



The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

UPDATE: HOW CAN A NONCITIZEN BE ORDERED REMOVED FOR PRIOR DWI AND/OR DWAI CONVICTIONS?

In certain cases your client can now be ordered removed for having two or more prior DWI or DWAI convictions. How can that be? The answer depends on whether your client is at risk for being placed in removal proceedings, whether your client is eligible for certain relief in those proceedings, and/or whether your client can/is applying for certain immigration benefits.

On October 25, 2019, the Attorney General, after directing the Board of Immigration Appeals to refer this case to himself, issued a decision in *Matter of Castillo-Perez*, 2 I&N Dec. 664 (A.G. 2019). In that case, the Respondent, who was not a Lawful Permanent Resident (LPR), applied for Cancellation of Removal under INA §240A(b), which allows the AG the discretion to cancel the removal and grant permanent resident status upon a showing that the Respondent's removal would result in exceptional and extremely unusual hardship to family members *and that the Respondent has been a person of "good moral character" for the 10 years preceding the application.*

The AG held that "evidence of two or more DUI convictions during the relevant period establishes a presumption that an alien lacks good moral character under INA §101(f), 8 U.S.C. 1101(f)." *Id.* at 673. (Emphasis added.) In *Castillo-Perez*, the Respondent applied for cancellation of removal but did not meet the statutory requirement of "good moral character" because of his alcohol related convictions. He was ordered removed.

What situations are affected by the "good moral character" requirement?

1. **Applications for relief in removal proceedings:**

a. Cancellation of removal:

- non-LPRs (with 10 years' physical presence in the U.S. who can demonstrate "exceptional and unusual hardship" to USC relative)
- "Special rule" cancellation of removal for victims of domestic



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CONTACT US!

Tel. (315)356-5794

Fax (315)356-5795

Sharon Ames, Esq.
sames@ocgov.net
CELL: (315)272-0505

Tina Hartwell, Esq.
thartwel@ocgov.net
CELL: (315)264-9217



Chief Defenders & Assigned Counsel Administrators:

Contact the RIAC2 to schedule your 2019 training, lunch hour or other session in your office/county. We will provide CLE credit!

violence

- “Special rule” cancellation of removal under the Nicaraguan and Central American Relief Act (NACARA)
- b. Voluntary departure (i.e. your client is allowed to depart the U.S. at his/her own expense avoiding the issuance of a removal order)
- c. Application for Bond – though this does not fall under the statutory “good moral character” provision, your client will not be released from ICE custody if he/she has a pending DWI or prior DWI convictions, being deemed a danger to public safety. DWAI convictions do not preclude release, but the bond will be high.

2. **Applications with USCIS:** Denial of these applications for someone who otherwise lacks valid immigration status means a referral to Immigration Court for removal from the U.S.
- a. Naturalization: lack of “good moral character” resulting in denial of citizenship
 - “Habitual drunkard” INA §101(f)
 - “Unlawful Acts” INA §101(f)
- Thus under *Castillo-Perez*, two or more DWI convictions create the presumption that your client lacks the required GMC for citizenship.
- b. Application for a green card: there is no statutory requirement of “good moral character” in these applications BUT, as stated in a footnote in *Castillo-Perez*, multiple DWIs are relevant to determine whether the client merits LPR status “as a matter of discretion.” This appears to apply whether or not the client is in removal proceedings.
 - c. Application for Special Immigrant status as the victim of abuse under the Violence Against Women Act (VAWA) – if denied, your client is more than likely without status and will be referred to Immigration Court for removal proceedings.

What this means for criminal defense counsel:

1. INTAKE! Find out whether your client is “otherwise removable,” is already in removal proceedings, and/or is eligible/applying for an immigration benefit such as a green card. This means getting a complete immigration history from your client with copies of any relevant immigration documents (e.g. green card, passport, visa, etc.) There is no substitute for getting this vital information.
2. As soon as possible, get the client into a program or services that will help demonstrate rehabilitation. Do not wait for sentencing. Gather other types of evidence to corroborate that your client is “rehabilitated.”
3. When possible, in the appropriate circumstances, seek a non-alcohol related disposition such as Reckless Driving (VTL §1212). If your client will be placed in removal proceedings, get a mitigation expert to assist in trying to negotiate a non-alcohol related disposition.
4. Your client’s fate, more often than not, depends on the “exercise of discretion” by someone, and alcohol related convictions now clearly negatively affect *any* discretionary decision by an Immigration Judge or USCIS adjudicator.

Contact the RIAC at the earliest possible moment in your client’s case!