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Practice Advisory¹ for Juvenile Defenders Representing Noncitizens
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SUMMARY BEST PRACTICE POINTS:

- **Juvenile adjudications are NOT convictions for immigration purposes and do not carry the same immigration consequences as convictions in adult court.**
- **Nonetheless, many juvenile adjudications can trigger “conduct-based” grounds of inadmissibility and deportation for noncitizen clients, which can cut off avenues to obtain or keep lawful immigration status and result in deportation.**
- **Juvenile defenders have a duty to advise their clients of the immigration consequences of juvenile adjudications and to preserve avenues to lawful status.**
- **Your office must have a protocol for identifying, a.s.a.p., noncitizen juvenile clients, obtaining the facts and analysis necessary to adequately represent them, and ensuring that these efforts are documented in case files.**
- **WDA's Immigration Project staff can assist in crafting resolutions that minimize immigration consequences AND assist in identifying avenues through which undocumented kids may obtain lawful status and legal representation to pursue these avenues.**
- **A juvenile defender representing any noncitizen client should make it a priority to avoid decline to adult court because even misdemeanor convictions in adult court can carry dire immigration consequences.**

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I. Juvenile Defenders' Duties to Noncitizen Juvenile Offenders and How to Effectively and Efficiently Meet Them

A. Juvenile Defenders' Duties to Noncitizen Clients under *Padilla v. Kentucky*² and *State v. Sandoval*³

It is clear that criminal and juvenile defenders have an affirmative duty to advise noncitizen clients of the immigration consequences of their choices in delinquency proceedings and to identify and preserve avenues to keep or obtain lawful status. In 2010, the U.S. Supreme Court held in *Padilla v. Kentucky* that the “collateral consequences” doctrine does not define the scope of a defender’s Sixth Amendment duties. The court went on to specifically hold that immigration consequences are not deemed to be collateral, but rather constitute a “severe penalty” that is intimately related to the criminal process.⁴

As a result of this finding, the court held that the Sixth Amendment requires defense counsel to give affirmative, competent advice to noncitizen defendants regarding the immigration consequences of the outcomes of their criminal cases (e.g. pleas, convictions at trial, deferred dispositions). Notably, the court rejected the argument that only affirmative misadvice should be condemned, holding instead that defense counsel cannot avoid responsibility by saying nothing about the likely immigration consequences for their clients.⁵

The *Padilla* court left open the question of whether the defendant in that case could show that he was prejudiced under the *Strickland*⁶ test for ineffective assistance of counsel. That question was subsequently addressed by the Washington State Supreme Court in *State v. Sandoval*. In *Sandoval*, the court first held that boilerplate warnings regarding the possibility of deportation, pursuant to RCW 10.40.200’s advisal statute, contained in plea forms or given by the court, did not excuse defenders from the duty of providing individualized advice regarding specific immigration consequences.⁷ Second, the *Sandoval* court found that the prejudice prong of the *Strickland* test was met where the defendant claimed that he would not have taken the plea deal if he had known that he would have been deported as a result, despite the fact that he faced a significantly higher sentence if convicted at trial.⁸

² 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)

³ 171 Wash. 2d 163, 249 P.3d 1015 (2011)

⁴ *Padilla* at 1481. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century... And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. Moreover, we are quite certain that noncitizen defendants facing risk of deportation for a particular offense find it even more difficult. *Id.* (internal citation omitted).

⁵ *Id.* at 1484 (“... we agree that there is no relevant difference ‘between an act of commission and an act of omission’ in this context;” holding that failure of defense counsel to give competent advice on immigration issues “clearly satisfies” the first prong of the *Strickland* test for ineffective assistance of counsel.)

⁶ *Strickland v. Washington*, 466 US 668 (1984).

⁷ *Sandoval* at 173.

⁸ *Id.* at 175.

PRACTICE POINT

Padilla v. Kentucky outlines five major holdings:

1. **Deportation is a *penalty* of a criminal conviction, not a collateral consequence.**
2. **Professional standards for defense attorneys provide the guiding principles for what constitutes ineffective assistance of counsel.**
3. **Nonadvice (silence) on immigration consequences of criminal proceedings is insufficient and constitutes ineffective assistance.**
4. **A defense attorney's 6th Amendment duty extends not only to avoiding deportation but also to preserving avenues to lawful immigration status.**
5. **Prosecutors and courts must give "informed consideration" to immigration consequences in negotiating and accepting pleas and at sentencing.**

B. Identifying Immigration Status of All Clients & Getting Assistance

The first step towards complying with counsel's 6th Amendment duties to noncitizen clients is to **get the facts** necessary to analyze the potential immigration consequences facing your client. We recommend using the WDA's Immigration project 1-page immigration intake form for juvenile clients. This information is what any competent defender or immigration expert needs to determine both the immigration consequences presented by the charges as well as identify potential avenues to obtain or preserve lawful immigration status. (See Appendix A for an intake sheet to use in assessing the immigration status of juveniles. See Appendix B for a listing of categories of immigration status.)

The most basic immigration-related duty of any criminal defender is to identify the immigration status of *all* clients during the initial interview or as soon as possible.⁹ (See Appendix B for a list of categories of immigration status.) Without determining each client's immigration status a defender cannot begin to assess the immigration consequences of plea deals and help clients make informed decisions about issues such as whether they should accept plea offers or go to trial. Immigration-safe options and the certainty of immigration consequences of decisions at the criminal stage will all hinge on a client's immigration status at the time of representation.

Basic knowledge of clients' immigration status and background also enables defenders to identify when a client's lawful status is at risk (e.g. permanent residents or refugees), and to advocate for resolutions that avoid or minimize the risk of triggering deportation. This information also allows defenders to screen for possible avenues to obtain lawful immigration status for undocumented clients and to gain knowledge of how to resolve the case without foreclosing those options. Many undocumented juveniles often have avenues available to them to obtain lawful immigration status.

While noncitizens in immigration proceedings are entitled to be represented by counsel, there is no right to appointed counsel. Obtaining immigration counsel is critical for clients who end up in removal proceedings and for those clients who are eligible to pursue avenues to obtain lawful status. WDA's Immigration Project can assist with referrals to the Northwest Immigrant

⁹ See NLADA Guideline 2.2(b)(2)(A).

Rights Project and/or Volunteer Advocates for Immigrant Justice, the two Washington agencies that provide representation to indigent immigrant juveniles.¹⁰

PRACTICE POINT: WHAT TO DO WHEN YOU HAVE A NONCITIZEN CLIENT

- **First, complete the 1 page immigration intake form**
 - See WDA Juvenile Immigration Intake Form at Appendix A
 - See also WDA Questionnaire at Appendix C and ILRC Checklist at Appendix D;
- **Contact WDAIP Staff;**
- **WDA staff will assist in identifying strategies for resolving the charges that avoid or mitigate immigration consequences;**
- **WDA staff will assist in identifying for possible avenues to obtain citizenship or lawful immigration status and make referrals to the Northwest Immigrant Rights Project or the Volunteer Advocates for Immigrant Justice for legal immigration representation.**

II. Juvenile Adjudications are NOT Convictions for Immigration Purposes, But They Can Still Lead to Serious Immigration Consequences for Noncitizen Juveniles.

