

Crimmigration: Criminal Law, Immigration Law and the Border



**HISPANIC ISSUES SECTION
OF THE TEXAS BAR ASSOCIATION**

**WITH CO-HOSTS:
CAMERON COUNTY BAR ASSOCIATION • EL PASO BAR
ASSOCIATION • HIDALGO COUNTY BAR ASSOCIATION • LAREDO-
WEBB COUNTY BAR ASSOCIATION**

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MODERATOR: NOVERT MORALES

**PANELISTS: JORDAN POLLOCK, JODI
GOODWIN AND JOHN BALLI**

Padilla v. Kentucky: The Back Drop



- Lawful Permanent Resident for 40 years
- Vietnam War Veteran
- Charged with trafficking marijuana
- Defense said no immigration consequences
- KY Supreme Ct said immigration is collateral
 - No obligation to advise of immigration consequences under Sixth Amendment

Padilla: The SCOTUS Decision



- Radical changes in immigration code after 1996
 - Intimately intertwined with state criminal law
- Immigration not outside ambit of 6th Amendment
 - Professional Rules
 - Last Attorney standing
 - Proportionality Concerns
- Specific advice if consequences are clear, general advice if not
 - Must research to see if clear
- Judicial admonition not sufficient



Padilla: The Prosecution



“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”**

Padilla v. Kentucky (2010)

Padilla: The Judiciary



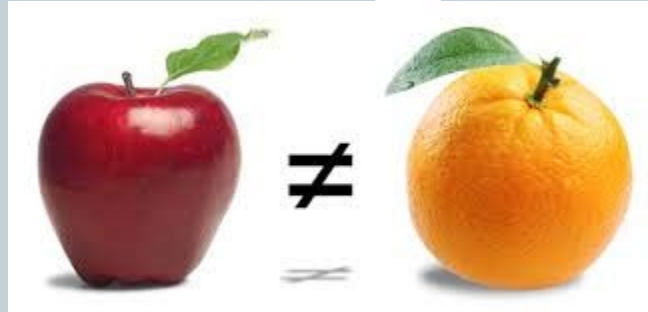
What the Judge Should Do

1. Grant continuances for the defense to get technical support
2. Encourage collaboration between state and defense
3. Grant funds to get an advisal for indigent clients (see sample Motion in the materials)

What the Judge Should NOT do

1. Give specific legal advice to the defendant
2. Solicit prejudicial immigration info on the record
3. Sacrifice competency for speed

Padilla: Fifth Circuit Weighs in



- Judicial obligation under 5th Amendment different than Defense Counsel's 6th Amendment Obligations

- General and Laconic vs. Specific and Detailed

- Timing is another key difference

- Padilla requires negotiation and thus admonition is too late

United States v. Batamula, 788 F.3d 166, 171 (5th Cir.), overruled in part on reh'g en banc, 823 F.3d 237 (5th Cir. 2016)

Padilla: Court of Criminal Appeals



Counsel found ineffective despite fact that he:

- Admonished client to “consult an immigration lawyer”
- Told the applicant that a plea to either of the charges he faced could subject him to deportation
- Discussed immigration with client three times

Ex Parte Torres, 483 S.W.3d 35 (Tex. Crim. App. 2016)

In *Ex parte Aguilar*, 537 S.W.3d 122, 127–28 (Tex. Crim. App. 2017), the CCA stated:

“We anticipate and expect, but do not demand, that **criminal law attorneys will rely on their immigration-law counterparts when representing noncitizens.**”

Padilla: 2nd prong of Strickland (*Lee v. US*)



- Mr. Lee was a long term LPR
- Substantial of evidence of his guilt
- Mr. Lee very clear his main goal was to avoid deportation
- Looking at the 2nd prong of Strickland, Court found prejudice despite likelihood he would have been convicted
- Analysis focuses on a defendant's decision-making, which may not turn solely on the likelihood of conviction after trial, particularly for non-citizens.

