

# RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

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**HAPPY NEW YEAR!**

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### **BAIL AND THE NON CITIZEN UNDER NY'S BAIL REFORM ACT**



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*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.*

### **BAIL AND THE NON CITIZEN UNDER NY'S BAIL REFORM ACT**

As you know, and as we previously discussed in our December 2019 newsletter, with the exception of “qualifying offenses,” your client must now be released on recognizance unless there are reasons that the Court finds your client will not appear in court when required. This is great news if you are a U.S. citizen. However, that ROR can send your OTHERWISE REMOVABLE\* noncitizen client, depending on the circumstances, straight into ICE custody. Because ICE ignores many state court orders to produce, your client will not be able to appear for any future court appearances if your client is taken into ICE custody.

Failure to appear on the state court charge(s) has negative consequences in both the state court criminal case and the federal immigration court removal proceeding. Pending or otherwise open cases, with no disposition, can delay the client’s immigration proceeding, meaning your client remains in ICE custody, at least, until the open charge is disposed of. In addition, an open case can prevent an Immigration Judge from ordering a bond where the client would have otherwise been released from ICE custody pending the outcome of the immigration court removal proceeding. In state court, the case remains open and there is nothing the court, DA or defense counsel can do to assure the defendant’s appearance.

While we know that ICE can no longer make arrests inside of courthouses, we have seen ICE pick people up outside of the courthouse, at probation offices, at their homes and at work. In other words, there is nothing to prevent ICE from arresting and detaining your client once he or she leaves the courthouse.

Under what circumstances should you request bail for your client who would otherwise be required to be released? The best way to make that determination is to use the immigration flow chart for arraignments, attached in this newsletter.

Refer to the Immigration Flow Chart below.

1. If your client was not born in the U.S., proceed as if NOT a U.S. citizen.
2. Is there an ICE hold? If Yes, then ask for bail and have client remanded with client's consent, explaining to client that there is an ICE hold and that you need to make sure that ICE will not detain the client if he or she is released. In the brief time you have with the client at arraignment, you will not be able to determine whether ICE will actually pick your client up.
3. Does your client have prior convictions that make him/her deportable? If yes, ask for bail. If not sure, ask for bail, explaining to client that priors could trigger ICE involvement. If no priors, proceed to step 4.
4. Does client have a green card? If yes, and no priors, client can be released. If no, go to step 5.
5. If client is a refugee /asylee, client can be released. If client is in valid nonimmigrant status (and you know this for sure), client can be released. If client is not in valid status, e.g. overstayed a visa, or you are unsure whether client is in lawful status, seek bail and remand, explaining to client that ICE could take client once out of custody but that we need time to determine that for sure.

When seeking bail, it is imperative to make the judge aware that if your client is released he or she will be unable to appear at future court appearances and this is **not the fault of the client**. Do **not** disclose any immigration information about the client. Simply make the court aware that there may be immigration issues. If there is an ICE hold, that is obvious, but do not otherwise reveal your client's personal information, including where he or she was born.

It is also imperative to instruct the client and or any family members **NOT TO POST THE BAIL** once it has been set, without talking to you first, and you will have, by then, talked to us at the RIAC.

We have seen nothing in the practice advisories, legislative announcements or guidance to the judiciary relating to non-U.S. citizens, yet blind adherence to the mandatory release provisions can have disastrous immigration consequences. We will be advising the magistrates and city court judges of the bail considerations for noncitizens, but those trainings may not take until later in the year.

As always, call the RIAC for assistance!

\*Otherwise Removable: Client is removable for a reason unrelated to the criminal case. Examples: Overstaying the time allowed in the U.S. upon entry; violating the terms of a visa (e.g. student falls out of status for less than full time enrollment); client has a prior order of removal. These are