The good news for criminal defenders in the juvenile context is that juvenile dispositions do not qualify as “convictions” for immigration purposes.¹¹ The Board of Immigration Appeals has consistently held that “juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.”¹² For this reason, grounds of deportation or inadmissibility that require a conviction, such as those involving crimes of moral turpitude, firearms or aggravated felonies, are not triggered by adjudications of juvenile delinquency.¹³

Nonetheless, delinquency adjudications and admissions that clients make during juvenile proceedings can carry serious immigration consequences. There are four primary ways in which juvenile delinquency adjudications can have immigration consequences for youth:¹⁴

¹⁰ See also the list of immigration attorney referrals on the WDA website: www.defensenet.org.

¹¹ *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000)(*en banc*)(holding that this long-standing rule was not changed by the 1996 enactment of a statutory definition of a conviction at INA § 101(a)(48)(A)), citing to *Matter of C.M.*, 5 I&N Dec. 27 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

¹² *Id.* at 1365

¹³ The same reasoning applies to a minor who admits to the elements of a crime involving moral turpitude or some other crime for which a conviction renders one removable or inadmissible because the youth is admitting to an act of juvenile delinquency, not a crime. *United States v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997); *Matter of M.U.*, 2 I&N Dec. 92 (BIA 1944).

¹⁴ A. Junck, et al. *Immigration Benchbook for Juvenile and Family Court Judges*, Immigrant Legal Resource Center (2010), available at www.ilrc.org.

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- If a juvenile case is declined to adult court, any resulting conviction will be treated as a conviction under immigration law. (See § III)
 - Findings of juvenile delinquency, evidence used in juvenile adjudications, and admissions during juvenile proceedings can trigger conduct-based grounds of removal or inadmissibility. (See § V)
 - Findings of juvenile delinquency and other evidence of illegal conduct on the part of a youth can result in an adverse discretionary decision by an immigration judge or examiner. Note that most avenues to lawful immigration status are discretionary and an adverse discretionary decision will eliminate these avenues to status. (See § VII)
 - Finally, findings of delinquency can result in a client being held in an immigration detention center during while his or her immigration case is pending. Detention during the pendency of a youth's immigration case can significantly interfere with his/her access to counsel, due process, and efforts to obtain lawful status.

III. It is Critical to Avoid Decline to Adult Court in Cases Involving Noncitizen Juveniles

Because juvenile adjudications do not carry the same severe immigration penalties as convictions for the same crimes in adult court, it is vital that juvenile defenders do everything in their power to avoid cases involving noncitizen clients being declined to adult court.

- In *mandatory and discretionary decline cases*, it may be worth pleading to a more serious charge in juvenile court to avoid decline to adult court to preserve the client's lawful status or avenues available to obtain lawful status.
- In *auto decline cases*, defenders should seek to preserve the possible argument in immigration proceedings that the client's conviction in adult court should not be treated as a conviction for immigration purposes by pleading to an offense that would not have warranted transfer to adult court under federal standards if the case had taken place in federal court.¹⁵ Note that **this is not an immigration-safe option**; it merely preserves an argument that can be made by immigration counsel if the client is put in deportation proceedings. Because most noncitizens in deportation proceedings do not have access to counsel and this argument has not been ruled on in the Ninth Circuit, keeping a case out of adult court is a much safer option.

If decline to adult court is unavoidable, counsel should consult with WDAIP staff attorneys and the relevant advisories on the WDAIP website for advice on avoiding immigration penalties for their clients.

¹⁵ Under the Federal Juvenile Delinquency Act (FJDA), there are two types of transfers to adult court, mandatory and discretionary. Transfer is mandatory in the case of a violent felony, drug trafficking or smuggling, or arson allegedly committed by a juvenile 16 years of age or older who has previously been found to have committed comparable misconduct. 18 USC § 5031. Similar offenses may warrant discretionary transfer if the juvenile is 15 years of age or older regardless of his or her prior record. Discretionary transfers are also possible for juveniles 13 years of age or older in serious cases of assault, homicide, or robbery. 18 USC § 5031.

IV. Immigration Detainers (a.k.a. ICE Holds)

Immigration and Customs Enforcement (ICE) holds or detainers are the primary mechanism through which ICE identifies noncitizens in criminal or juvenile custody and ensures that they will be placed in removal proceedings or transferred to federal custody and charged with immigration-related crimes (such as illegal reentry after deportation under 8 U.S.C. 1326). An ICE hold is not the same as a criminal detainer. It is an administrative request that a state detention facility notify ICE upon a noncitizen's release from criminal (or juvenile) detention.¹⁶ The Board of Immigration Appeals has described a detainer as "merely an administrative mechanism to assure that a person subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act."¹⁷ Although most jails and detention facilities believe that the ICE detainer is mandatory, compliance with the detainer is, in fact, mandatory and up to the discretion of local officials.

Compliance with immigration detainers is not mandatory by the local jail or detention facility (although many jails do not know or understand this). ICE is informed of the criminal confinement of individuals suspected of being noncitizens through various enforcement initiatives and federal programs operating in state and local jails and prisons, including, in many cases, juvenile detention facilities. However, in most instances, ICE relies on some degree of collaboration with the local jail/detention facility (e.g. providing ICE with information regarding individuals booked into jail who indicate foreign birth and access to those individuals while they are detained.) Anyone whom ICE *believes* is a noncitizen and is *suspected* of being in violation of immigration law is at risk of having a detainer placed on them.¹⁸ It is common in many areas for ICE to place detainers on any person in criminal custody who admits to having been born outside of the United States. (For more information on the mechanics of ICE detainers see the Immigration Detainer Advisory on the WDAIP website at www.defensenet.org).

Because detainers are the primary way that ICE identifies and gains custody of noncitizens, including juveniles, in criminal proceedings, it is critical for defense counsel to be aware of the local detention facility practices for alerting ICE to the presence of noncitizen detainees. Also, defense attorneys needs to have a system in place for ensuring that they are aware of the presence of a detainer on a client as quickly as possible, prior to any custody hearing.

PRACTICE POINT

- **Defense counsel should be aware of local detention center practices related to immigration detainers in order to prevent, to the extent possible, any client contact with ICE.**

Because ICE agents place detainers without conducting any reliable investigation into whether a person is actually subject to deportation, it regularly places detainers on people who are in fact U.S. citizens, persons who will qualify for lawful status to be granted by the immigration judge in removal proceedings and others who are lawfully present. Thus, an ICE detainer is not determinative of a person's immigration status. Nor is it a reliable indicator of whether she or he

¹⁶ See USCIS Form I-247; 8 CFR § 287.7.

¹⁷ *Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990); citing to *Moody v. Daggett*, 429 U.S. 78, 80 n. 2 (1976).

¹⁸ 8 CFR § 287.7; INA § 287(d)(3).

will, in fact be deported, placed in ICE custody, or even picked up by ICE upon his or her release from state custody. (See the Immigration Detainer Advisory at the WDA's Immigration Project website for information on how to challenge an ICE detainer that may have been improperly placed).

Importantly, the presence of an ICE detainer should not affect a client's right to bail¹⁹ or to a speedy trial.²⁰ While it may be a factor that a judge can consider when making determinations as to a person's flight risk, defense counsel can and should educate the court on what, in fact a detainer is and provide countervailing information as to why the client is not a flight risk. WDA's Immigration Project can also assist counsel in contacting ICE officials to request that the juvenile not be taken into ICE custody upon release.

The language of the ICE detainer form also states that the presence of a detainer in no way limits the discretion of local authorities in terms of a detained person's classification or eligibility for services and other treatment while detained.²¹

An ICE detainer is triggered when a state detention center's lawful authority to detain a person expires.²² Thus, ICE is informed that a person on whom a detainer has been placed will soon be released from state custody if: (a) the case is pending and the court orders release and, when imposed, the defendant posts bail; (b) the case is dismissed and the person is to be released; or (c) a conviction is entered and the person completes his or her sentence.

