

General Immigration Issues

Speakers:

Sharon L. Ames, Esq. & Robert R. Reittinger, Esq.
*Directors, Regional Immigration Assistant Center, Region #2
Rome, NY*

Sponsored by the:
Oneida County Bar Association
In Cooperation with
Oneida County Public Defender, Criminal Division
Oneida County Supplemental Assigned Counsel Program
New York State Defenders Association, Inc.
New York State Office of Indigent Legal Service

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

Saturday, October 22, 2016
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Avenue
Utica, NY
IT Building, Room 225

MCLE Credits: 2 Professional Practice and 1 Ethics



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AND



SIGN IN

SPEAKERS

Sharon L. Ames is the Director, Immigration of the Region #2, Regional Immigration Assistance Center (RIAC) in Rome, New York. She had her own solo law practice in Syracuse since 1984, where she practiced in the areas of criminal defense both in private practice and as an Assistant Public Defender in Cortland County; and in family law, both as assigned counsel and as a Law Guardian. Since 1999, she has practiced exclusively in Immigration law. She earned her B.A. degree from St. Lawrence University and her J.D. from Syracuse University College of Law. Sharon is fluent in Spanish.

Robert R. Reittinger is the Director, Criminal of the newly created Region #2, Regional Immigration Assistance Center in Rome, New York. Robert is a graduate of St. Thomas University School of Law, Miami Florida, where he received his Juris Doctorate and Master of Laws. Robert began his legal career working as an intern and assistant public defender for the Broward County Public Defender's Office. Upon returning to New York State Robert began his private practice focusing on criminal law. Robert was appointed Assistant County Attorney for the County of Oneida Department of Law as Kendra's Law attorney and as lead family court attorney. Robert has also worked as first assistant Oneida County Public Defender, Criminal Division as DWI defense counsel, First Assistant Appellate Counsel and Chief Appellate Counsel.

AGENDA

Saturday, October 22, 2016

*REGISTRATION: 8:30 a.m. – 9:00 a.m.
IT Building Room 225*

9:00 a.m. – 10:30 a.m. **“An Overview of the Immigration Process and Available Defenses”**

*Sharon L Ames, Esq., Director, Immigration
Region #2, Regional Immigration Assistance Center*

10:30 a.m. – 10:40 a.m. **BREAK**

10:40 a.m. – 12:00 p.m. **“CRIMMIGRATION: A Basic Criminal Immigration Overview in Criminal Court”**

*Robert R. Reittinger, Esq., Director, Criminal
Region #2, Regional Immigration Assistance Center*

**MCLE Credits: 3
2 Professional Practice and 1 Ethics**

Immigration Practice “A to Z”

An Overview of the Immigration Process and Available Defenses

Sharon L. Ames, Esq.

Director, Immigration

Region #2, Regional Immigration Assistance Center

General Immigration Issues

Mohawk Valley Community College

IT Building 225

Saturday, October 22, 2016



IMMIGRATION PRACTICE “A TO Z”

**An Overview of the
Immigration Process and
Available Defenses**

1



“ADMISSION” TO THE UNITED STATES

2

FAMILY

EMPLOYMENT

HUMANITARIAN



3

Key Terms:

“IMMIGRANT” : Anyone who is entering the U.S. to stay here *permanently*.

“NONIMMIGRANT”: Anyone who is Entering the U.S. for a *temporary* stay.

4

**Why is it important to specify?
Isn't everybody who is not a
U.S. citizen an "immigrant"?**

These are "terms of art" in immigration law.

Eligibility for many visas is determined by a person's "intent" as to why they are seeking admission to the United States.

5

"Immigrant" intent means the person is intending to stay here permanently after they enter.

"Nonimmigrant" intent means the person is only intending to stay here for a certain length of time, depending on the reason for travel and the type of visa.

6

Immigrants

- Lawful Permanent Residents (green card)
- Conditional Permanent Residents (2 year green card)
- Those with immigrant visas
- Asylees
- Refugees

Nonimmigrants

- Visitors (tourists, temporary business visitors) (B-1/B-2)
- Students(F-1)
- Agricultural and other temporary workers (H-1A, H-2B)
- Exchange students (J-1)
- Skilled workers(H-1B)

7

“Dual intent” visa: H-1B

Although a nonimmigrant status, “immigrant intent” permitted because H-1B status often leads to employment-based permanent residence.

“Hybrid” visa: K-1 fiance(e)

Technically a nonimmigrant visa classification, but treated as an immigrant visa because the person is coming to marry USC and stay in the U.S. permanently.

8

Family-based immigration: Immediate Relatives

- Spouse of a USC
- Child under 21 whose parent is a USC
“Child” includes stepchild* and adopted child**

*Marriage creating stepparent relationship must occur prior to stepchild’s 18th birthday

** Adoption must be finalized prior to adopted child’s 16th birthday

- Parent of a Child over 21 who is a USC

9

FAMILY-BASED IMMIGRATION STATUS

FIRST (1 ST) FAMILY-BASED PREFERENCE	Unmarried Son or Daughter of USC	INA §203(a)(1)
SECOND (2 ND) FAMILY-BASED PREFERENCE	LPR Spouse and “Child” & Unmarried Son or Daughter	INA § 203(a)(2)
SECOND (2A) FAMILY-BASED PREFERENCE	Spouse and “Child” of LPR	INA § 203(a)(2)(A)
SECOND (2B) FAMILY-BASED PREFERENCE	Unmarried Son & Daughter of LPR	INA § 203(a)(2)(B)
THIRD (3 RD) FAMILY-BASED PREFERENCE	Married Son & Daughter of USC	INA § 203(a)(3)
FOURTH (4 TH) FAMILY-BASED PREFERENCE	Brother or Sister of USC (USC sibling must be 21 yrs old +)	INA § 203(a)(4)

10

State Department Visa Bulletin November 2016

Family-Sponsored
All Chargeability Areas
Except Those Listed

		CHINA (mainland)	INDIA	MEXICO	PHILIPPINES
■ F1	22OCT09	22OCT09	22OCT09	08APR95	01SEP05
■ F2A	22JAN15	22JAN15	22JAN15	08JAN15	22JAN15
■ F2B	15APR10	15APR10	15APR10	08OCT95	15FEB06
■ F3	22JAN05	22JAN05	22JAN05	01DEC94	08AUG94
■ F4	01DEC03	01AUG03	15FEB03	08MAY97	08MAY93

