sitio <http://www.ice.gov/locator>.

Anteriormente, la única forma de determinar la ubicación de un detenido consistía en comunicarse con una Oficina de Operaciones de Detención y Deportación (DRO) del ICE. Como parte de la reforma del sistema de detenciones, el ICE ha implementado el ODLS para que los familiares y abogados puedan localizar a los detenidos con mayor facilidad en línea, durante las 24 horas del día, los siete días de la semana. El sistema también está disponible en español, y pronto se ofrecerá en más idiomas.

## ¿Cómo puede un familiar o abogado buscar a una persona bajo detención migratoria?

Usted puede realizar una búsqueda en el ODLS mediante dos formas:

### 1. Por Número de Registro de Extranjero (A-Number) y país de nacimiento.

La mejor manera de realizar una búsqueda en el sistema es utilizar el “A-Number” y el país de nacimiento del detenido. El “A-Number” es el número de identificación de nueve dígitos que se asigna a una persona que solicita beneficios de inmigración o que está sujeta a procedimientos de control migratorio. El “A-Number” de nueve dígitos puede comenzar con ceros. Los “A-Numbers” son únicos, y sólo se asigna uno por persona. El “A-Number” se halla en el extremo superior derecho de la Notificación de Comparecencia (NTA), el Formulario I-862. Junto con el “A-Number”, usted debe ingresar el país de nacimiento del detenido, o

2. Por apellido, nombre de pila y país de nacimiento. Si no cuenta con el “A-Number”, puede realizar una búsqueda en el sistema utilizando el nombre de pila, el apellido y el país de nacimiento del detenido. Si no tiene éxito en su búsqueda, trate de ingresar variaciones del nombre del detenido.

Name	Country of Birth	Year of Birth	Status	Current Detention Facility	State
1. CARLOS H HELU	Mexico	1980	<a href="#">Not in Custody</a>		AZ
2. CARLOS VICTOR HELU	Mexico	1952	In Custody	<a href="#">FLORENCE SPC</a>	AZ
3. CARLOS HELU	Mexico	1976	In Custody	<a href="#">FLORENCE SPC</a>	AZ
4. CARLOS HELU	Mexico	1965	In Custody	<a href="#">BERGEN COUNTY JAIL</a>	NJ
5. CARLOS HELU	Mexico	1970	In Custody	<a href="#">POLK CO JAIL</a>	OR
6. CARLOS HELU	Mexico	1954	In Custody	<a href="#">BEDFORD COUNTY JAIL</a>	PA
7. CARLOS HELU	Mexico	1965	In Custody	<a href="#">LACKAWANA CITY JAIL</a>	PA

## ¿Debo saber exactamente cómo se escribe el nombre de un detenido?

Sí. El ODLS realiza una búsqueda exacta. Esto significa que para poder encontrar a un detenido, usted debe ingresar el “A-Number” exacto de la persona, o su nombre de pila y apellido tal como aparecen en su registro de detención. Si escribe la información de una persona de forma incorrecta accidentalmente, el sistema quizá no le proporcione el resultado correcto.

Por ejemplo, la búsqueda con el nombre “Robert Smith” no le permitirá acceder a un registro de detención bajo el nombre “Robert Smyth” o “Bob Smith.”

Al realizar una búsqueda utilizando un “A-Number”, aparecerá sólo un registro en los resultados, ya que cada persona posee un único “A-Number”. No obstante, cuando la búsqueda se realice usando el nombre de una persona, pueden aparecer varios registros entre los resultados, si es que existen varios detenidos con el mismo nombre y país de nacimiento. Cuando aparezcan muchos registros, busque el año de nacimiento del detenido, que también aparecerá entre los resultados, o realice la búsqueda utilizando el “A-Number” de la persona.

## ¿Qué debería hacer si aún no obtengo resultados luego de una búsqueda?

El ODLS sólo posee información de detenidos que actualmente se encuentran bajo la custodia del ICE, o que fueron liberados de la custodia del ICE dentro de los últimos 60 días. Si no puede localizar en el ODLS a un detenido que se encuentra bajo la custodia del ICE o que fue liberado de la custodia del ICE dentro de los últimos 60 días, sírvase comunicarse con la oficina DRO local del ICE que resulte apropiada. El sitio <http://www.ice.gov/about/dro/contact.htm> proporciona una lista de las diversas oficinas DRO locales, así como su información de contacto.