Once one of these events triggers the detainer, a 48-hour clock begins. Federal regulation provides that state agencies can keep a noncitizen on whom a detainer has been placed in custody for **no more than 48 hours** past the time when he or she would otherwise have been released, excluding weekends and federal holidays. Because local agencies have no authority to detain an alleged noncitizen beyond this 48-hour period, a state detention facility is required to release a person under an ICE hold if ICE has not taken custody of him/her within that period. (See Immigration Detainer Advisory for information regarding remedies for violations of the 48-hour rule and a sample detainer form).

V. Conduct-Based Grounds of Inadmissibility and Deportation

In addition to the numerous grounds of deportation and inadmissibility under the immigration law that require a criminal conviction in adult court, there are additional grounds that require only evidence that a noncitizen has engaged in prohibited conduct. This leaves juvenile noncitizens in the strange position in which dispositions for violent crimes and theft pose no per se bar to lawful

¹⁹ Article 1 § 20 of the Washington Constitution provides, "All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great." Where the prosecutor requests release conditions by arguing that the defendant presents a flight risk, the relevant court rule provides a list of nine factors the court must consider in order to evaluate flight potential, none of which reference a defendant's immigration status. CrR 3.2(c).

²⁰ The presence of an immigration detainer does not qualify for any of the exceptions for tolling the relevant time period listed at CrR 3.3(e). In particular, an immigration detainer does not constitute any form of additional "charge"; nor does it constitute "custody." Washington Courts have yet to directly rule on issues related to the impact of immigration detainers on speedy trial rights. However, the state courts that have addressed the issue have held that an immigration detainer does not constitute a pending charge or any action that creates a 'hold' on the defendant that impacts speedy trial calculations. *State v. Sanchez*, 110 Ohio St.3d 274, 852 N.E.2d 283 (2006); *State v. Montes-Mata*, 41 Kan.App.2d 1078, 208 P.3d 770 (2009).

²¹ See Immigration Detainer Form I-247.

²² 8 CFR § 287.7(d).

status but possession for sale of marijuana, and other seemingly less-serious conduct can pose a complete bar to almost any avenue to lawful status.

PRACTICE POINT

- **Defense counsel must also guard against conduct-based grounds of inadmissibility and deportation, which do not require a conviction.**
- **Triggering conduct-based grounds of immigration law can trigger deportation for juveniles with lawful immigration status (e.g. permanent residents and refugees) and eliminate avenues for undocumented juveniles to obtain lawful status.**

A. Grounds of Inadmissibility vs. Grounds of Deportation

- **Grounds of Deportation**²³ are the grounds by which individuals who already have lawful status are deported from the US.
- **Grounds of Inadmissibility**²⁴ serve four distinct purposes in immigration law:
 1. They are the grounds under which undocumented persons are deported from the US.
 2. They preclude people outside of the US from gaining lawful entry.
 3. They preclude legal permanent residents from gaining citizenship.²⁵
 4. They act as a legal bar to legal permanent residents gaining discretionary relief from deportation if they are placed in deportation proceedings.

Some of the grounds listed below are “waivable” for various avenues to lawful status. The availability of waivers means that, for some clients, the immigration consequences of conduct-related information that comes out in juvenile proceedings will depend on the nature of the status they are likely to seek in the future.

In addition to the conduct-based grounds described below, DHS has placed a high priority on targeting noncitizen gang members for deportation. Any allegation of gang-related activity can have a serious effect on a noncitizen’s immigration case. All defenders should be vigilant in attempting to keep any evidence of gang activity out of the record in cases of noncitizen clients.

It’s unclear at this point how regularly ICE looks to records of juvenile proceedings to find that a person is inadmissible or removable for a conduct-based ground. While having one’s juvenile record, including police records, sealed may prohibit ICE from gaining information that comes out in juvenile court, the efficacy of state sealing statutes in shielding records from the FBI, from whom ICE gets criminal histories for people in deportation proceedings, is uncertain. Thus, defense counsel should be aware of these conduct-based grounds and limit as much as possible the admission of any evidence into the record that would render a client removable under them. Because ICE must provide substantive and probative evidence that person is removable or

²³ See 8 U.S.C. 1227.

²⁴ See 8 U.S.C. 1182.

²⁵ A finding of “good moral character” is required to gain US citizenship and people whose convictions or juvenile dispositions trigger crime-related inadmissibility grounds lack good moral character as a matter of law.

inadmissible based on one of these grounds, any effort by defense counsel to render the evidence on the record ambiguous or inconclusive could help in later deportation proceedings.

PRACTICE POINT

- **The best way for defense counsel to shield against conduct-based grounds of inadmissibility and deportation is to keep the evidentiary record concerning the conduct ambiguous or inconclusive. To achieve this goal, counsel should fight the admission of any negative evidence and get as much exculpatory evidence on the record as possible, to preclude ICE from attaining “substantial and probative evidence” of the conduct.**

B. Reason to Believe Involvement in Drug Trafficking²⁶

If immigration officials have “reason to believe” (RTB) that a noncitizen has ever assisted in drug trafficking or been a drug trafficker, the person is inadmissible (but not deportable). All that is needed to trigger this ground is “reasonable, substantial, and probative” evidence that a person has knowingly engaged in drug trafficking.²⁷ Drug trafficking has been defined as “some sort of commercial dealing,”²⁸ and “the unlawful trading or dealing of any controlled substance.”²⁹ Evidence such as police reports, testimony from police, admissions by noncitizens, delinquency adjudications, adult convictions, and any other evidence of sale or possession with intent to distribute have all been held to supply “reason to believe.”³⁰

The RTB ground also applies to any spouse, son, or daughter of a drug trafficker who has received some “financial or other benefit” from the trafficking in the previous five years.³¹ Importantly, though, the terms “son” and “daughter” under immigration law refer only to those who are over the age of 21.³² Thus, this ground should not apply to noncitizens who receive a benefit from a parent’s drug trafficking while still juveniles.

Because the drug trafficking ground can’t be waived in any context, except that of U and T Visa applicants (see below), it creates a nearly absolute bar to a client receiving any form of lawful immigration status. Also, because the RTB bar is so low and can, apparently, be met by evidence brought out during juvenile proceedings, it is vital for defense counsel to be aware of any evidence of drug trafficking that is admitted and to fight the admission of such evidence whenever possible.

²⁶ INA § 212(a)(2)(C)

²⁷ *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *Alarcon-Serano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); *See also Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992)(government’s knowledge or reasonable belief that an individual has trafficked in drugs must be based on “credible evidence).

²⁸ *Lopez v. Gonzales*, 549 US 47, 127 S.Ct. 625, 166 L. Ed. 2d 462, (2006).

²⁹ *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).

³⁰ *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979); *Matter of Rico*, *supra* (“reason to believe” found based on testimony of Border Patrol agents that respondent frequently drove a car in which 162 pounds of marijuana was found).

³¹ INA § 212(a)(2)(C)(ii).

³² INA § 101(b)(1).

Impact of the RTB ground on clients with lawful status (e.g. permanent residents & refugees). Because it is not a ground of deportation, the RTB will not trigger deportation for juveniles already lawfully in the U.S. However, it can still have serious consequences. Namely, the RTB ground will 1. Preclude refugee and asylees from going on to obtain permanent resident status; 2. Preclude lawful re-entry to the U.S. from foreign travel; 3. Delay, and potentially preclude, permanent residents from obtaining U.S. citizenship.