Above dates = the "Receipt Date" of the filed Form I-130, Petition for Alien Relative

<https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-november-2016.html>

11

EMPLOYMENT-BASED IMMIGRANT VISAS

1 st Priority Worker	(a) Aliens w/Extraordinary ability (b) Outstanding Profs & Researchers (c) Multinational Execs & Managers	INA § 203(b)
*2 nd Advanced Degree & Exceptional Ability Foreign Nationals	(a) Aliens with Advanced Degrees (b) Aliens with Exceptional Ability (Note: * National Interest Waiver)	INA §203(b)(2)
3 rd Skilled Workers, Professionals and Unskilled Workers	(a) Skilled Workers (b) Professionals (c) Unskilled Workers	INA §203(b)(3)
4 th Special Immigrant (defined in INA §101(a)(27)(C) –(M))	Includes reacquisition of citizenship and returning residents; religious workers; court-protected juveniles; and US Consulate employees in Hong Kong	INA §203(b)(4)
5 th Investors (2 yr conditional LPR status)	Invest \$ 1 million+ (or \$500,000+ in target rural & high unemployment areas) in new or existing business and create 10+ jobs for USC's	INA §203(b)(5)

12

State Department Visa Bulletin November 2016

<https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-november2016.html>

Employment based

All Chargeability Areas Except Those Listed		CHINA (mainland born)	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	15JUL12 C	01NOV07	C	C	C
3rd	01JUL16	15APR13	01JUL16	08MAR05	01JUL16	01APR11
Other	01JUL16	01SEP05	01JUL16	08MAR05	01JUL16	01APR11
4th	C	C	15JUL15	C	C	C
Rel.Wkrs	C	C	15JUL15	C	C	C
5 th (C5,T5)	C	08MAR14	C	C	C	C
5 th (I5, R5)	C	08MAR14	C	C	C	C

- Above dates = the "Receipt Date" of the filed Form I-140, Petition for Alien Relative
- "C" = current (i.e., no backlog exists for visa to be issued)

13

DIVERSITY IMMIGRANT VISA - LOTTERY

= random lottery selects the beneficiaries INA § 203(e)(2)

- 1 APPLICATION PER YR; and
- HIGH SCHOOL OR EQUIVALENT;
- or
- 2 YRS EMPLOYMENT EXPERIENCE IN A JOB REQUIRING MIN. 2 YRS TRAINING OR EXPERIENCE WITHIN PRECEDING 5 YRS OF APPLICATION

- **Ineligible:** Citizens from BRAZIL, CANADA, CHINA (mainland-born), COLOMBIA, DOMINICAN REPUBLIC, ECUADOR, EL SALVADOR, GUATEMALA, HAITI, INDIA, JAMAICA, MEXICO, PAKISTAN, PERU, PHILIPPINES, POLAND, SOUTH KOREA, UNITED KINGDOM (except Northern Ireland) and its dependent territories, and VIETNAM.

http://travel.state.gov/visa/immigrants/types/types_1318.html

14

IMMIGRANT VISA THROUGH REFUGEE AND ASYLUM STATUS

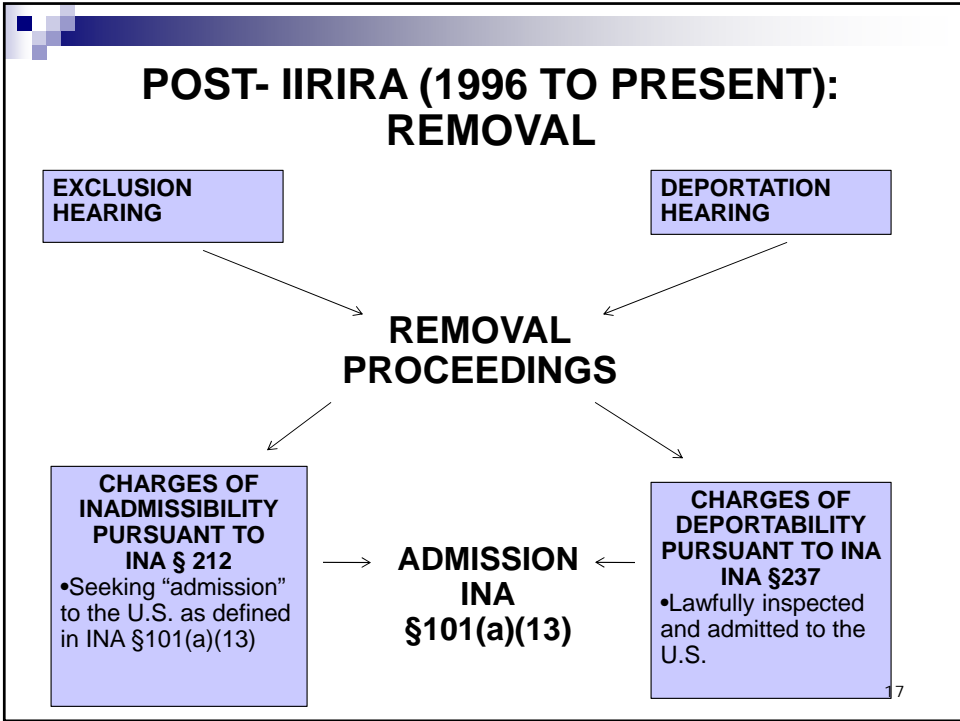
If client was:	Client may apply for permanent resident status:
Admitted to the US as: <ul style="list-style-type: none">• a refugee• a qualifying family member of an asylee	1 year after your entry into the United States
Granted Asylum in the United States	1 year after the grant of your asylum status