Obligations on Defense Counsel



- Padilla requires specific advice
- Padilla requires you to give that advice
- Padilla requires you to at least try and negotiate for an immigration neutral outcome
- Padilla does not require you to go to trial, only that your client understand the consequences



The Three Pieces of the Advisal Puzzle



Piece 1:
Information
Specific to your
client including
immigration
status, prior
criminal history
and future
immigration goals



Piece 2:
Immigration
Research to
understand the key
immigration provisions
at issue for your
individual client

Piece 3:
Texas
Statutes and
how they line
up with the
criminal
grounds in the
immigration
code

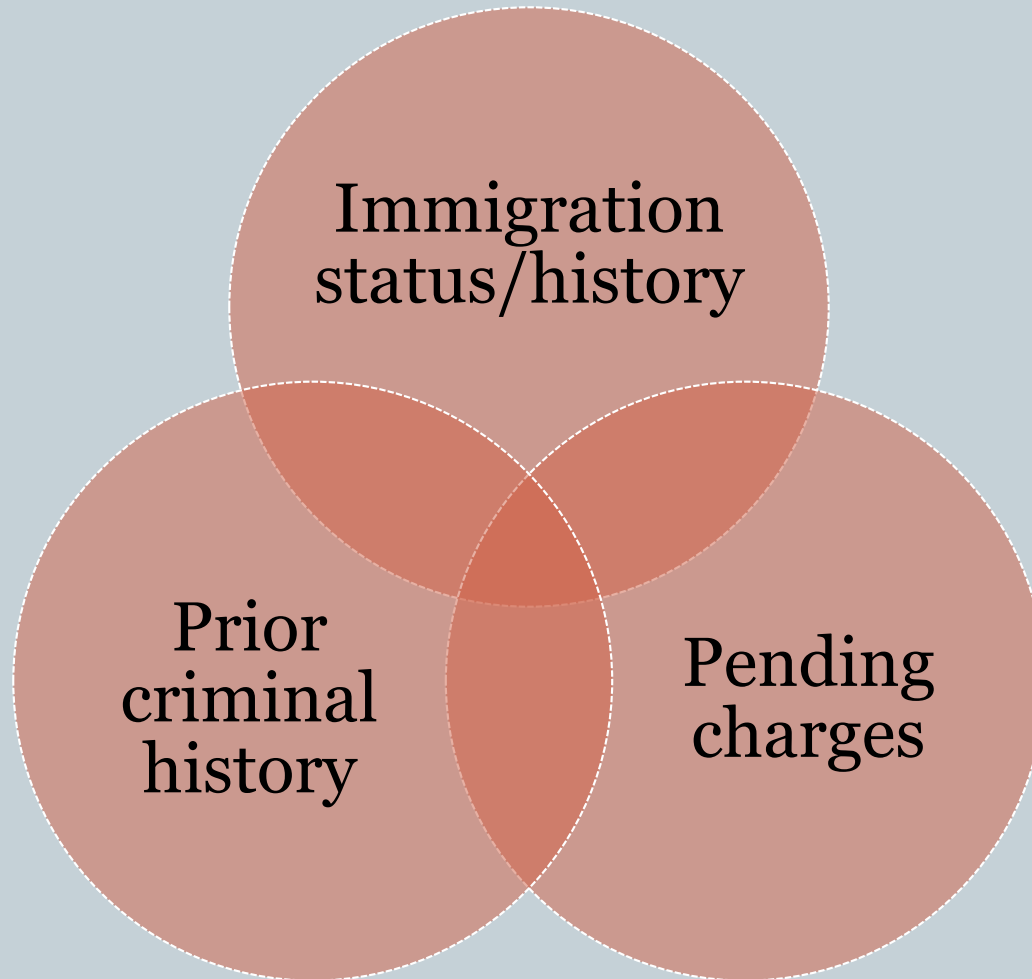
Gold Standard for Effective Assistance



- Advise on how to avoid being deportable
- Advise on how to avoid bars to relief from removal
- Advise regarding ability to travel
- Advise regarding naturalization if possible
- Advocate for avoidance of negative outcomes



To advise your client you need to know:



Types of Immigration Status



U.S.
Citizen

Lawful Permanent Resident
(Green card)

Lawful Non-Immigrants

Refugees & Asylees

Special Relief: TPS, DACA

Undocumented and Out of Status

Sample Intake Sheet in Materials



Non-Citizen Defendant Worksheet/Referral

Defendant Name: _____ Referring Attorney: _____
 DOB: _____ Language: _____ Referral Date: _____
 Defendant is: Not in custody In custody Booking #: _____
 ICE Detainer? Yes No Detainer Copy? Yes No Arresting Officer: _____