Impact of RTB ground on undocumented juveniles. The RTB ground is an unwaivable bar to most avenues to obtaining lawful permanent resident status. There is a discretionary waiver for persons applying for U or T visas. If your client is eligible for one of those forms of obtaining lawful status it is imperative to do everything possible to minimize the record.

C. Prostitution³³

A noncitizen minor can be found inadmissible (but not deportable) for engaging in prostitution if an immigration court finds that he or she has engaged in sex for money in an ongoing manner in the previous ten years. Prostitution is defined as engaging in a pattern or practice of sexual intercourse for financial or other material gain.³⁴ A finding of a pattern or practice of prostitution requires that there be evidence of “continuity and regularity,” as distinguished from “casual or isolated acts.”³⁵ Notably, the prostitution ground does not penalize conduct that falls short of intercourse.³⁶

While no conviction is required for this ground of inadmissibility, one or more delinquency adjudication for prostitution can serve as evidence of having engaged in prostitution in immigration proceedings. This provision applies even if the noncitizen engaged in prostitution in a place where it is legal.³⁷

Because of the requirement of intercourse and ongoing activity for this ground, defense counsel can preserve avenues to lawful status by specifying on the record that some conduct less than intercourse was involved or that the juvenile adjudication involves an isolated incident, when possible.

Impact on clients with lawful status (e.g. permanent residents & refugees). Because it is not a ground of deportation, the prostitution ground will not trigger deportation for juveniles already lawfully in the U.S. However, it can still have serious consequences. Namely, a finding of inadmissibility pursuant to the prostitution ground will 1. Preclude refugee and asylees from going on to obtain permanent resident status; 2. Preclude lawful re-entry to the U.S. from foreign travel; 3. Delay, and potentially preclude, permanent residents from obtaining U.S. citizenship.

Impact on undocumented juveniles. There are discretionary waivers for this ground of inadmissibility available for Special Immigration Juvenile Status,³⁸ as well as U and T Visas.³⁹

D. Drug Addict or Abuser⁴⁰

³³ INA § 212(a)(2)(D).

³⁴ *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008); 22 CFR § 40.24(b)

³⁵ 22 CFR § 40.24(b); see also *Matter of Gonzalez-Zoquiapan*, *supra*; *Matter of T--*, 6 I&N Dec. 474 (BIA 1955).

³⁶ *Matter of Gonzalez-Zoquiapan*, *supra*; *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006).

³⁷ 22 CFR § 40.24(c).

³⁸ INA § 245(h)(2)(B)

³⁹ INA § 212(d)(14)-(15)

⁴⁰ INA § 212(a)(1)(A)(vi); INA § 212(a)(1)(A)(iii)

A noncitizen can be found inadmissible for being a “current” drug addict or abuser and deportable for having been a drug addict or abuser as any time since being admitted to the United States. Though these are technically health-related, rather than criminal-related grounds, it is possible that multiple delinquency findings related to drug use or other evidence admitted during juvenile adjudications could trigger these grounds.

Drug addiction is defined as use “which has resulted in physical or psychological dependence.”⁴¹ The definition of drug “abuser” is not settled, but in some places it is defined basically as anything beyond one-time use.

It is critical to minimize or avoid any record of evidence in the juvenile delinquency record related to drug abuse/addiction.

Impact on clients with lawful status. Placement in removal proceedings and possible deportation.

Impact on undocumented clients. Such findings can preclude a juvenile from obtaining lawful status through otherwise available legal avenues outlined below.

E. Mental Disability Posing a Threat to Self or Others⁴²

Technically another health-related ground, this ground of inadmissibility can be triggered by issues including current suicidal tendencies, sexual predator tendencies, and alcoholism. Noncitizens who are charged as being inadmissible under this ground can argue in immigration court that the condition does not exist, or that that it existed in the past but is no longer a problem.

A waiver is available for this ground for noncitizens with certain qualifying relatives.⁴³

This ground of inadmissibility generally only applies to noncitizens applying for lawful immigration status (e.g. an undocumented juvenile seeking a U visa or a refugee applying for lawful permanent resident status).

F. False Claim to US Citizenship;⁴⁴ False Documents⁴⁵

A person who falsely represents, or has falsely represented him or herself to be a U.S. citizen for any purpose or benefit under state or federal law is both inadmissible and deportable. The language of these two provisions is identical and do not require a conviction. Theoretically, ICE could charge these grounds for anyone who uses someone else's US passport for essentially any reason and for false claims of citizenship by individuals who came to the US as infants and believe themselves to be citizens. There are no waivers available for these grounds, except for people who qualify for cancellation of removal (see below).

Additionally, a noncitizen can be found inadmissible for knowingly forging or altering a document or using, attempting to use, possessing, obtaining, accepting, receiving, or providing any false document in order to receive an immigration benefit.⁴⁶ There is a waiver available for permanent residents who violate this provision solely in order to assist a spouse or child, if other requirements are met.

⁴¹ 42 CFR § 34.2(g).

⁴² INA § 212(a)(1)(A)(iii).

⁴³ INA § 212(g).

⁴⁴ INA § 212(a)(6)(C)(ii); INA § 237(a)(3)(D).

⁴⁵ INA § 237(a)(3)(C).

⁴⁶ INA § 274C(a)(2).

G. Violation of a DV Protection Order⁴⁷

A noncitizen is rendered deportable, but not inadmissible, if a civil or criminal court finds that he or she has violated a protection order designed to protect against credible threats of violence, repeated harassment, or bodily injury. It is unsettled whether a person found to have violated a different portion of a protection order is deportable.⁴⁸ No conviction is required; the government must only prove that the protection order has been violated by clear and convincing evidence. In order to trigger this ground, however, the government must show that the protection order was related to domestic violence.⁴⁹

Impact on juveniles with lawful status. This ground of removal only applies to juveniles with lawful status (permanent residents, refugees) or who are present in the U.S. pursuant to a lawful admission (e.g. student visa). It is critical to identify your client's immigration status and, for those with lawful status, to avoid juvenile delinquency dispositions for any offenses related to violations of protection or no-contact orders.

Impact on undocumented juveniles. Although juvenile delinquency dispositions related to no-contact and protection order violations will be deemed negative discretionary factors in any application for lawful status, this is only a ground of deportation, not a ground of inadmissibility. As such it does not trigger statutory bars to obtaining lawful status.

VI. Using a Client's Eligibility for Lawful Immigration Status as Part of a Plea Negotiation Strategy

While the primary focus of the *Padilla* decision focuses on defense counsel's Sixth Amendment duties, the Court also provides guidelines to both prosecutors and judges regarding addressing immigration consequences. Specifically, the court addresses prosecutors and judges to give "informed consideration" the potential immigration consequences facing noncitizen defendants when negotiating pleas and crafting sentences.⁵⁰ Juvenile defenders should use a noncitizen client's eligibility for lawful immigration status or risk of deportation as bargaining tool in negotiating solutions that will preserve that eligibility or avoid deportation. In using this bargaining strategy, defense counsel must weigh the possible benefits against the risk that the prosecution will alert ICE to a client's undocumented status.

VII. Primary Avenues to Obtain Lawful Immigration Status for Noncitizen Juveniles

Determining whether your undocumented client is eligible to pursue one of the avenues to obtain lawful immigration status outline below generally involves consultation with an

⁴⁷ INA § 237(a)(2)(E)(ii)

⁴⁸ In a recent Ninth Circuit case, the court held that where a protection order can be issued only upon a showing of reasonable proof of a past act of abuse, any violation of such protection order will trigger deportation, even if the act that violates the protection order is not itself a domestic violence offense. *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008).