15

REMOVAL PROCEEDINGS

IMMIGRATION COURT REPRESENTATION

16



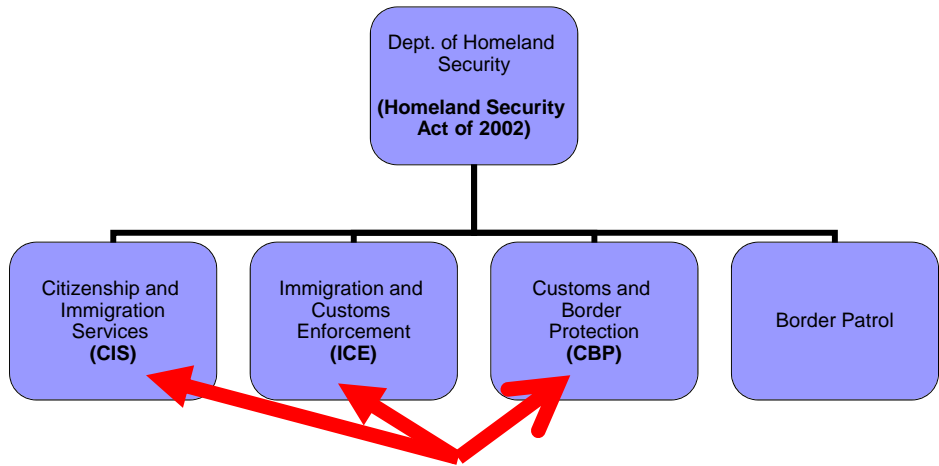
DEPORTABILITY vs. INA §237 INADMISSIBILITY INA §212

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)
LPR's ("Greencard Holder")	Refugees & Asylees, Undocumented, Non-LPRs
Nonimmigrants (ex. visitors, students, workers on valid status)	Returning LPR's (Green Card Holders) (i.e., even after brief departure from U.S.)
Visa "Overstayers" (ex. overstayed authorized period of stay in U.S.)	Nonimmigrants (i.e., persons seeking permission to visit, work or go to the school in the U.S.)

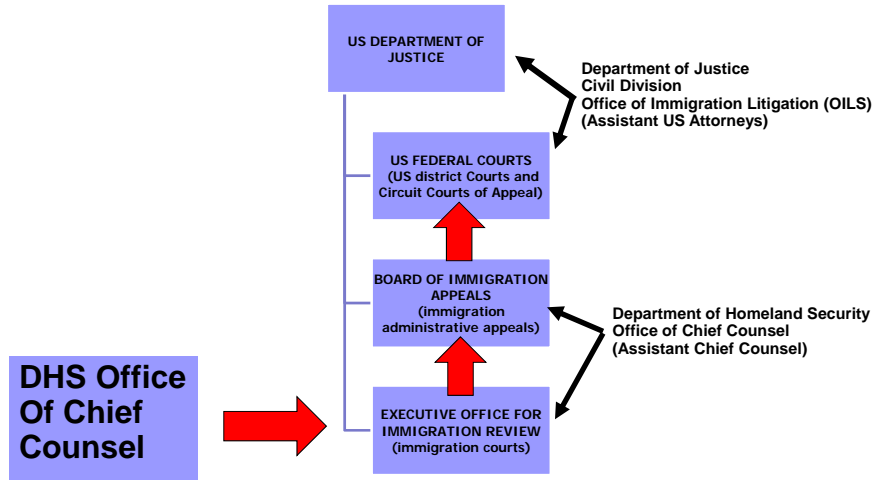
WHO CAN BE REMOVED?

- Lawful Permanent Resident** • Admitted to the U.S. as a green card holder
- Refugee or Asylee** • Granted refugee status outside of the U.S. or asylum status from within the U.S.
- Nonimmigrant** • Admitted to the U.S. on a temporary basis (i.e., to visit, attend school, work, etc.)
- Humanitarian Relief** • Granted temporary protection within the U.S. (i.e., TPS, DACA, T, U or S visa, etc.)
- Undocumented** • Entered the United States illegally (i.e., without being inspected and admitted)

WHO IS AUTHORIZED TO ISSUE AN IMMIGRATION DETAINER?



IMMIGRATION COURT SYSTEM



21

SAMPLE "NOTICE TO APPEAR"

ALLEGATIONS:

- 4.) You are not a citizen or national of the United States;
- 5.) You are a native of the Dominican Republic and a citizen of the Dominican Republic;
- 6.) You were admitted to the United States at Champlain, New York on July 15, 1983 as a legal permanent resident;
- 7.) You were, on October 29, 1990, convicted in the Supreme Court, of the State of New York, County of New York, for the offense of Criminal Sale of a Controlled Substance, in the 2nd degree, to wit, cocaine, in violation of section 220.41 of the New York State Penal Law.

CHARGE:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act.

Section 237(a)(2)(B)(1) of the Immigration and Nationality Act (Act), as amended, in that, at anytime after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. 8022]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

22

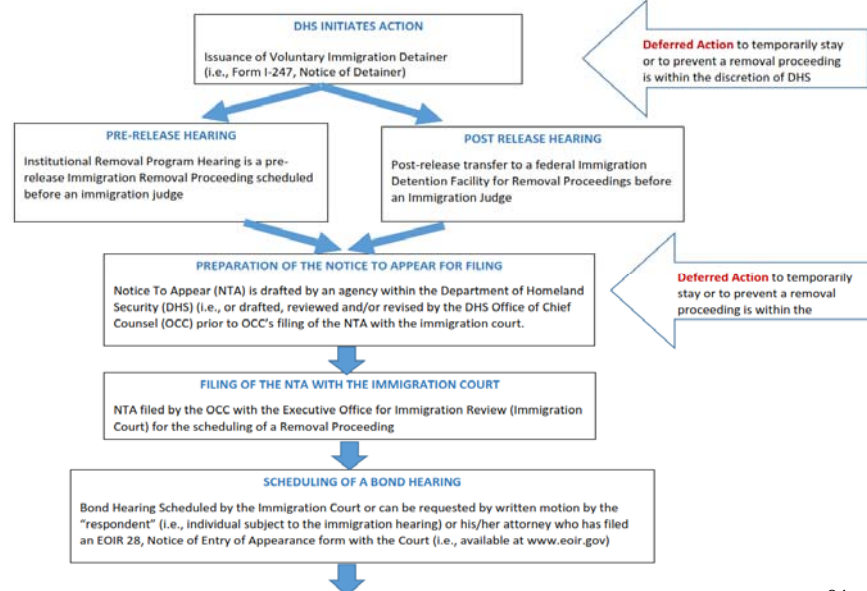
REMOVAL HEARING PROCEDURES

RIGHT TO COUNSEL:

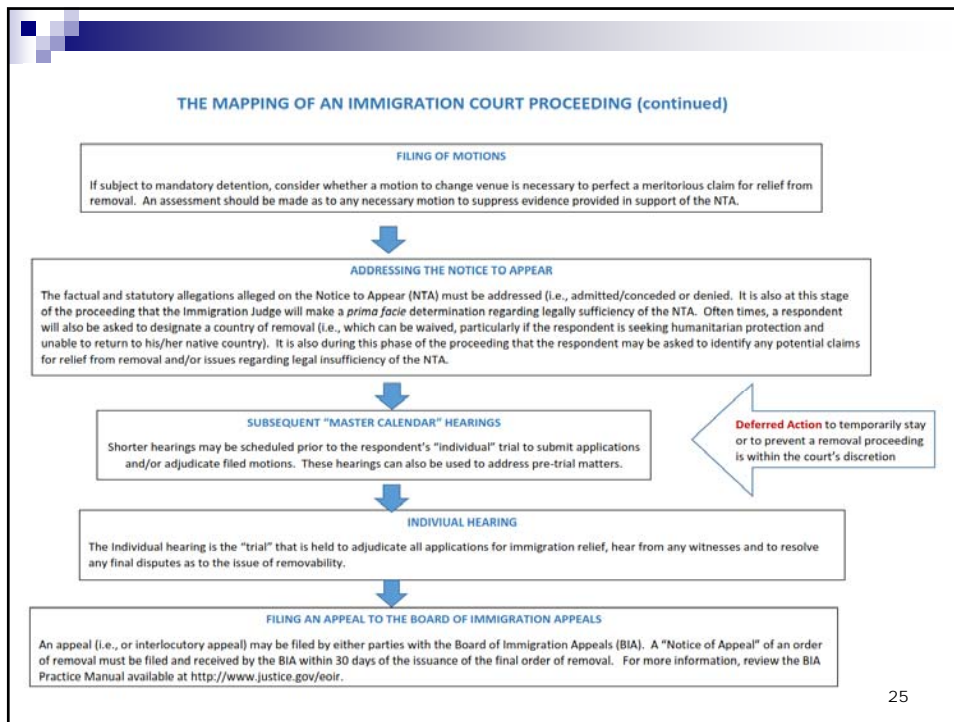
- Have the right to be represented by counsel at no expense to the Government by counsel of the alien's choosing who is authorized to practice in such proceedings (see INA §240(b)(4)(A)).
- If cannot afford legal counsel - must be informed of free legal services in the area (see 8 C.F.R. §240.10(a)(2)).

23

THE MAPPING OF AN IMMIGRATION COURT PROCEEDING



24



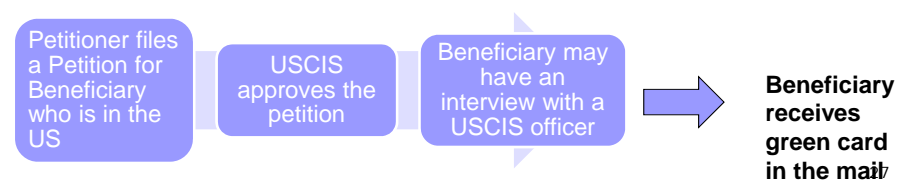
- ## COMMON FORMS OF RELIEF
- LPR cancellation
 - 212(h) waiver
 - Adjustment of status
 - Non-LPR cancellation
 - Asylum/ Refugee Adjustment
 - Withholding of Removal
 - UN Convention Against Torture Treaty
 - Temporary Protected Status (TPS)
 - Naturalization
 - Acquired or Derived Citizenship
 - VAWA
 - DV waiver for Victims
 - Special Immigrant Juvenile (SIJ) Status
 - T and U Visa
- 26

BECOMING A PERMANENT RESIDENT OF THE U.S.

Consular Processing:



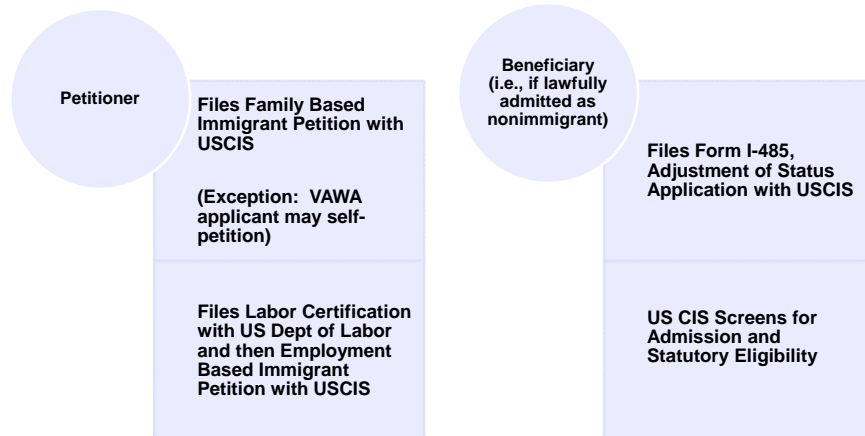
Adjustment of Status:



ADJUSTMENT OF STATUS

STEP ONE:
CAN THE CLIENT APPLY FOR A GREEN CARD?

