Immigration Consequences for Criminal Convictions: Introduction to the new Consultant Process

Robert Lamb of Hatch Rockers Immigration
Barbara Lagemann of the Durham Public Defender's Office

What is the purpose of the program?

• Meet your ethical and constitutional obligations as an attorney

The U.S. Supreme Court held that counsel are required to inform their client whether his or her plea carries a risk of deportation:

"...In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence of Padilla's conviction. [C]ounsel is not relieved of the burden of advising his client that he faces a risk of deportation as a result of the conviction. But where the immigration consequences are truly clear, as they are here, it is not necessary for counsel to inform his client that he faces a risk of deportation." Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

The Court of Appeals of North Carolina, following Padilla, held that when the consequence of deportation is clearly stated, it is not sufficient for the attorney to advise the client only that there is a risk of deportation. The court held that counsel is required to inform the client that they face a risk of deportation, and not just that there is a risk of deportation based on Padilla.

What is the purpose of the program?

• Beyond the mandate of Padilla:
  • Help your client avoid further legal problems
  • Detention
  • Improve chances of getting immigration bond
  • Avoid obstacles to obtaining legal status
  • Be prepared for what lies ahead by speaking with an immigration attorney

• Knowing the basics is often not enough to provide adequate advice
  • Better to know what you don’t know
  • The statutory scheme and process is complex
  • Changes are occurring frequently
Criminal convictions in the removal process

- **ICE holds**: A request for illegal detention
- **Immigration Bond**: Everything considered in discretion
- **Some convictions make detention without bond mandatory**
- **Notice toAppear**
- **Indictment**
- **Burden on government**
- **Applications for relief**
- **Burden on respondent**
- **Appeals to Board of Immigration Appeals and Circuit Court**

Categorization of convictions

- **Categories are defined by statute (mostly)**
  - The consequences of a conviction that fits in a particular category are also defined by statute (mostly): Example: Aggravated felony: makes an LPR removable; prevents application for relief; worsens penalty for re-entry
  - Outer limits of most categories defined by case law
    - Board of Immigration Appeals
    - Circuit Courts (9th and 11th most important for North Carolina residents)
  - **DACA rules are defined by FAQ**
  - **Elements of Statute of conviction control for some, not for others**
    - CRPLs, Controlled Substance (but see Reason to Believe), Aggravated Felonies
    - Particularly Serious Crimes, DACA Significant Misdemeanors, Domestic Violence Crime

Conviction under the INA 101(a)(43)

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, or, if adjudication of guilt has been withheld, where

1. The alien was found guilty of the offense, and the official judgment of the alien's guilt, and (2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

- **Juvenile**—Delinquency adjudication is not a conviction. Under 18 not a CIMT (sometimes)
- **Engagements do not change anything**
- **Deferred Prosecutions and other deferral programs must adhere to statute: No admission, no penalty**

*Boggala v. Sessions* 866 F.3d 563 (2017)

- The helpful language in fn 3 indicating that the "admission of responsibility language" on the deferred prosecution forms is not enough to show a conviction for immigration purposes. Here, the court focused on the omission of facts to make a conviction. The hope is that this may get DHS and immigration courts to require more (than just a deferred form) to find that there is a conviction for immigration purposes in the context of a deferred prosecution.
How do I request advice and what do I get?

- Initiate process on IDS Website or email word document to Judicial.IDS.Contractor.Forms@nccourts.org.
- Provide accurate criminal history
- Provide as much information as you can from your client about status, relatives and past interactions with immigration
- If you have specifics beyond the form feel free to provide by email
- You will receive a written memo asap (72 hrs)
- Potential consequences of conviction
- Recommended action
- Feel free to request follow up by email
- In an emergency (imminent plea) we can try to respond by phone