⁴⁹ "Crime of domestic violence" is defined at INA § 237(a)(2)(E)(i).

⁵⁰ *Padilla*, 130 S.Ct. at 1486. ("Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.")

immigration expert. WDA's Immigration Project staff have the capacity to do initial screenings for this based upon the 1-page immigration intake questionnaire, and can assist defenders in follow-up screening to determine *prima facie* eligibility. We can also facilitate referrals to the Northwest Immigrant Rights Project and the Volunteer Advocates for Immigrant Justice, who may be able to provide your client with *pro bono* or low cost legal representation to pursuing any available options. See also Appendix C for a list of questions that can assist counsel in determining eligibility to seek lawful immigration status.

A. Derivative Citizenship⁵¹

Under certain circumstances, minors are able to gain derivative citizenship, though their parents, without having to meet any criteria, including proving their "good moral character." A child automatically becomes a U.S. Citizen if, before he or she reaches the age of 18, the following events happen *in any order*:

- (1) The child becomes a permanent resident;
- (2) At least one of the child's parents becomes a US citizen;
- (3) The child lives in the US in the citizen parent's legal custody.⁵²

When working with juvenile clients who are permanent residents, *defense counsel should encourage parents with custody to naturalize to US citizenship, if possible*. If a juvenile's parents naturalize before his or her 18th birthday, the minor will automatically become a citizen and will be protected against the immigration consequences of any future convictions.

B. Special Immigrant Juvenile Status (SIJS)⁵³

A noncitizen minor is eligible for permanent residency (a.k.a. a greencard) through Special Immigrant Juvenile Status (SIJS) if:⁵⁴

- (1) He or she is under the jurisdiction of a juvenile court, including a delinquency court or dependency proceedings; and
- (2) The court has made a finding that the juvenile cannot be reunited with at least one of his or her parents due to abuse, neglect, abandonment, or some similar ground under state law⁵⁵; and
- (3) It is not in the juvenile's best interest to return to his or her home country or the country where his or her parents live.

The juvenile court judge must sign an order making the required findings. It is not necessary for a court to formally terminate the client's parent's rights and the immigration status of the client's parents is irrelevant.

⁵¹ INA § 320.

⁵² INA § 320.

⁵³ INA § 101(a)(27)(J)

⁵⁴ This definition of Special Immigrant Juvenile at INA § 101(a)(27)(j) was amended by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2011 to remove confusing language about long-term foster care.

⁵⁵ This provision was clarified to only require a finding that a child cannot be reunited with one, rather than both, parents by TVPRA § 335(d)(1).

An SIJS application must be adjudicated *while a person remains under juvenile court jurisdiction*, so it is imperative that juvenile defense attorneys screen clients for possible eligibility early in the process and to identify when it may be necessary to extend jurisdiction beyond the child's 18th birthday. Discretionary waivers for most grounds of inadmissibility are available in SIJS cases, but not for adult criminal convictions or "reason to believe" the juvenile was involved in drug trafficking.⁵⁶ It should also be noted that minors who are granted SIJS status will not be able to later petition to bring a parent to the country through family immigration.⁵⁷

C. VAWA Self-Petition⁵⁸

A juvenile may be eligible for lawful permanent residency under the immigration provisions of the Violence Against Women Act (VAWA) through what is commonly referred to as the "self-petition" process if he or she has been abused or subjected to cruelty by a *US citizen or permanent resident parent or spouse*. The self-petitioning process is available only if the following conditions are met:

- (1) The abusive family member was a US citizen or legal permanent resident; and
- (2) The person petitioning for lawful status resided with the abusive family member at some point; and
- (3) The petitioner qualifies as a child, meaning that he or she is unmarried and under the age of 21 (or the petitioner qualifies as the spouse of the abuser under immigration law); and
- (4) The petitioner is of good moral character (meaning, among other things, that he or she is not inadmissible).

The parent must have the required status, but there is no requirement that the child remain under the jurisdiction of the juvenile court. The requisite abuse can have been either physical or psychological, including economic coercion, but it must constitute "extreme cruelty."⁵⁹

Defense counsel should be aware that delinquency findings may complicate the "good moral character" requirement for this avenue to lawful status.

D. U-Visa for Victims of Certain Crimes⁶⁰

The U visa is available for noncitizens who have suffered substantial physical or mental abuse resulting from having been the victim of a wide range of criminal activity (and regardless

⁵⁶ See post-TVPRA amended INA § 245(h)(2)(A).

⁵⁷ INA § 101(a)(27)(J)(iii)(II).

⁵⁸ INA § 204(a)(1)(A)

⁵⁹ Examples of non-physical abuse that may rise to the level of extreme cruelty include: social isolation, accusations of infidelity, incessant calling, threats, economic abuse, not allowing the victim to get a job, and degrading the victim. See Aleinkoff, Executive Associate Commissioner, Office of Programs, INS Memo entitled: Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents April 16, 1996, at 9-10 [reprinted as Appendix II, 73 Interpreter Releases 737, May 24, 1996].

⁶⁰ INA § 101(a)(15)(U).

of the perpetrators immigration status).⁶¹ The applicant must possess information concerning the criminal activity and must have been helpful, currently be helpful, or be likely to be helpful in the investigation or prosecution of the person who committed the crime. In order to qualify for this visa, a law enforcement official, judge, prosecutor, investigator, or similar official must sign a certification that the applicant has met the helpfulness requirement. There are waivers available for U visa applicants for all crime-based grounds of inadmissibility, including “reason to believe” drug trafficking.

E. T-Visa for Victims of Human Trafficking⁶²

T visas are available to noncitizens who have been victims of severe forms of trafficking in persons, including (a) “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age”; or (b) “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁶³

Applicants must have complied with any reasonable request for assistance in investigation or prosecution of the offense (unless they are under the age of 16), and show that they have suffered extreme hardship. As with U visas, there are waivers available for all crime-based grounds of inadmissibility, including “reason to believe” drug trafficking.

F. Family Immigration⁶⁴

Children (unmarried and under the age of 21) and spouses of US citizens can gain permanent residence fairly quickly if those citizen family members file a petition for them. Children and spouses of permanent residents, however, will have to wait several years for family-related avenues to lawful status, or even longer if they are from Mexico, China, India, or The Philippines. The wait times are also very long for children of US citizens who are over the age of 21 or married and brothers or sisters of US citizens. Brothers and sisters of permanent residents are not eligible for family-based immigration.

In short, family-based immigration is not always a realistic solution for most people who are already in deportation proceedings or who are at risk of being placed into proceedings in the near future.

G. Asylum,⁶⁵ Withholding of Removal,⁶⁶ and Relief under the Convention Against Torture (CAT)⁶⁷

⁶¹ The list of eligible criminal offenses includes: rape, torture, trafficking, incest, domestic violence, sexual assault, prostitution, sexual exploitation, female genital mutilation, involuntary servitude, kidnapping, false imprisonment, blackmail, witness tampering, etc. INA § 101(a)(15)(U)(iii).

⁶² INA § 101(a)(15)(T).

⁶³ 22 USC § 7102.

⁶⁴ INA § 203(a); See current USCIS Visa Bulletin for waiting times for various family members.

⁶⁵ INA § 208.

⁶⁶ INA § 241(b)(3).

⁶⁷ United State Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).

Noncitizens who fear returning to their home country because of an individualized fear of persecution based on their race, religion, nationality, political opinion, or membership in a particular social group can apply for asylum or withholding of removal. Noncitizens who fear torture by the government of their home country for any reason can apply for relief under the Convention Against Torture.