OBTAINING IMMIGRANT VISA FROM WITHIN US See INA § 245



29

ADJUSTMENT OF STATUS INA § 245 (a), (c)

- Adjustment replaces visa processing abroad and provides for a form of immigration relief from removal
- **RULE:** INA §245(a) requires that applicant must be inspected and “admitted” or paroled INA 212(d)(5)(A)
– **“EWI” NOT ELIGIBLE TO ADJUST**
- Filing of Form I-485 when immigrant visa is immediately available

30

ADJUSTMENT OF STATUS

- **INA §245(i)**: covering persons who were in the United States on **December 21, 2000** who had a immigrant visa petition or labor certification filed for them by **ON OR BEFORE April 30, 2001**

(INA §245(i) IS NOW REPEALED)

31

INELIGIBLE FOR ADJUSTMENT OF STATUS

- Entered without Inspection (and outside of INA 245(i))
- Worked without authorization before filing (exception: immediate relative)
- Unlawful immigration status on the date of filing (exception: immediate relative)
- Failed to maintain continuously a lawful status since admission (exception: immediate relative)
- Terrorist deportable under INA §237(a)(4)(B)
- Admitted as alien crewman
- Admitted as “transit without a visa”
- Admitted under VWPP (exception: immediate relative)
- Admitted as an informant nonimmigrant INA §101(a)(15)(S)

32

ADJUSTMENT OF STATUS

STEP TWO:
IS THE CLIENT ELIGIBLE FOR A
GREEN CARD (i.e., admissible
pursuant to INA §212?)

33

HEALTH-RELATED GROUNDS

- Communicable Diseases INA §212(a)(1))

8 diseases are listed as communicable diseases of inadmissibility including:

- active TB
- AIDS (HIV removed by President Obama 11/3/2009)
- leprosy
- several venereal diseases (ex. syphilis)

Vaccination requirements and documentation

- Physical or mental disorder – threat to public safety
- Drug abuser or drug addict

WAIVERS: INA §212(g) waiver is available.

34

CRIMINAL GROUNDS
INA § 212(a)(2)

“CONVICTION”
or
“ADMISSION”

CIMT – petty offense exception

NO exception for Drug crimes

GROUND OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)
Conviction or <i>admitted commission</i> of a Controlled Substance Offense , 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 Crime Involving Moral Turpitude (CIMT) > Crimes in this category cover a broad range of crimes, including: <ul style="list-style-type: none"> ◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ◆ 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) ◆ Most sex offenses > <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
Prostitution and Commercialized Vice
Conviction of 2 or more offenses of any type + aggregate prison sentence of 5 years

35

SECURITY-RELATED GROUNDS

- **Security Related Grounds**
 - INA §212(a)(3)(C) clear negative for foreign policy impact associated with their admission
 - Secretary of State must have reasonable ground to believe alien's entry/proposed activities within the US would have **potentially serious adverse foreign policy consequences**
 - **Two Exceptions:**
 - **Political figure**
 - **Alien's past, current or expected beliefs, statements or associations**
 - INA §212(a)(3)(B) engaged in **terrorist activity** and those the consular officer had **reasonable ground to believe are likely to engage in** such activity after entry.

36

PUBLIC CHARGE or IMMIGRATION VIOLATOR

■ Public Charge

- § 212(a)(4)(A) - “likely at any time to become a public charge...”

■ Illegal Entrants and Immigration Violators

- ...present in the U.S. **without being admitted**** or **paroled** or
- **fails or refuses to attend removal proceeding**
- who seeks admission to the U.S. **within 5 years** of subsequent **departure** or removal is inadmissible
- **fraud** and **willful misrepresentation of material facts**

37

FALSE US CITIZEN CLAIM

■ FALSELY CLAIMING CITIZENSHIP – INA §212(a)(6)(C)(ii)

- Falsely representing to be a U.S. citizen for any purpose or benefit under the INA or under State or Federal Law.
- **EXCEPTION:** alien has U.S. citizen parent and resided in the U.S. prior to age 16 and “reasonably believed” at the time of making the representation that he/she was a citizen.

38

NO DOCUMENTATION OR VISA

- **DOCUMENTATION REQUIREMENTS – INA §212(a)(7)(A)(i)(I) and (II):**
- Not in possession of a valid unexpired visa, reentry permit, border crossing ID card, or other valid entry document and valid, unexpired passport or other travel document or document of identity and nationality
- or-
- Visa is issued without compliance to INA § 203 (i.e., immigrant visa preference categories)

39

UNLAWFUL PRESENCE INA §212(a)(9)

UNLAWFUL PRESENCE:

- INA §212(a)(9)(B) as of April 1997
 - 3 yr bar (for unlawful presence 6 mos to 1 yr)
 - 10 yr bar (for unlawful presence 1 yr or more)
- **(NOTE:** the 3- and 10-year bar only apply to those who depart the U.S. making adjustment of status favorable)
- **“UNLAWFUL PRESENCE”** includes EWI, overstay of authorized nonimmigrant status (See *INA §212(a)(9)(B)(ii)*)

WAIVER: INA §212(a)(9)(B)(v) waiver to 3- and 10-year bar is available.

40

INADMISSIBILITY: UNLAWFUL PRESENCE INA §212(a)(9)

“UNLAWFUL PRESENCE” defined as:

- **EWI or VISA OVERSTAY**
- **Exceptions:**
 - **Minors (ex. under 18 years of age)**
 - **Asylee applicant**
 - **Family unity pursuant to INA §301**
 - **Battered women and children**
 - **Victims of Severe Trafficking**
 - **Tolling for “good cause”**

41

INA §212(h) WAIVER

- **If a crime renders alien inadmissible, waiver is available for certain inadmissible offenses if**
- **Not a drug offense (except for one time simple possession of 30 gms of marijuana)**
- **not murder or torture**
- *** Alien is spouse, parent, son or daughter of USC or LPR and**
- *** Denial of alien’s admission would be an extreme hardship for relative**
- *** AG must consent**
- **-OR-**
- **Activities of inadmissibility occurred more than 15 years before the date of admission, visa application or adjustment of status and admission is not contrary to the national welfare, safety or security of the US. Applicant must show rehabilitation. (exception: 15 years not required to waive inadmissibility for prostitution).**

42

ADJUSTMENT OF STATUS

STEP THREE:
HOW DOES YOUR CLIENT
APPLY FOR A GREEN
CARD?