<p><u>Immigration Status:</u></p> <p>Place of Birth/ Citizenship (note if more than 1) : _____</p> <p><input type="checkbox"/> LPR – Lawful Permanent Resident (greencard) Since when? _____</p> <p><input type="checkbox"/> Refugee or granted asylum status Since when? _____</p> <p><input type="checkbox"/> Entered without documentation Date of entry _____ Age on entry _____</p> <p><input type="checkbox"/> Entered with a visa that expired on _____</p> <p><input type="checkbox"/> Previously deported? If yes, when? _____ <input type="checkbox"/> By ICE <input type="checkbox"/> Saw Immigration Judge</p> <p>Alien/ A number _____</p> <hr/> <p><u>U.S./Family Ties:</u></p> <p>* Other may be Asylee/Refugee or other valid immigration status</p> <p>SPOUSE: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented <input type="checkbox"/> Other _____</p> <p>PARTNER: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented <input type="checkbox"/> Other _____</p> <p>CHILDREN: How many? _____ Ages? _____ <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented <input type="checkbox"/> Other _____</p> <p>MOTHER: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented <input type="checkbox"/> Other _____</p> <p>FATHER: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented <input type="checkbox"/> Other _____</p> <p># of USC Grandparents? _____ # of USC Siblings? _____</p> <hr/> <p><u>Options for Relief:</u></p> <p>Currently in H.S.? _____ Diploma? _____ GED? _____</p> <p>Did your family or an employer ever file a petition for you? _____ If so, when? _____</p> <p>Have you ever filed for any immigration relief in past? _____ If so, what type of relief? _____</p> <p>Were you ever a victim of crime and reported it to the police? _____ (Qualifying crimes: incest, assault, DV, false imprisonment, extortion, obstruction of justice, sex abuse or related crimes)</p> <p>Do you fear return to home country/suffered past persecution? _____</p> <p>Were you ever a victim of Domestic Violence or Trafficking? _____</p>	<p><u>Contact Info:</u></p> <p>Name of closest relative: _____ Phone: _____ Permission to contact? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <hr/> <p><u>Current Charge(s):</u></p> <p>Cause #: _____ Court: _____ Offense and level: _____ Plea offer: _____</p> <p>Cause #: _____ Court: _____ Offense level: _____ Plea offer: _____</p> <p>Cause #: _____ Court: _____ Offense level: _____ Plea offer: _____</p> <hr/> <p><u>Complete Criminal History:</u> (ATTACH Information/Indictment, JI55/county criminal history and include offense, date of conviction and sentence here. Include arrests, deferred adjudications, memo agreements or divert programs, juvenile history and any other resolutions) IF NO CRIMINAL HISTORY, INDICATE THAT BY WRITING "NONE".</p> <hr/> <p><u>Defendant's Goals re: Immigration Consequences</u></p> <p><input type="checkbox"/> Avoid conviction that triggers deportation/ <input type="checkbox"/> Preserve eligibility to obtain future immigration benefits (e.g. LPR status or citizenship) or keep lawful status & stay in U.S. <input type="checkbox"/> Get out of jail ASAP <input type="checkbox"/> Immigration consequences, including deportation, are not a priority <input type="checkbox"/> Other goals re immigration consequences: _____</p>
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Padilla Resources around the State



- Mimi Alcocer- Ft Bend PD
- Jordan Pollock, Dallas PD
- Adela Meraz, CAPDS-Austin
- Dolores Martinez/John Balli, Webb PD
- Katrina Fleury, TRLA-RGV
- Amy Mena/ Veronica Campos, Harris PD,
- Alicia Alvarado, American Gateways Waco
- Julie Wimmer – myPadilla.com
- Your local immigration law bar (motion in materials)



Immigration Consequences of Criminal Convictions



- Deportation (sometimes mandatory)
- Detention during deportation case (sometimes mandatory)
- Bar to getting lawful immigration status (e.g. greencard, asylum, temporary protected status, student or work visas)
- Bar to citizenship (temporary or permanent)
- Bar to relief from deportation
- Bar to returning to U.S. after trip abroad or after deportation.