Juvenile applicants for asylum and withholding are entitled to special protections and evidentiary rules under the government's "Guidelines for Children's Asylum Claims."⁶⁸ Additionally, the Trafficking Victims Protection Reauthorization Act of 2011 amended the INA to exempt unaccompanied minors from the 1-year deadline for asylum applications that applies to adults.⁶⁹ Convictions for certain crimes in adult court, as well as "reason to believe" drug trafficking, bar eligibility for asylum and withholding of removal.

H. Cancellation of Removal⁷⁰

Unlike the other avenues to lawful status described in this section, cancellation of removal is only available to noncitizens who are *already in deportation proceedings*. If the noncitizen is a permanent resident, he or she may be eligible for cancellation of removal if he or she meets the following criteria:

- (1) The applicant has been a permanent resident for at least five years; and
- (2) The applicant has resided in the US continuously for at least seven years after being admitted in any status; and
- (3) The applicant has not been convicted of an aggravated felony in adult court;⁷¹ and
- (4) The immigration judge makes a favorable discretionary finding. Note that juvenile adjudications can act as negative factors in this discretionary determination.

If the noncitizen is not a permanent resident, but is undocumented, the threshold for gaining cancellation of removal is much higher. The elements required for this form of cancellation of removal are:

- (1) The applicant has been continuously physically present in the US for at least 10 years; and
- (2) The applicant has demonstrated good moral character⁷²; and
- (3) The applicant has not been convicted of any of the enumerated crimes in adult court, and does not trigger the conduct-based grounds of inadmissibility and deportability related to criminal offenses (i.e. drug trafficking, prostitution and protection/no-contact order violations); and
- (4) The applicant demonstrates that his or her deportation would result in "exceptional and extremely unusual hardship" to his or her US citizen or permanent resident spouse, parent, or child.

⁶⁸ "Guidelines for Children's Asylum Claims," memorandum by Jeff Weiss, Acting Director, Office of International Affairs, INS (December 10, 1998). Available at <http://www.uscis.gov/files/pressrelease/ChildrensGuidelines121098.pdf>; See also *76 Interpreter Releases* 1 (January 4, 1999) for a summary and additional information.

⁶⁹ TVPRA § 235(d)(7)(A).

⁷⁰ INA § 240A.

⁷¹ See INA § 101(a)(43) for a list of what constitutes an aggravated felony under immigration law.

⁷² See INA § 101(f) for a list of people who lack good moral character as a matter of law.

Element (4) above sets a very high bar for cancellation of removal for non-permanent residents. Applicants must show hardship beyond that which one would normally face as a result of having a parent, child, or spouse deported.⁷³ Successful cases often involve eligible family members with serious health problems or disabilities.

I. Temporary Protected Status⁷⁴

Noncitizens from certain enumerated countries that have experienced severe natural disasters or civil strife may be eligible for Temporary Protected Status (TPS). TPS authorizes a person to stay temporarily in the US and to work legally. A noncitizen is not required to show that he or she will experience any individualized persecution or hardship, only that he or she is a national of a country that is currently designated for TPS.

In recent years, TPS, or similar status, has been designated countries such as Angola, Bosnia-Herzegovina, Burundi, El Salvador, Haiti, Honduras, Kosovo, Liberia, Nicaragua, Sierra Leone, Sudan, South Sudan, and Somalia.⁷⁵

Because TPS offers only temporary lawful status and does not provide a path toward permanent residency or citizenship, it does not offer a long-term solution for clients who wish to stay in the US permanently, but it can be an easy way for eligible noncitizens to gain some sort of legal status in the short-term.

VIII. Immigration Resources for Noncitizen Minors

We recommend that defense counsel first consult with WDA's Immigration Project staff, who can assist in screening your client's case, as well as facilitate referrals to these agencies.

Northwest Immigrant Rights Project (NWIRP)

- www.nwirp.org
- Offices in Seattle, Granger, Moses Lake, and at the immigration detention center in Tacoma
- Provides direct legal services for low-income immigrants

Volunteer Advocates for Immigrant Justice (VAIJ)

- http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/volunteer_advocates_for_immigrant_justice_vaij.html
- Office in Seattle
- Offers direct representation in immigration proceedings and specializes in representing unaccompanied minors

⁷³ *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002)

⁷⁴ INA § 244.

⁷⁵ For a current list of countries designated to receive TPS, visit: www.uscis.gov/tps.

Appendix A: Noncitizen Juvenile Offender Intake Worksheet

<u>Noncitizen Juvenile Offender Intake Worksheet</u>		[WDA: 2-2-11]
Defendant Identifier: (optional) _____ Date: _____		
Attorney: _____ County: _____ Need Response By: _____		
<u>Immigration Status:</u> <input type="checkbox"/> LPR - Lawful Permanent Resident (greencard) Since when: _____ <input type="checkbox"/> Refugee or granted asylum status Since When: _____ <input type="checkbox"/> Undocumented (entered illegally / overstay) Date of Entry : _____ <input type="checkbox"/> Previously Deported or Currently in Deportation Proceedings <input type="checkbox"/> At border <input type="checkbox"/> By Immigration Judge	DOB: _____ POB: _____ ICE Detainer: <input type="checkbox"/> YES <input type="checkbox"/> NO Defendant is: <input type="checkbox"/> IN CUSTODY <input type="checkbox"/> NOT IN CUSTODY	
<u>Family Ties:</u> MOTHER: <input type="checkbox"/> US citizen <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented FATHER: <input type="checkbox"/> US citizen <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented CHILD: <input type="checkbox"/> US citizen <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented SIBLINGS: Number _____ Ages: _____ _____ US citizen _____ LPR _____ Undocumented	<u>Complete Delinquency History:</u> Include offense, date of adjudication and sentence (including suspended time) for each adjudication. Include arrests, deferred adjudications, deferred sentences or other resolutions.	
<u>Defendant's Goals Re: Immigration</u> <input type="checkbox"/> Preserve eligibility to obtain future immigration benefits (e.g. greencard or citizenship) <input type="checkbox"/> Avoid delinquency disposition that triggers Deportation and loss of lawful status <input type="checkbox"/> Get out of detention ASAP, regardless of immigration consequences <input type="checkbox"/> Other:		
<u>Indicators of Possible Immigration Relief</u> <input type="checkbox"/> Dependent youth/potential dependency <input type="checkbox"/> History of abuse, abandonment or neglect <input type="checkbox"/> Not living with either parent in U.S. <input type="checkbox"/> Living in foster care or in guardianship. <input type="checkbox"/> Has been the victim of a crime or DV while in U.S. <input type="checkbox"/> Crime/DV was reported to law enforcement <input type="checkbox"/> Crime/DV was reported to CPS <input type="checkbox"/> Fears returning to home country <input type="checkbox"/> Has been in forced labor or prostitution in U.S.	Current Charge(s): _____ _____ _____ Plea Offer(s): _____ _____ _____	

Appendix B: An Overview of Categories of Immigration Status Under U.S. Law

Summer 2011

Introduction

When working with or representing a noncitizen facing criminal charges the critical first step is always to determine her or his immigration status. This information is essential to accurately determine how to resolve a criminal proceeding in a manner that avoids the likelihood of deportation and/or preserves ability to obtain or keep lawful immigration status. It is not possible to accurately identify the immigration consequences that will result from any given action to resolve the case (e.g. trial, plea, deferred disposition) without first identifying the defendant's immigration status. In short, it will be the starting point that informs many of the key decisions you and your client will need to make.