43

FILING APPLICATION FOR ADJUSTMENT OF STATUS

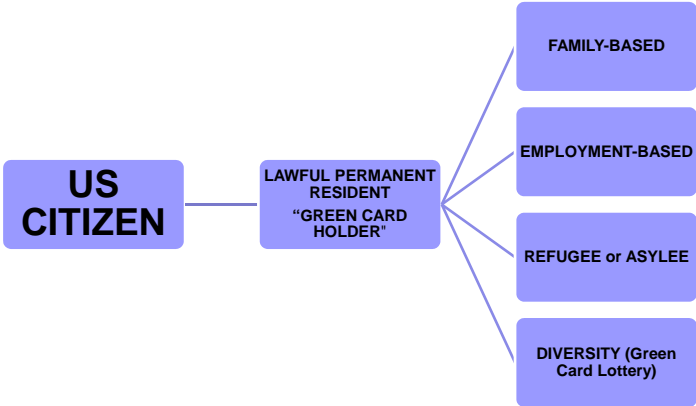
- Approval Notice I-130, Petition for Alien Relative
- File I-485, Application to Adjust Status
- File Affidavit of Support (i.e., Form I-864, Affidavit of Support)
- File supporting documentation (i.e., evidence of family, employment, diversity or refugee/asylee status)
- File I-601, Application for Waiver of Grounds of Inadmissibility with supporting evidence

WWW.USCIS.GOV

44

Becoming a U.S. Citizen

HOW TO BECOME A U.S. CITIZEN




HOW TO BECOME A U.S. CITIZEN

- must be Lawful Permanent Resident (LPR);
- must be a resident continuously for 5 years (or 3 years for LPR's from USC marriage) immediately preceding the date of filing the application;
- must have resided at least 3 months within the state in which petition is filed;
- must not be absent from the U.S. for a continuous period of more than 1 year during the periods for which continuous residence is required;
- must be a person of good moral character for the requisite 5 years (or 3 years for LPR spouse to a USC) (note: 8 USC § 1101(f) "good moral character");
- must be attached to the principles of the Constitution and be well disposed to the good order and happiness of the U.S.;
- must not be a subversive/member of the communist party/convicted deserter/an alien who has removal proceedings pending or an outstanding order of deportation/ or an alien who has received relief from the Selective Service System based on his alien age;
- must demonstrate an elementary level of reading, writing and understanding of the English language.

47

DERIVATIVE CITIZENSHIP: CHILD CITIZENSHIP ACT OF 2000

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

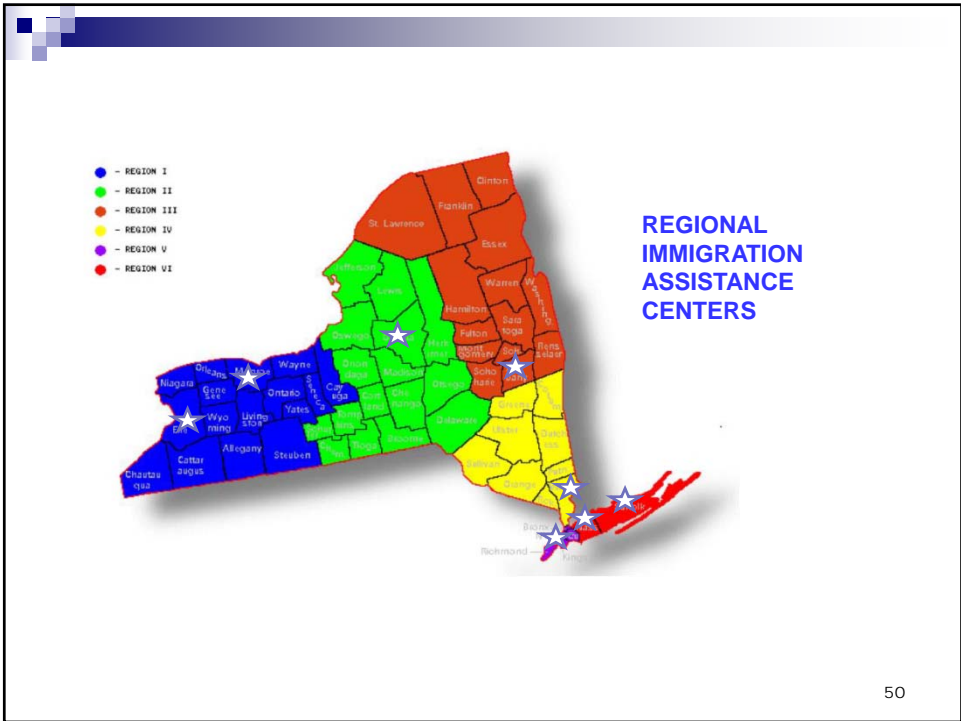
- child is UNDER 18 yrs of age and
- One parent is a U.S. citizen (i.e., biological or adoptive parent if adoption completed before child was 16 yrs of age) and
- The child is residing in the legal and physical custody of the U.S. citizen parent and
- The child was lawfully admitted to the U.S. as an immigrant (i.e., admitted for LPR status). 

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

48

WHERE TO GET HELP

Immigration Resources





**CNY REGIONAL IMMIGRATION
ASSISTANCE CENTER**

**Oneida County Courthouse
302 N. James Street
Rome 13440**

Sharon Ames, Esq.
sharon.ames@verizon.net

Bob Reitinger, Esq.
rreitinger@twcny.rr.com

51

CRIMMIGRATION
A Basic Criminal Immigration Overview in
Criminal Court

Robert R. Reitinger, Esq.
Director, Criminal
Region #2, Regional Immigration Assistance Center

General Immigration Issues
Mohawk Valley Community College
IT Building 225
Saturday, October 22, 2016

"CRIMMIGRATION" :

Basic Criminal Immigration Overview In Criminal Court

Robert R. Reitinger, Esq. Regional Immigration Assistance Center, Region 2 315.356.5794 1

- **Topic 1:** Non-Citizens v. Citizens
- **Topic 2:** Voluntariness of Pleas and Non-Citizen Defendants
- **Topic 3:** Role of the Courts
- **Topic 4:** Role of Defense Counsel
- **Topic 5:** Immigration Law and Criminal Convictions
- **Topic 6:** Best Practices

2

- Who are “U.S. citizens?”
 - Those who have applied through naturalization;
 - Those who have acquired citizenship automatically by operation of law;
 - Those who have derived citizenship through a parent or other qualifying relative.

