CRIMMIGRATION COMMUNICATION: 2023 Case Law Update

2023 brought many important changes to the laws governing the immigration consequences of criminal charges, including to the consequences of some New York-specific offenses. While most decisions discussed below benefit non-citizens, the Board of Immigration Appeals and the Second Circuit have increased the immigration risks of some convictions. As always, to receive the most accurate and up-to date advice in your client's specific case, please reach out to the Long Island Regional Immigration Assistance Center.

Perhaps most significantly, the Second Circuit has decided that most (but not all) New York convictions for drug offenses are not properly classified as "controlled substance" offenses as defined in the immigration law, and thus, fewer non-citizens will be removed or denied entry to the US for these convictions.

In *U.S. v. Gibson*, 60 F.4th 720 (2d Cir. 2023) and *United States v. Minter*, 80 F.4th 406 (2d Cir. 2023), the Second Circuit found that the respective NY drug schedules criminalized substances not covered by the federal drug schedules. Thus, many New York drug crimes fail to qualify as "controlled substance offenses," the immigration category which triggers inadmissibility and deportability. Nevertheless, where the conviction contains a "sale" or "intent to sell" element, these crimes may still be classified as Crimes Involving Moral Turpitude, and marijuana convictions (even old convictions which do not appear on a NYSID) will also still cause problems for non-citizens.

In *Debique v. Garland*, 58 F.4th 676 (2d Cir. 2023) (2020), the Second Circuit firmly concluded that a conviction under NYPL § 130.60(2) is categorically a Sexual Abuse of a Minor Aggravated Felony resulting in automatic deportation.

In *U.S. v. Eldridge* (2d Cir. March 30, 2023), the Circuit Court found that kidnapping in the second degree, NYPL § 135.20, is categorically *not* a "crime of violence" Aggravated Felony, since this statute does not require "the use, attempted use, or threatened use of physical force," as defined in 18 U.S.C. § 924(c)(3)(A). Because the NYPL defines "abduct" and "restrain" to include the use of (non-violent) *deception* to hold a victim in a place where it is unlikely that the victim will be found, the Aggravated Felony "crime of violence" definition is not satisfied.

In publishing *Matter of Brathwaite*, 28 I&N Dec. 751 (BIA 2023), the administrative court deciding immigration appeals applied nationally the rule issued in *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021), that an appeal accepted under NYCPL § 460.30 is classified as a direct appeal, therefore, a non-citizen in removal proceedings with a pending appeal under this section *does not* have a final conviction for immigration purposes. Removal orders cannot be supported by non-final convictions. 8 USC §1101(a)(48)(A). Where relevant, counsel should file a Notice of Appeal or late Notice of Appeal.

In *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023), the BIA reiterated the choice of controlling law will follow the venue: where DHS has vested jurisdiction in the Immigration Court by filing charging documents, and only a change of venue granted by the Immigration Judge will alter this choice of law. Therefore, it may be necessary to explain to a client that the law that governs the analysis of the consequences of their conviction may apply only in a given circuit.

In *Matter of Pougatchev*, 28 I&N Dec. 719 (BIA 2023) the Board of Immigration Appeals altered significantly the consequences of New York convictions for Burglary. NYPL §140.25(1) is no longer a "burglary" Aggravated Felony because the

subsection refers to a "building" and not a "dwelling" as required by the federal burglary definition. This holding also applies to NYPL §140.20. At the same time, the BIA found that NYPL §140.251(d), the offense at issue in the case, which refers to unlawful entry or remaining in a building while the person "displays what appears to be a . . . firearm," is a "crime of violence" aggravated felony. A conviction under NYPL §140.25(1)(c) will probably also be deemed a "crime of violence" aggravated felony due to the element of "uses or threatens the immediate use of a dangerous instrument." A conviction under NYPL §140.25(1)(c) will probably also be deemed a "crime of violence" aggravated felony due to the element of "uses or threatens the immediate use of a dangerous instrument." A conviction under NYPL §140.25(1)(a) is probably not a "crime of violence" Aggravated Felony despite its "armed with explosives or a deadly weapon" element, because it lacks an element of "used, attempted to use, or threatened to use" force. This case's holding also reduces (but does not eliminate) the risk that NYPL §140.20 and 145.25(1) will be considered Crimes Involving Moral Turpitude.

As a result of *Pougatchev*, other offenses such as NYPL §120.14(1), NYPL §120.55(1), and NYPL §215.51(b)(i), which contain the element that the defendant "displays what appears to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm," will also be at greater risk of classification as "crimes of violence" for aggravated felony or crime of domestic violence purposes.

In *Pugin v. Garland*, 143 S. Ct. 1833 (2023), the Supreme Court held that a conviction may be an offense "relating to obstruction of justice," even if it does not require that an investigation or proceeding be pending or reasonably foreseeable. This decision increases the risk that New York hindering prosecution offenses (NYPL §§ 205.60, 205.65will be deemed "obstruction of justice" Aggravated Felonies where a sentence of a year or more is imposed.

In *US v. Texas*, Slip OP. No 22-58 (June 23, 2023), the Supreme Court re-confirmed the Executive Branch's authority to set priorities for immigration enforcement, allowing the "Guidelines for the Enforcement of Immigration Law" memorandum issued by Secretary of the Department of Homeland Security Alejandro Mayorkas to take effect. The "Priorities Memo" as it is called includes "danger to the community" from criminal activity as an enforcement priority. The memo also includes a list of mitigating factors officers should consider before taking enforcement action.

In *US v. Hansen,* Slip Op. 22-179 (June 23, 2023), the Supreme Court interpreted the criminal prohibition on "encouraging or inducing" non-citizens to come to the US in violation of the law. The Court found that in the context of an illegal scheme that promised immigration status to non-citizens via "adult adoption" in exchange for payment, the terms "encourage" and "induce" carried their common law, criminal meaning. These statutory terms thus referred to nothing more than the liability imposed by common law for "criminal solicitation and facilitation," and thus were not overbroad and therefore do not violate the First Amendment.

As evidenced by the above decisions, the landscape of potential immigration consequences of criminal charges and convictions is constantly changing in ways both helpful and harmful to non-citizen defendants. For the most accurate and up-to-date advice in your client's particular case, please do not hesitate to reach out to the Long Island Regional Immigration Assistance Center. We provide free advice and analysis of the current immigration consequences of your 18B client's charges and convictions.