Often times a noncitizen will know her immigration status (for example, if she has a greencard and, thus, is a lawful permanent resident) or if she entered illegally and has never had any lawful immigration status (and, as such, is an undocumented person). Sometimes, however, when a person does not know or is not certain of her immigration status and you cannot clarify it based upon the information in this document, you may need to consult with the staff of the WDA's Immigration Project.

PRACTICE POINT: Whenever possible, make a copy of any documents that your client has regarding her or his immigration status.

PRACTICE POINT: Simply being undocumented (without lawful immigrations status) does not automatically mean that a person will, in fact, be deported (removed).

A. United States Citizens (USC)

USCs cannot be removed (deported) from the U.S. (unless they obtained citizenship through fraud or other illegal means), even if they are convicted of serious crimes. USCs may file petitions for their spouses, parents, children under 21 to "immediately" become LPRs. [xx why the quotes here?]

A.1 Citizenship at Birth or Through A USC Parent

Persons born in the U.S., its territories and certain possessions (e.g., Puerto Rico, Guam and the Virgin Islands) are automatically USCs at birth, even if their parents are not USCs and/or are undocumented. Generally, a child born outside the US to one or both parents who are USCs at the time of the child's birth acquires USC at birth. Adopted Children Born outside the U.S. to USC parent(s) may also automatically acquire USC under the provisions described below.

CRs who are divorced (but married in good faith), who would suffer extreme hardship if deported, or who were abused by their spouses, may file petition to remove conditions on their own and request a "waiver" of the joint filing requirement.

D. Asylum and Refugee Status

Asylum and refugee status is granted to noncitizens that show that they have suffered persecution or have a "well-founded fear" of future persecution in their homeland based on race, religion, nationality, political opinion or membership in a social group.

Refugees who applied for and were granted refugee status abroad *before* they came to the U.S. Asylees who applied for and were granted asylum *after* they arrived in the U.S. by some other means.

Asylees and refugees are issued an employment authorization document (EADs), as proof of their status. Asylees and refugees are eligible to apply to become LPRs after one year in asylee/refugee status (their status does not expire if they do not, although their proof of status (the EAD) will). Like LPRs, asylees and refugees can be deported at any time for violating immigration laws, including obtaining deportable criminal convictions.

E. Temporary Protected Status (TPS)

The U.S. may grant TPS for a limited period of time to qualifying persons who would otherwise be undocumented (or at risk of becoming undocumented) if they are citizens of a particular country encountering catastrophic events (e.g., ongoing armed conflict, earthquake, flood, other disasters, or other extraordinary and temporary conditions).

Citizens of a designated country who apply for and are granted TPS status are issued an employment authorization document (EAD) which permits them to live and work in the U.S. for the designated period of time (usually 18 months) ,which can be (and often is) extended.

Persons with 2 misdemeanors or 1 felony conviction are ineligible to apply for or renew TPS. Unlike asylees and refugees, persons granted TPS status are not permitted to apply to become LPRs. Once the designated period of protection ends, these persons must either obtain another lawful immigration status or leave (or be deported from) the U.S.

F. Nonimmigrant Visa Holders

A nonimmigrant visa (NIV) is issued to permit a noncitizen to enter and remain lawfully in the U.S. for a specific purpose and for a limited period of time. There are many kinds of nonimmigrant visas (over 20), including visitors for business or pleasure (tourists), foreign students, and temporary workers and trainees and their spouses and children. Most NIV holders are issued stamps in their passports. Nonimmigrant visa holders (including U visa holders) who violate the terms of their visa, such as a student who drops out of school, a tourist who stays beyond the date on their visa, or anyone who obtains a deportable criminal conviction become undocumented and subject to deportation.

U Visa Holders: Victims of designated crimes (e.g., domestic violence, felonious assault, involuntary servitude and numerous other crimes) can be granted a special nonimmigrant visa called a "U Visa" for 3 years where requisite officials (usually law enforcement) certify that s/he has been, if or is likely to be helpful in prosecution of the crime. After 3 years, U visa grantees

can go on to apply for LPR status. U visa holders are issued Employment Authorization Documents (EADs) as proof of status.

T Visa Holders: Victims of sex trafficking and labor trafficking can be granted a special nonimmigrant visa called a "T Visa" for 3 years where requisite officials (usually law enforcement) certify that s/he has been, or is likely to be helpful in prosecution of the crime. After 3 years, T visa grantees can go on to apply for LPR status. T visa holders are issued Employment Authorization Documents (EADs).

G. Undocumented Persons

Undocumented noncitizens are often called "illegal aliens" although simply being in the U.S. without documents is not a crime (unless they were previously deported and then reentered). There are two types of undocumented persons:

- Those who entered the U.S. illegally by crossing the U.S. border without being inspected at a designated port of entry or using fraudulent documents to gain admission; and,
- Nonimmigrants who entered the U.S. lawfully and their legal immigration documents have since expired or they have violated the terms of their visa (e.g. a tourist who overstays the time permitted).

Undocumented individuals do not have a legal right to work and are always subject to deportation if apprehended by immigration authorities.

H. Work permits (a.k.a. Employment Authorization Documents)

A work permit, called an Employment Authorization Document, (EAD) is not, in itself, a category of lawful immigration status. Work permits are issued by immigration authorities for a variety of reasons, including: a) as proof of some type of lawful status (e.g. TPS or asylum); b) to permit noncitizens to lawfully work while applying for LPR status or some other type of lawful immigration status; or c) as a benefit to persons who have agreed to act as informants for ICE enforcement officers. If working with someone with a work permit it is important to determine the basis for which it was issued. Here is a sample EAD:



Appendix C: Eight Questions to Determine Potential Eligibility for Lawful Immigration Status⁷⁶

The following are basic threshold questions meant to flag possible eligibility for lawful status. If a noncitizen answers yes to one or more questions, a defender should look to this and other advisories on the specific avenue to lawful status for which a client is eligible. Most importantly, the defender should contact WDAIP to learn how to preserve the client's eligibility for lawful status and refer the client to qualified immigration counsel.

1. Is the noncitizen afraid to return to his or her home country?

- Noncitizens from areas of war or human rights abuses where they face persecution or torture may be eligible for **political asylum, withholding of removal** or protection under the United Nations **Convention Against Torture**. A grant of asylum can lead to lawful permanent residency.
- People from certain countries that have experienced devastating natural disaster or civil strife may be able to obtain **Temporary Protected Status (TPS)** which provides temporary permission to be in the United States and temporary work authorization. Nationals of El Salvador, Haiti, Honduras, Nicaragua, Somalia, and Sudan have had TPS.

2. Does the noncitizen have a U.S. citizen parent, spouse, child brother or sister? Or does the noncitizen have a lawful permanent resident spouse or parent?

- The noncitizen may be eligible for lawful permanent residency through a **family-based visa petition**. Note that some visa petitions involve a waiting list of many years.
- Adopted children may be able to obtain lawful permanent residency through an adoptive U.S. citizen or permanent resident parent. The adoption *must* be finalized before the child's 16th birthday, with an exception for adopted sibling groups. Where the child is from a country that is a signatory to the Hague Convention, additional rules apply.

3. Was the noncitizen's parent or grandparent born in the United States or granted U.S. citizenship?

- If so, the noncitizen may have unknowingly acquired U.S. citizenship already.

4. Is the noncitizen under the jurisdiction of a juvenile court and not going to be reunified with one or both parents due to abuse, neglect, or abandonment?