3

- Who are NOT “U.S. Citizens?”
EVERYBODY ELSE! This includes:
 - Lawful Permanent Residents (green card holders)
 - Refugees and Asylees
 - Temporary visa holders (tourists, students, those with a work visa)
 - Those allowed to be present in the U.S. for humanitarian reasons:
 - e.g. Temporary Protected Status,
 - Special Immigrant Juveniles

4

- *Non-Citizens and the Consequences of Criminal Convictions*
- •Defendant's who are not U.S. citizens may be subject to deportation based upon any conviction, or admission to a crime (i.e followed by a penalty or punishment or restraint on liberty), this includes misdemeanors and violations.
- •This means that they will be permanently removed from the United States- regardless of how long they have resided in the United States or their family ties.

5

- **Pleas in Criminal Court**
- •**94 %** of state convictions are the result of guilty pleas.
- •Plea bargains are an essential component of the administration of justice.
- *Help the defendant to avoid greater consequences
- *Resolves cases in a way that benefits both parties
- *Conserves government resources to focus on more serious cases

6

- Voluntariness :
- Trial courts take certain measures to ensure that a plea is knowing, intelligent and voluntarily made by the defendant before it is accepted by the court.

7

- What makes a plea knowing, intelligent and voluntary?
- The court is expected to advise the defendant of the direct consequences of a plea. Direct consequences are:
 - *The rights that the defendant is surrendering by pleading guilty (right to trial, right to appeal)
 - *Terms that have a definite, immediate and largely automatic effect on defendant's punishment (jail time, fines, probation...)

8

- Shifting Standards
- Until 2013, immigration consequences were treated as a collateral consequence of a plea by New York Courts.
- However, in 2013, the Court of Appels found that due process requires advising defendants that immigration consequences can result from a plea. And that a plea cannot be voluntary if a defendant is not so advised (*People v. Peque* (22 N.Y.3d 168 [2013]))

9

- *People v. Peque*
- "Deportation is a plea consequence of such tremendous importance, grave import and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea."
- *Peque at 176*
- "Thus, a non-citizen defendant convicted of a removable crime can hardly make "a voluntary and intelligent choice among the alternative courses of action open to the defendant" unless the court informs the defendant that the defendant may be deported if he or she pleads guilty."
- *Peque at 193*

10

- • *Peque* did not address misdemeanor pleas.
- • But, the court held that where an immigration consequence will result from a conviction, a defendant must be made aware of this consequence in order to render a plea knowing intelligent and voluntary.
- But see *Peo. v. Marshall*, 2015 Slip Op 51932(U)[50 Misc 3d 131(A)], decided 12/31/2015, the County Court held that such warnings were required in the local courts.

11

What are the Courts' responsibilities in light of *Peque* ?

- • Due process compels a trial court to apprise **all defendants** in a straightforward statement on the record that if he is not a United States Citizen he or she may be deported as a result of this guilty plea.
- • This statement should be issued to all defendants in criminal proceedings.

12

- **New York Law: CPL Section 220.50(7)**
- Prior to accepting a defendant's plea of guilty to a felony offense, the court must advise the defendant on the record, that the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.

13

- **ABA Model Standards**
- Standard 14-1.4 Defendant to be advised:
- . . . (c) Before accepting a plea of guilty . . . , the court should also advise the defendant that by entering the plea, the defendant may face additional consequences. . . . (listing examples). . . . and, if the defendant is not a United States citizen, a change in the defendant's immigration status. **The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea. . . .**

ABA Standards for Criminal Justice, Pleas of Guilty 14-1.4(c).

14

- **The Court should not question defendants about their immigration status.**
- • Courts should not try to ascertain specific immigration status of each defendant appearing before them.
- • Defendant has 5th Amendment right to remain silent as to their immigration status
- • Defendant has a 6th Amendment right to counsel, and right to attorney client privilege
- • The Court should not infringe on these rights in attempting to assess who is and who is not a citizen
- • Duty to ascertain immigration status and provide advice on consequences rests with defense counsel.

15

- **Effective Assistance v. Due Process**
- "Although both the right to effective assistance of counsel and the right to due process exist to preserve the defendant's entitlement to a fair trial or plea proceeding, they operate in discrete ways in the plea context; the right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, give the defendant essential advice specific to his or her personal circumstances and enable the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea."

16

- ***Padilla v. Kentucky*** 130 S. Ct. 1473 (2010)
- 6th Amendment applies to immigration consequences
- Counsel must affirmatively advise of the specific immigration consequences of a criminal disposition, based on the individual facts.
- Failure to do this + prejudice is basis to vacate a conviction for ineffective assistance of counsel.
- "...changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important."

17

- **Duties of Defense Counsel**
- Interview competently- determine client's immigration status, background and goals
- Analyze immigration consequences with an immigration attorney
- Preserving availability of relief from removal when available
- Provide accurate and complete advice

18

- It is defense counsel's duty to inquire as to each defendant's immigration status
- *People v. Picca* (97 A.D.3d 170) mandated a duty to inquire about citizenship. The *Picca* Court, reasoned that "to require that defendants apprehend the relevance of their non citizenship status, and affirmatively provide this information to counsel, would undermine the protection that the *Padilla* Court sought to provide to noncitizen defendants."

19

- In order to give complete and accurate advice, a defense attorney must know a defendant's immigration history and criminal history.
- Courts can assist defense attorneys by providing a copy of a defendant's criminal history report at arraignment (CPL 160.40[2]).