# **New York State Defenders Association, Inc.**

## ***Public Defense Backup Center***

194 Washington Ave. • Suite 500 • Albany, NY 12210-2314

Telephone (518) 465-3524

Fax (518) 465-3249

www.nysda.org

May , 2011

**BY FACSIMILE** (914) 347-6240

Attention: Kevin M. Cherverko, Acting Commissioner  
Westchester County of Correction  
P.O. Box 389,  
Headquarters Building  
10 County Road 300  
Valhalla, NY 10595-1529

Re: Immigration Detainer Issued Against  
[NAME OF CLIENT], DOB: [CLIENT'S DATE OF BIRTH]

Dear Acting Commissioner Cherverko:

We are contacting you on behalf of [NAME OF CLIENT] who we understand is presently being detained by the Westchester County Department of Correction on an "immigration detainer." We have been asked by [NAME OF CLIENT] to address his continued detention at the Westchester County Jail. Specifically, it is our understanding that [NAME OF CLIENT] completed his sentence of time served more than 48 hours ago. However, the jail continues to detain [NAME OF CLIENT] to await his transfer to immigration custody.

We wish to advise you that, pursuant to 8 C.F.R. 287.7, the Westchester County of Correction is not authorized to continue to detain [NAME OF CLIENT]'s custody for more than 48 hours after the criminal sentence is completed. Detaining [NAME OF CLIENT] beyond the authorized 48-hour period is considered unlawful and may result in liability against the facility unless a judicial warrant has been executed for [NAME OF CLIENT]'s arrest. We attach a copy of 8 C.F.R. 287.7 for your review.

We respectfully request that [NAME OF CLIENT] be immediately released from the facility's custody since 48 hours have passed from the completion of his criminal sentence and immigration authorities have not yet secured his release for transfer to immigration custody.

Should you have any questions, please do not hesitate to contact me immediately at [INSERT ATTORNEY CONTACT INFORMATION].

Thank you for your consideration in this matter.

Sincerely,  
[NAME OF ATTORNEY]  
Attachment

**APPENDIX H**

**§ 287.7**

**8 CFR Ch. I (1–1–05 Edition)**

the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server;

- (ii) Administrative documents;
- (iii) Notarial acts; and

(iv) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

(4) In accordance with the Convention, the following are deemed not to be public documents, and thus are subject to the more stringent requirements of § 287.6(b) above:

(i) Documents executed by diplomatic or consular agents; and

(ii) Administrative documents dealing directly with commercial or customs operations.

(d) *Canada*. In any proceedings under this chapter, an official record or entry therein, issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy.

[50 FR 37834, Sept. 18, 1985, as amended at 54 FR 39337, Sept. 26, 1989; 54 FR 48851, Nov. 28, 1989]

**§ 287.7 Detainer provisions under section 287(d)(3) of the Act.**

(a) *Detainers in general*. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical

custody is either impracticable or impossible.

(b) *Authority to issue detainers*. The following officers are authorized to issue detainers:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the BCIS.

(c) *Availability of records*. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) *Temporary detention at Department request*. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) *Financial responsibility for detention*. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on

the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

[68 FR 35279, June 13, 2003]

**§ 287.8 Standards for enforcement activities.**

The following standards for enforcement activities contained in this section must be adhered to by every immigration officer involved in enforcement activities. Any violation of this section shall be reported to the Office of the Inspector General or such other entity as may be provided for in 8 CFR 287.10.

(a) *Use of force*—(1) *Non-deadly force.* (i) Non-deadly force is any use of force other than that which is considered deadly force as defined in paragraph (a)(2) of this section.

(ii) Non-deadly force may be used only when a designated immigration officer, as listed in paragraph (a)(1)(iv) of this section, has reasonable grounds to believe that such force is necessary.