#### 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!

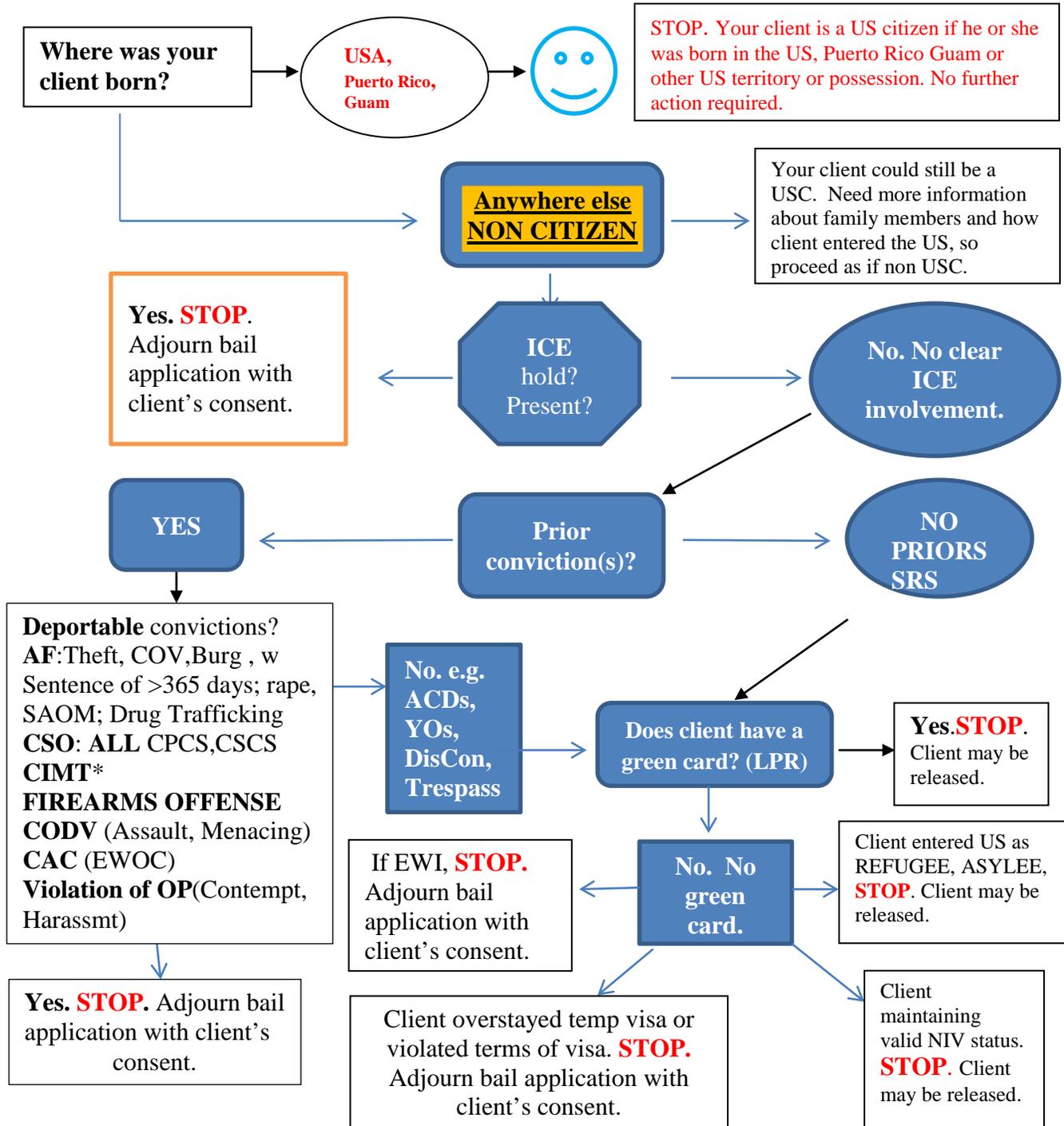
just examples. Get the information we ask for in our brochure (see attached) and contact the RIAC as soon as possible!

## Information We Need from You

Please have as much of the following information available as possible when contacting our office:

1. Client's name, date of birth and country of birth;
2. Client's immigration status, (if known);
3. Date of client's initial and last entry into the United States;
4. Information concerning current family law issue or pending criminal matter;
5. Any prior criminal history (i.e., nature of conviction, disposition, arrest and sentencing dates)
6. Any prior or pending immigration matter (i.e., pending immigration court proceeding or application for an immigration benefit);
7. Any "immediate family" residing in the U.S. (i.e., (grand) parents, spouse and/or children and their immigration status, if known).

# IMMIGRATION FLOWCHART



\*CIMT: If one prior CIMT, was it within 5 years of client's admission to US? If yes, **STOP**. Adjourn bail application with client's consent. If one CIMT (the only prior) not committed within 5 yrs of admission, and no other issues (see above), client may be released. If client has more than 1 prior CIMT, **STOP**. Adjourn bail application with client's consent.

**IF YOU ARE NOT SURE WHETHER A CRIME IS A "DEPORTABLE OFFENSE" INCLUDING WHETHER IT IS A CIMT, DO NOT GET THE CLIENT RELEASED. IF YOU ARE NOT SURE ABOUT THE CLIENT'S IMMIGRATION STATUS, ADJOURN THE BAIL APPLICATION WITH CLIENT'S CONSENT.**