- If the noncitizen child is under the jurisdiction of a court that can make decisions regarding care and custody of juveniles or the court has legally committed the child to, or placed him or her under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court, and reunification with one or both parents is not viable due to abuse, abandonment, or neglect, or the death of a parent or a similar basis under state law, and it would not be in the child's best interest to be returned to the home country, he or she may be eligible for **Special Immigrant Juvenile Status (SIJS)**. Special Immigrant Juvenile Status leads to lawful permanent residency.

5. Has the noncitizen been abused by a U.S. citizen or lawful permanent resident spouse or parent?

⁷⁶ Adapted from A. Junck, et al., *Immigration Benchbook for Juvenile and Family Court Judges*. Immigrant Legal Resource Center (2010).

- A noncitizen who has been subjected to physical abuse or extreme cruelty (including non-physical abuse) by a U.S. citizen or lawful permanent resident spouse or parent may be eligible to apply for permanent residency under the immigration provisions in the **Violence Against Women Act (VAWA)**. A child whose parent has been abused, or a parent whose child has been abused, may qualify even if the person him or herself was not abused.
- The noncitizen may qualify for a **U visa** if he or she was a victim of certain crimes, suffered substantial physical or mental abuse as a result of the crime and can provide a certificate from a judge, prosecutor or law enforcement official stating that he or she is likely to be helpful in the investigation or prosecution of that crime. U visas are temporary but can lead to lawful permanent residency.

6. Has the noncitizen been the victim of a crime that led or might lead to a criminal investigation or prosecution?

- The crimes that are covered by the U visa include rape, incest, domestic violence, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, abduction, unlawful criminal restraint, false imprisonment, felonious assault, witness tampering, or attempt, conspiracy, or solicitation to commit these *or similar offenses* in violation of federal, state or local criminal law. There is no requirement that the perpetrator have lawful immigration status or any family relationship with the victim.

7. Has the noncitizen been the victim of human trafficking?

- Noncitizens who have been trafficked into the U.S. may be eligible for a **T visa**. T visas can be granted to persons who have been (1) induced to come to the United States by force, fraud or coercion for commercial sex or are under the age of 18 and are brought for commercial sex purposes, or (2) recruited or transported to the United States by force, fraud or coercion for involuntary servitude, peonage or slavery. T visas are temporary but can lead to lawful permanent residency.

8. Is the noncitizen in immigration deportation proceedings?

- The noncitizen may be eligible for certain defenses to deportation, which may lead to lawful permanent resident status.
- If the noncitizen has lived in the United States (even though it was unlawful) for ten years or more, he or she may be eligible for a form of relief from deportation called **cancellation or removal**. The noncitizen must have close relatives who are U.S. citizens or permanent residents who would suffer exceptional and extremely unusual hardship if the noncitizen were to be deported. If granted cancellation of removal at the discretion of an immigration judge, the noncitizen will obtain lawful permanent residency.
- Noncitizens who are abused by a U.S. citizen or permanent resident spouse or parent may also qualify for **VAWA cancellation of removal** and only need to have resided in the U.S. for 3 years.

Appendix D: IRLC Juvenile Defender Immigration Cheat Sheet

Immigrant Legal Resource Center
 www.ilrc.org

December 2009

IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY **Inadmissibility (8 USC § 1182(a)) and Deportability (8 USC § 1227(a))**

Although not a conviction for immigration purposes, a delinquency adjudication still can create problems for juvenile immigrants. Certain grounds of inadmissibility (bars to obtaining legal status) and deportability (loss of current legal status) do not depend upon conviction; mere "bad acts" or status can trigger the penalty. The following are commonly applied conduct-based grounds and the juvenile court dispositions that might provide the government with evidence that the person comes within the ground.

Delinquency Disposition

Immigration Penalty & Waiver

Prostitution (being the prostitute, not the customer)	Inadmissible for engaging in prostitution Waivers often available
Drug Trafficking: Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses	Inadmissible where DHS/ICE has "reason to believe" participation in drug trafficking No waivers except for the S, T, or U visa.
Drug Abuse or Addiction: Repeated drug findings, finding of abuse (more than one time experimentation in last three years), addiction to drugs	Inadmissible and deportable for drug addict or abuser Waivers often available
Behavior showing a mental condition that poses a current threat to self or others: including suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (showing alcoholism)	Inadmissible for mental disability posing threat to self or other Waivers may be available
False Claim to U.S. Citizenship: Use of false documents and fraud offenses relating to false claim to citizenship	Inadmissible and deportable for false claim to U.S. citizenship Waivers may be available, e.g., SIJS and U Visa
Violations of protective or "no-contact" orders designed to prevent repeated harassment, credible threats of violence or bodily injury	Deportable where Court finds violation of domestic violence protective order designed to prevent repeated harassment, credible threats of violence or bodily injury Some waivers

WARNING! Be aware that gang membership, affiliation, and activity, violent offenses, and sex offenses can cause also problems for noncitizen youth including secure detention and denial of immigration applications as a matter of discretion. Go to www.defendingimmigrants.org for more information and resources on immigration consequences of delinquency.

Immigrant Legal Resource Center
www.ilrc.org

December 2009

**DIAGNOSTIC QUESTIONS FOR NONCITIZEN YOUTH:
DETERMINING POTENTIAL AVENUES FOR LEGAL STATUS**

1. Is the child a U.S. citizen without knowing it?
 - A. Anyone born in the U.S. or Puerto Rico is a citizen, and born in Guam, American Samoa or Swains Island is a national who can't be deported.
 - B. If person born outside the U.S., ask two threshold questions to see if the person automatically is a U.S. citizen. If the answer to either might be yes, refer for immigration counseling.
 - Was there a USC parent or grandparent at time of person's birth? Or,
 - Before person's 18th birthday, did both of these events happen (in either order): child became a permanent resident, and at least one natural or adoptive (but not step-) parent having some form of custody over the child is or becomes a U.S. citizen. (Tip: Encourage the parent to naturalize!)
2. Is the child currently under delinquency court jurisdiction where the court has ruled that the child (a) *cannot be reunified with one or both parents* parent because of abuse, neglect or abandonment or a similar basis under state law and (b) that it would not be in the child's best interest to be returned to the home country? The child may qualify for *special immigrant juvenile status*.
 - IMPORTANT: if possible, the child should stay in the jurisdiction of the delinquency court until the entire SIJS application is adjudicated, so watch out for youth aging out of the system. If this is not possible, the court should explicitly state that termination of jurisdiction is being done based on age.
3. Has the child been abused by a *U.S. citizen or permanent resident* spouse or parent, including adoptive, natural or step-parent? Has the child's parent been a victim of domestic violence by his/her U.S. citizen or permanent resident spouse? Consider *VAWA relief*.
 - Child doesn't need to be under current court jurisdiction, and may be reunited with the other parent.
 - Child will need to show "good moral character." Violent crimes will be a negative factor, but can be offset if there is a connection between the abuse and the bad conduct.
4. Has the child been a victim of serious crime, or of alien trafficking? Is the child willing to cooperate with authorities to investigate or prosecute the offense? Consider the *S, T, or U visas*.
 - This is one of the few forms of relief available even if the child has a drug trafficking delinquency disposition.
5. Does the child have a *U.S. citizen or permanent resident parent or spouse* who is willing to petition for her? Investigate **family immigration**.
 - To immigrate through an adoptive parent the adoption must be completed by the child's 16th birthday.
6. Does the child come from a country that's recently experienced *civil war, natural disaster, or political persecution*? Investigate various forms of relief such as **asylum and temporary protective status**.