20

- What Constitutes a “Conviction” for Immigration Purposes?
- Defined at 8 U.S.C. 1101(a)(48)(A) to include:
 1. Formal judgment of guilt entered by a court; or
 2. If adjudication of guilt has been withheld, where:
 - a. A judge or jury has found the alien guilty or the alien has entered a plea of guilty or has admitted sufficient facts to warrant a finding of guilt; and
 - b. The judge has ordered some form of punishment, penalty or restraint on the alien’s liberty to be imposed

21

CONVICTION	NOT A CONVICTION
Formal judgment of guilt in adult criminal court (including NY Juvenile Offender conviction)	Youthful offender disposition (even though entered in adult court) and juvenile delinquency* dispositions (*possibly not “conduct” grounds)
Diversion, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT made by defendant	Diversion, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT WAIVED** (i.e., NY CPL §216.05(4))
Conditional Discharge Sentence or Alford Plea	Adjournment in contemplation of dismissal
Post Conviction Relief/Motion pending on collateral challenge	Conviction on direct appeal or NYS late notice of appeal (460.30)
Disposition vacated/expunged in the “interest of justice” – based on rehabilitation ONLY! (See <i>Sutherland v. Holder</i> , Dckt. 12-4510, ___ F.3d ___, 2014 WL 4999963 (2d. Cir. Oct. 8, 2014))	Disposition vacated based on legal defect in criminal case (i.e., NY CPL §440.10 motion)

21

22

What convictions trigger removability?

- 1. Aggravated felony ("AF")
- 2. Crime involving moral turpitude ("CIMT")
- 3. Controlled substance offense
- 4. Firearm or destructive device offense
- 5. DV offense

23

• What Are Aggravated Felonies?

- *Murder, rape or sexual abuse of a minor
- *Drug trafficking
- *sale and intent to sell, possession of any amount of flunitrazepam, and 2 or more possession charges where there is a finding of recidivism
- *Firearms trafficking
- *Prostitution business offenses
- ... and more!

See INA 101(a)(43)(A) thru (U)

24

Consequences Of An Aggravated Felony Conviction:

- Mandatory Detention
- Removal
- No Relief From Removal
- Permanent Bar To Re-entry to the United States

25

Crimes Involving Moral Turpitude (CIMT)

- * A conviction for a "crime involving moral turpitude" is one of the oldest grounds of removal. CIMT conviction can be a ground for removal and a ground for inadmissibility.
- *Statute does not define "crime involving moral turpitude".
- * CIMT is defined by case law as:
 - " inherently base, vile or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Rodriguez v. Gonzales*, 451 F. 3d 60, 63 (2nd Cir. 2006).
- *Whether a crime involves moral turpitude depends upon the elements of the offense, not the name of the offense.

26

CIMT offenses include:

1) Crimes with the intent to steal or defraud as an element; (e.g. theft offenses –Petit larceny PL 155.25, forgery offenses- Forgery 3rd PL 170.05)

2) Crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by a reckless act (e.g. murder, rape, and certain manslaughter and assault offenses- Assault 3rd PL 120.00(1)&(2))

3) Most sex offenses, e.g. prostitution – PL 230.00

27

Other CIMTs :

- Murder
- Manslaughter
- Rape
- Spousal abuse
- Child abuse
- Incest
- Kidnapping
- Animal fighting
- Conspiracy, attempt, or acting as an accessory to a crime , if that crime involved moral turpitude.

28

CIMTs and Removal from the United States

- Conviction of 1 CIMT committed within 5 years of admission if punishable by one year or more in prison (actual sentence imposed is irrelevant & includes NY felonies and Class A misdemeanors).
- Conviction of 2 CIMTs at any time not arising out of a single scheme of criminal misconduct, regardless of actual or potential sentence.

29

• Naturalization and Citizenship

INA Sec.316.10 – Good moral character.

A conviction for a CIMT can make a non-citizen ineligible for citizenship because a CIMT may negate a showing of “good moral character” if committed during the statutory period.

A conviction for an AF will shall make a non-citizen ineligible for citizenship.

30

Controlled Substance Offenses

- Conviction of a violation (including conspiracy or attempt) of any law or regulation.
- **RELATING TO** a controlled substance defined in 21 U.S.C. 802
- Other than a single offense involving possession for one's own use of 30 grams or less of marijuana.
- Person is subject to deportation
- Permanently barred from reentry to the U.S.

31

Firearms Offense

- Includes a conviction for any crime of buying, selling, using, owning, possessing or carrying any firearm or destructive device
- e.g., CPW PL 265.03

32

Domestic Violence Offenses

Four grounds of DV deportability:

- 1. Crime of Domestic Violence
("Crime of Violence" defined in 18 U.S.C. 16)
- 2. Stalking
- 3. Crime Against a Child- Abuse, Neglect or Abandonment
- 4. Violation of an Order of Protection
- does NOT require conviction (includes family court findings)!

33

DEFENSE COUNSEL'S ROLE

- Determine Client's immigration status, background and goals.
- Analyze immigration consequences with an immigration attorney
- Contact a RIAC within your region.
- Minimize and Mitigate risk
- Provide accurate and complete advice.

34

Judges Role:

- *People v. Peque*

Advising all defendants that if they are not citizens they may be deported as a result of a conviction.

35

- AT THE PLEA/SENTENCING:

"If you are not a citizen of the United States, your plea of guilty may subject you to deportation from the United States, exclusion from admission to the United States or denial of naturalization and citizenship."
CPL 220.50 (7)



36

- **JUDGES** SHOULD INCLUDE THIS STATEMENT AT ARRAIGNMENT OF EVERY DEFENDANT:

“ If you were not born in the United States, tell your attorney so that he or she can obtain advice about any immigration consequences that may relate to your case. Free immigration advice is available to your attorney through the Regional Immigration Assistance Center.”



37

- Providing a copy of the defendant's criminal history report to defense counsel at arraignment (CPL 160.40[2]). This will ensure that the defendant is receiving advice based on his individual circumstances.

38

- Referring defense counsel to the Immigration Assistance Center for advice and providing an opportunity for defendants to review that advice before entering a plea or proceeding to trial.

39

WHAT WE DO:

- Provide assigned counsel and public defenders support and assistance to properly advise their clients of the immigration consequences of any plea in criminal court or disposition in Family Court.
- Our services assure that defense attorneys are in compliance with the holding in Padilla v. Kentucky.
- We work with defense counsel and do not provide any direct representation of a defendant.
- RIAC s provide training with CLE and CJE credit for 18b counsel, public defenders, and judges to help facilitate communication with the client, counsel and the court about these consequences.
- We provide support for language access when needed.

40