(iii) A designated immigration officer shall always use the minimum non-deadly force necessary to accomplish the officer's mission and shall escalate to a higher level of non-deadly force only when such higher level of force is warranted by the actions, apparent intentions, and apparent capabilities of the suspect, prisoner, or assailant.

(iv) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to use non-deadly force should circumstances warrant it:

- (A) Border patrol agents, including aircraft pilots;
- (B) Special agents;
- (C) Deportation officers;
- (D) Detention enforcement officers or immigration enforcement agents;
- (E) Immigration inspectors;
- (F) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;
- (G) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(H) Immigration officers who need the authority to use non-deadly force under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary for ICE.

(2) *Deadly force.* (i) Deadly force is any use of force that is likely to cause death or serious physical injury.

(ii) Deadly force may be used only when a designated immigration officer, as listed in paragraph (a)(2)(iii) of this section, has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury.

(iii) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to use deadly force should circumstances warrant it:

- (A) Border patrol agents, including aircraft pilots;
- (B) Special agents;
- (C) Deportation officers;
- (D) Detention enforcement officers or immigration enforcement agents;
- (E) Immigration inspectors;
- (F) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;
- (G) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
- (H) Immigration officers who need the authority to use deadly force under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary for ICE.

(b) *Interrogation and detention not amounting to arrest.* (1) Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain



# G-28, Notice of Entry of Appearance as Attorney or Accredited Representative

Department of Homeland Security

## Instructions

### What Is the Purpose of This Form?

An attorney or accredited representative appearing before the Department of Homeland Security (DHS) must file Form G-28 in each case. Form G-28 must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation for the appearance to be recognized by U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). Under 8 CFR 103.2(a)(3), a beneficiary of a petition is not a recognized party in a proceeding before USCIS. Form G-28 will be recognized by USCIS, CBP, or ICE until the conclusion of the matter for which it was entered. This does not change the requirement that a new Form G-28 must be filed with the Administrative Appeals Office when filing an appeal to that office on Form I-290B, Notice of Appeal or Motion.

### Who May Use This Form?

#### Appearances for Immigration Matters

This form is used only by attorneys and accredited representatives (as defined in 8 CFR 1.1(f) and 292.1(a)(4)).

Attorneys admitted to the practice of law in countries other than the United States must use Form G-28I and may only represent individuals in matters filed in DHS offices outside the geographical confines of the United States.

An attorney or accredited representative who seeks to withdraw his or her appearance in a proceeding before DHS must file a written request with the DHS office with jurisdiction over the pending matter. An attorney or accredited representative who seeks to be recognized by DHS as the new representative for an applicant, petitioner, or respondent must file a properly completed Form G-28 with the DHS office with jurisdiction over the pending matter. An attorney or accredited representative who is appearing for a limited purpose at the request of the attorney or accredited representative of record must file a properly completed Form G-28 as noted on the form.

When a person acts in a representative capacity, his or her personal appearance or signature shall constitute a representation under the provisions of 8 CFR 103.2(a)(3) and 292.1(a)(1) or 292.1(a)(4) that he or she is authorized and qualified to represent the individual. Further proof of authority to act in a representative capacity may be required.

### General Instructions

#### Part 1. Notice of Appearance as Attorney or Accredited Representative

- A. Check one block to indicate the DHS agency where the matter is filed. If it is USCIS, list the form number(s) filed with Form G-28. If it is CBP or ICE, list the specific matter in which the appearance is entered.
- B. Fill in all information. The mailing address of the applicant, petitioner, or respondent is required in this part of the form, except when filed under the Violence Against Women Act (VAWA). The applicant, petitioner, or respondent must sign the form, preferably in dark blue or black ink.

#### Part 2. Information about Attorney or Accredited Representative

- A. Attorneys admitted to practice in the United States, as defined in 8 CFR 1.1(f):

Check the box and fill in required information regarding the State bar(s) of admission. If you are subject to any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting you in the practice of law, you must disclose this information on Form G-28. Attorneys are required to notify DHS of convictions or discipline pursuant to 8 CFR 292.3.

