# RIAC2

CRIMINAL LAW

FAMILY LAW

IMMIGRATION LAW

June, 2017

Volume 1, Number 6


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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.

# *Anatomy of a RIAC Advisory: Part 4*

## DEPORTABILITY: AGGRAVATED FELONIES

Under INA §237(a)(2)(iii), a person is deportable if convicted of an "aggravated felony." "Aggravated felony" is a term of art in Immigration Law that refers to a crime listed in INA §101(a) (43). That is because the definition of "aggravated felony" includes many misdemeanors, excludes some felonies, and contains offenses that are not even defined as "aggravated" under the criminal statutes.

There are now roughly 35 offenses that are classified as AFs. The more common potential aggravated felony categories charged in New York state courts are burglaries, theft offenses, drug trafficking charges, murder, rape, sexual abuse of a minor, firearms trafficking (as defined under federal law which includes possession), fraud offenses, forgery, obstruction of justice, perjury, or an attempt or conspiracy to commit an "aggravated felony." The "aggravated felony" designation applies to a crime committed at any time, and includes foreign country convictions where the sentence was completed within the previous 15 years.

Some of the crimes listed are only AFs if the sentence imposed is one year or longer, even if the sentence is suspended. These include "crimes of violence," theft offenses, burglary offenses, forgery offenses, obstruction of justice, perjury, bribery of a witness, counterfeiting and commercial bribery.

Aggravated felony convictions carry the most serious immigration consequences and result in automatic deportation in nearly all cases. In the first instance, a foreign national who is convicted of an AF is subject to mandatory ICE (Investigations and Customs Enforcement) detention upon release from state custody. There is no right to a bond for an aggravated felon. Secondly, most forms of relief available in removal proceedings are

off limits to anyone convicted of an AF. This includes "cancellation of removal," asylum, any waiver of deportation for criminal convictions under INA §237(h) and "voluntary departure."

Any non-citizen convicted of an AF who is not a Lawful Permanent Resident (LPR) of the U.S. "shall be conclusively presumed to be deportable from the United States." INA § 238(c); 8 U.S.C. §1228. He or she is subject to "expedited removal" on an administrative docket without a hearing before an Immigration Judge; is ineligible for any type of relief; and the only means of review available is by filing a Petition for Review in the federal circuit court of appeals.

If your client is a LPR (has a "green card"), he or she will still be subject to mandatory detention, but will get a hearing in front of an Immigration Judge (IJ). The only issue, however, upon the government's production of a properly certified copy of your client's conviction (or other evidence listed in INA §240(c)(3)(B) and (C)), is your client's identity and whether your client's crime of conviction constitutes an "aggravated felony." Any issue relating to the validity of the conviction itself is outside the jurisdiction of the Immigration Court.

A post- conviction state court matter relating to the criminal disposition is not a ground for terminating the removal proceeding absent an order vacating the conviction on constitutional or legal grounds (i.e. NOT in the " interests of justice"), nor is it even a ground for a continuance. The IJ may, in his or her discretion, grant a continuance if a motion is already pending and a decision forthcoming, or if a late Notice of Appeal is being filed (and your client is not otherwise removable), but the decision to grant or deny a continuance rests solely with the IJ. In other words, unless there is forthcoming relief in the state court, the removal case proceeds apace.

Because of the extreme consequences resulting from an AF conviction, whether a crime or offense constitutes an "aggravated felony" in the first place has expanded into an entire area of Immigration Law. The methodology for analyzing any particular statute has also evolved with the latest Supreme Court holdings further solidifying the "categorical" approach (a topic for a future newsletter). See, e.g. *Esquivel-Quintana v. Sessions,* 581 U.S. _____(2017) , decided May 30, 2017.

The message here is that defense counsel should, in the first instance, contact the RIAC to determine whether any of the client's charges are AFs, and if so, avoid a conviction for any charge that is an AF.

What are some of the ways to avoid the dreaded "aggravated felony"?

1. Negotiate a sentence of 364 days or less for those AF crimes where the sentence imposed is a year or longer.

2. File a Notice of Appeal, including a late Notice of Appeal via motion to the Appellate Division.

## UPCOMING EVENTS:

June 23, 2017: Oneida County Public Defender training, Utica, NY. 2:00 pm – 4:00 pm
(limited to members of the Oneida County Public Defender, Criminal Division)

Ongoing: Sharon will be in the Onondaga County Assigned Counsel Program offices every other Friday to discuss cases with ACP attorneys. If possible, please contact her in advance to schedule a time slot so that no one has to wait should two attorneys wish to meet with her at the same time.
June Dates: June 9 & June 30.

**Chief Defenders & Assigned Counsel Administrators:**

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

Sept. 7-8, 2017: Fifth Judicial District Training, Clayton,NY

3. Have your client allocute to stipulated facts that "sanitize" the record of any reference to an element of an AF (e.g. firearm, age of the complainant, amount of loss to the complainant for a fraud offense, simple possession with no intent to sell).

If there are post-indictment plea bargaining restrictions, it is critical for counsel to contact the RIAC as soon as your client's status as a noncitizen is known in order to avoid a possible AF conviction. For example, a Burglary 3d with probation or a 364 day sentence (which is neither an AF nor a CIMT with the proper allocution) may satisfy the prosecutor in terms of a disposition, but if your client has already been indicted on a Burglary 2d, it will be impossible to avoid an AF conviction without extensive legal maneuvering that may be unacceptable to the DA. Often the prosecutor will agree to a disposition that avoids an AF conviction if the proper discussions are had *prior* to indictment.

This brings us back to the intake process! The severe consequences of an AF conviction dictate that you must do everything in your power to avoid your client's removal on this ground. That means contacting the RIAC and getting all of your client's immigration and criminal histories as early as possible along with the background information detailing your client's positive equities that can be used to argue for anything other than a plea to an AF.

Other resources, such as the Center for Community Alternatives, can be utilized to help avoid an AF plea or to help minimize a sentence post-plea. In most of these situations, the severity of the immigration consequences far outweighs the seriousness of the offenses alleged, making it necessary to present a complete and accurate picture of the client to obtain as favorable outcome as possible.