Immigration and Criminal Law



**“CONVICTION” FOR
IMMIGRATION PURPOSES
IS NOT THE SAME AS FOR
OTHER PURPOSES?**

What is a “Conviction” for Immigration Purposes?



Under the INA, a conviction exists where there has been a formal adjudication of guilt entered by a court or if adjudication has been deferred, where all of the following elements are present:

What is a “Conviction” for Immigration Purposes?



(1) A judge or jury has found the alien guilty, or the person entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and

What is a “Conviction” for Immigration Purposes?



(2) The judge has ordered some form of punishment, penalty or restraint on the person’s liberty to be imposed.

INA § 101(a)(48)(A).

What is a “Conviction” for Immigration Purposes?



**JUDGEMENT OF GUILT – PLEA OR
VERDICT (INCLUDING PLEA OF
NOLO CONTENDERE):**

YES

INA § 101(a)(48) [8 U.S.C 1101(a)(48)]

What is a “Conviction” for Immigration Purposes?



JUDGEMENT OF GUILT – APPEAL PENDING:

NO

Matter of Devison, 22 I&N Dec. 1362 (BIA
2000)

Matter of J. M. Acosta, 27 I&N Dec. 420 (BIA
2018) (pending direct appeal of right not a
“conviction”)

What is a “Conviction” for Immigration Purposes?



DEFERRED ADJUDICATION WITH PENALTY:

YES

Matter of Punu, 22 I&A Dec. 224 (BIA
1998)

Matter of Cabrera, 24 I&A Dec. 459
(BIA 2008) (court cost is penalty)

What is a “Conviction” for Immigration Purposes?



DISMISSAL

NO

What is a “Conviction” for Immigration Purposes?



PRETRIAL DIVERSION (AKA “DEFERRED PROSECUTION” or “PLEA IN ABEYANCE”):

NO

Pretrial diversion is not a conviction for immigration purposes as long as the process of securing pretrial diversion does not satisfy both prongs of the definition of conviction set forth in INA § 101(a)(48)(i) and (ii), [8 U.S.C. 1101(a)(48)(i) and (ii)]

Matter of Mohamed, 27 I&N Dec. 92 (BIA 2017) (if pretrial agreement contains admission of facts comprising guilt, waives right to trial if agreement is violated, and is filed with court, it may cross the line and qualify as “conviction.”)

What is a “Conviction” for Immigration Purposes?



**EXPUNCTION AND RECORD
SEALING:**

YES

Matter of Roldan, 22 I&N Dec. 224 (BIA
1999)

What is a “Conviction” for Immigration Purposes?



VACATION OF A CONVICTION (ON THE MERITS):

NO

Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378
(BIA 2000)

But see *Renteria* and *Discipio* from the Fifth Circuit and *Pickering* from the BIA.

What is a “Conviction” for Immigration Purposes?



VACATION SOLELY RELATED TO
IMMIGRATION:

YES

Renteria Gonzalez v. INS, 310 F.2d 825
(5th Cir 2002)

What is a “Conviction” for Immigration Purposes?



**JUVENILE DELINQUENCY
DISPOSITION:**

NO

Matter of Devison, 22 I&N Dec. 1362
(BIA 2000)

What is a “Conviction” for Immigration Purposes?



SUSPENSION OF SENTENCE:

YES

**INA 101(a)(48)(B) [8 USC
1101(a)(48)(B)]**

Immigration and Criminal Law



- **Waivable Crimes v. Aggravated Felonies**
 - Immigration consequences may be more harsh than punishment for crime
 - Avoid the aggravated felony designation if possible
- **Crimes Involving Moral Turpitude**
 - No set definition: base, vile, against the commonly accepted mores of community
 - Categorical approach is used; Silva-Trevino overruled
 - Petty Offense Exception

Immigration and Criminal Law



- **Domestic Violence**
 - Must be a crime of violence under 18 U.S.C. §16(b)
 - Simple Assault v. Assault “Plus”
 - Specific designation of victims
- **Firearms**
 - Unlawful Carrying of a Weapon
 - Certain firearms offenses are aggravated felonies