- B.** Accredited representatives of recognized organizations, as defined in 8 CFR 292.1(a)(4):

Check the box and fill in the name of the organization recognized by the Board of Immigration Appeals (BIA) under 8 CFR 292.2 and provide the expiration date of your accreditation.

- C.** Attorneys or accredited representatives associated with the attorney or accredited representative with Form G-28 previously filed in this matter:

Check the box and fill in the name of the attorney or accredited representative who has previously filed Form G-28 in this matter. A new Form G-28 must be filed by each attorney associated with that attorney or accredited representative.

You must also check Box A or B and provide the required information.

**Part 3. Name and Signature of Attorney or Accredited Representative**

Fill in all information and sign the form, preferably in dark blue or black ink.

**Warning**

Individuals appearing as attorneys or accredited representatives are subject to the rules of Professional Conduct for Practitioners found in 8 CFR 292.3.

**Freedom of Information/Privacy Act**

This form may not be used to request records under the Freedom of Information Act or the Privacy Act 5 USC 552 & 552a. The procedures for requesting such records are contained in 6 CFR 5.

**Paperwork Reduction Act**

An agency may not conduct or sponsor an information collection, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 20 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Products Division, 111 Massachusetts Avenue, NW, 3rd Floor, Suite 3008, Washington, DC 20529-2210, OMB No. 1615-0105. **Do not mail your application to this address.**

## G-28, Notice of Entry of Appearance as Attorney or Accredited Representative

Department of Homeland Security

### Part 1. Notice of Appearance as Attorney or Accredited Representative

**A. This appearance is in regard to immigration matters before:**

- USCIS - List the form number(s): \_\_\_\_\_  CBP - List the specific matter in which appearance is entered: \_\_\_\_\_
- ICE - List the specific matter in which appearance is entered: \_\_\_\_\_

**B. I hereby enter my appearance as attorney or accredited representative at the request of:**

List Petitioner, Applicant, or Respondent. **NOTE:** Provide the mailing address of Petitioner, Applicant, or Respondent being represented, and not the address of the attorney or accredited representative, except when filed under VAWA.

<b>Principal Petitioner, Applicant, or Respondent</b>			A Number or Receipt Number, if any	<input type="checkbox"/> Petitioner	
Name: Last	First	Middle		<input type="checkbox"/> Applicant	
				<input type="checkbox"/> Respondent	
Address: Street Number and Street Name		Apt. No.	City	State	Zip Code

Pursuant to the Privacy Act of 1974 and DHS policy, I hereby consent to the disclosure to the named Attorney or Accredited Representative of any record pertaining to me that appears in any system of records of USCIS, USCBP, or USICE.

Signature of Petitioner, Applicant, or Respondent Date

### Part 2. Information about Attorney or Accredited Representative *(Check applicable items(s) below)*

- A.  I am an attorney and a member in good standing of the bar of the highest court(s) of the following State(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia: \_\_\_\_\_  
 I am not  or  am subject to any order of any court or administrative agency disbaring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law (If you are subject to any order(s), explain fully on reverse side).
- B.  I am an accredited representative of the following qualified non-profit religious, charitable, social service, or similar organization established in the United States, so recognized by the Department of Justice, Board of Immigration Appeals pursuant to 8 CFR 1292.2. Provide name of organization and expiration date of accreditation: \_\_\_\_\_
- C.  I am associated with \_\_\_\_\_  
 The attorney or accredited representative of record previously filed Form G-28 in this case, and my appearance as an attorney or accredited representative is at his or her request *(If you check this item, also complete item A or B above in Part 2, whichever is appropriate).*

### Part 3. Name and Signature of Attorney or Accredited Representative

**I have read and understand the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation before the Department of Homeland Security. I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct.**

Name of Attorney or Accredited Representative	Attorney Bar Number(s), if any
Signature of Attorney or Accredited Representative	Date

Complete Address of Attorney or Organization of Accredited Representative (Street Number and Street Name, Suite No., City, State, Zip Code)

Phone Number <i>(Include area code)</i>	Fax Number, if any <i>(Include area code)</i>	E-Mail Address, if any
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