Immigration and Criminal Law



- **Section 101(a)(43) – Aggravated Felony**
 - Murder, Rape, Sexual abuse of a minor
 - drug trafficking
 - firearms trafficking
 - money laundering
 - Arson
 - certain firearms offense
 - crimes of violence
 - certain theft or burglary offenses
 - ransom offenses
 - child pornography
 - RICO offenses
 - prostitution and slavery offenses

Immigration and Criminal Law



- **Section 101(a)(43) – Aggravated Felony (cont.)**
 - offenses relating to National Defense
 - certain fraud crimes
 - alien smuggling offenses
 - passport offenses
 - certain failure to appear for sentencing offenses
 - offenses relating to bribery, counterfeiting forgery or trafficking in vehicles with altered ID numbers
 - obstruction of justice offenses
 - failure to appear to answer felony charges
 - an attempt to commit any of the above offenses
 - aiding or abetting the commission of any of the above offenses.

Immigration and Criminal Law



- **Term of Imprisonment**

- Some offenses designated as aggravated felony where term of imprisonment is at least one year
- Term of imprisonment includes any suspension of the term
- Deferred adjudication is a good way to avoid the term of imprisonment issue

- **Loss to Victim**

- Some offenses designated as aggravated felony where the loss to the victim is at least ten thousand dollars
- Care should be taken to keep actual loss figures out of the criminal record

Immigration and Criminal Law



- **Types of Waivers Available**
 - Waive grounds of inadmissibility or deportability
 - Check each ground of removability to determine if a waiver is available
 - 212(c) (criminal waiver), 212(h) (criminal waiver), 212(i) (fraud or misrepresentation waiver), 237(a)(1)(H) (certain misrepresentations waiver), 209(c) waiver (asylee adjustment waiver)

Immigration and Criminal Law



- Cancellation of Removal
 - 5 years as a lawful permanent resident
 - 7 years physically present after a lawful admission
 - No aggravated felony convictions
 - Discretionary factors
 - “Stop-time” rule applies

Immigration and Criminal Law



- **Section 212(c) Waiver**
 - 7 years as a lawful permanent resident
 - Available for crimes where plea agreement was entered into on or before April 24, 1996
 - Aggravated felonies can be waived
 - No “stop-time” rule

CrimImm Resources



- www.fd.org
- www.nlada.org
- www.defendingimmigrants.org
- www.nationalimmigrationproject.org
- www.immigrantdefense.org
- www.ilrc.org
- www.nortontooby.com
- www.crimmigration.com
- www.criminalandimmigrationlaw.com

DWI



- DWI is NOT a Crime Involving Moral Turpitude (CIMT)
- DWI is a bar to DACA (Significant Misdemeanor)
- DWI could lead to revocation of non-immigrant visas under discretionary grounds

Matter of Castillo Perez – DWI 2nd Conviction

- This case deals with the “Good Moral Character” (GMC) finding only
 - GMC is required for Cancellation of Removal
 - GMC is required for Naturalization

Matter of CASTILLO-PEREZ



Matter of CASTILLO-PEREZ, Respondent

Decided by Attorney General October 25, 2019

U.S. Department of Justice
Office of the Attorney General

- (1) The Immigration and Nationality Act's "good moral character" standard requires adherence to the generally accepted moral conventions of the community, and criminal activity is probative of non-adherence to those conventions.
- (2) Evidence of two or more convictions for driving under the influence during the relevant period establishes a presumption that an alien lacks good moral character under INA § 101(f), 8 U.S.C. § 1101(f).
- (3) Because only aliens who possessed good moral character for a 10-year period are eligible for cancellation of removal under section 240A(b) of the INA, 8 U.S.C. § 1229b(b), such evidence also presumptively establishes that the alien's application for that discretionary relief should be denied.

DWI Continued



Driving While Intoxicated with Child Passenger

- Maybe a CIMT, but likely classified as Child Abuse/Child Endangerment.
 - *In Matter of Velasquez-Herrera*, the BIA concluded that the term child abuse should be interpreted broadly to mean “any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child.” 24 I. & N. Dec. 503 (BIA May 20, 2008).

Practice Tip: Plead to a simple DWI.

Avoid 180 days confinement (GMC)

Drugs



Manufacture or Delivery of a Controlled Substance

- **§ 481.112(a) is likely a CIMT.** While simple possession is not generally a CIMT, offenses relating to drug trafficking are generally held to be CIMTs.
- **§ 481.112(a) would be a Controlled Substances Offense** for deportability and inadmissibility, **if the drug named is on the federal list of controlled substances.**

Drugs-Controlled Substance Offense (CSO)



Possession of Controlled Substance

- **Violations under Texas Health & Safety Code §§481.115-481.118** would be considered a Controlled Substance Offense (CSO) for deportability and inadmissibility, if the drug named is on the federal list of controlled substances (and there is a realistic probability of prosecution in Texas for that offense), or if the conviction does not mention the drug name, then the conviction will arguably not be a CSO.

Drugs-Possession of Marijuana (POM)



- Possession of Marijuana, Tex. Health & Safety § 481.121 (b)(2)-(b)(6), is a CSO for deportability and inadmissibility as marijuana is on the federal list of Controlled Substances.

Exceptions and Waivers

- A single offense under (b)(1), possession of two ounces or less, would not trigger deportability if the record reflects amount possessed was less than 30 grams. INA § 237(a)(2)(B)(i). Inadmissibility will trigger. A waiver is available if applicant can prove hardship to a U.S. Citizen spouse, parent or child. *See* INA § 212(h); INA §212(a)(2)(A)(i)(II).

Theft



Theft Texas Penal Code § 31.03

- Theft is an Aggravated Felony if sentenced to a year or more (including suspended sentence).
- Theft is a CIMT if committed after November 2016.
- Theft **requires** a permanent taking of property.

Practice Tip: Plea should be less than one year.

Assault



Assault §22.01

- Simple Assault is **not** an independent ground of deportability or inadmissibility.
- Simple Assault **with a one-year sentence** to imprisonment, including community supervision, is an aggravated felony/COV. and will render a non-citizen deportable. *INA §101(a)(43)(F)*

Family Violence and Assault to a Child will not be a simple assault.

Assault



Family Violence

- A conviction for Assault-Family Violence is a crime of violence (COV) and is a deportable offense. 18 U.S.C. § 16; INA § 237(a)(2)(E)(i).
- A conviction to a family violence assault is a Crime Involving Moral Turpitude (CIMT). The commission of a crime of moral turpitude (CMT) will also cause your client to be inadmissible. INA § 212(a)(2)(A)(i)(I).

Our Contact Info



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Q & A



- **Question 1**

- What advice do you have for district attorneys interested in crafting sensible policies regarding (1) charging and plea agreements regarding noncitizens in the criminal justice system, and (2) noncitizens who were never advised of immigration consequences prior to their convictions? For the latter, is post-conviction relief available and role can prosecutors have?

Jordan Pollock

Q & A



- **Question 2**

- Are you aware of instances where traffic violations or class C misdemeanors in Texas have caused immigration problems for noncitizen clients?

Jordan Pollock

Q & A



- Question 3

- Is habeas relief available for offenders prior to *Padilla*? If so, what do you recommend attorneys to do?

Jordan Pollock

Q & A



- Question 4

- Looking into a crystal ball how do you foresee the “crimmigration” area changing with a new administration and presumably significant changes in the arena of immigration law? And, specific to DACA applicants, what do you foresee happening regarding the effect on their immigration status?

Jodi Goodwin

Q & A



- Question 5
 - How are the risks different for lawful permanent residents, Temporary Protected Status (TPS) beneficiaries, Deferred Action for Childhood Arrivals (DACA) recipients, etc?

Jodi Goodwin

Q & A



- Question 6

- There are several instances where a person is detained crossing the border illegally while transporting narcotics. If the person was threatened or coerced, are there any available remedies for the person.

Jodi Goodwin

Q & A



- Question 7
 - If you do not have a criminal background and are having to reach out to your client's criminal attorney, what are some good questions to ask to get as much information as possible to determine if your client's criminal issue will affect his immigration status?

John Balli

Q & A



- Question 8
 - What are some of the viable options for defense attorneys and prosecutors in crafting plea agreements when you have a noncitizen client who wants to remain in the country?

John Balli

Q & A



- Question 9
 - For law students interested in having a criminal defense practice in a border state like Texas where many clients may be noncitizens, what do you recommend they do? Intern with immigration judges?
 - John Balli