



Practice Advisory Dependency Immigration Basics

This practice advisory describes basic immigration concepts and how they intersect with a dependency defense practice.

Purpose of this Practice Advisory¹

The purpose of this practice advisory is to discuss how basic immigration law concepts and procedures intersect with the practice of legal representation of parents and children in child welfare proceedings. This advisory will also inform child welfare lawyers of the ways in which child welfare orders (as well as child welfare agency actions) may have devastating *direct* immigration consequences for noncitizens. Recent federal executive orders and federal immigration enforcement practices have prompted additional need to ensure all dependency clients are receiving effective and zealous legal representation.² Noncitizens may become subject to state intervention under Title 13 child welfare proceedings because they reside in the United States with their children.

For purposes of this advisory, noncitizen means anyone who is not a U.S. citizen or U.S. national.³ Both children and parents of any age might be noncitizens. It should also be noted that the children of noncitizen parents may have only U.S. citizenship; may have dual nationality with the United States; or may have dual nationality with one or more foreign countries. Some noncitizen parents and children may also be stateless.⁴

Ongoing Duty of Diligence in Advising Clients Regarding Immigration Consequences

Public defenders are often reminded about the devastating immigration consequences of criminal convictions. Child welfare practitioners should *also* take great care to ensure they provide ethical legal representation, which includes competent, diligent counsel and advice. Such representation helps clients make informed, intelligent, and voluntary decisions in their child welfare cases.⁵ Because immigration law is a hyper-technical area of legal practice, child welfare practitioners who do not have immigration law expertise should strongly consider seeking consultation with immigration law experts in order to correctly advise their clients about the direct and collateral immigration consequences of the child welfare intervention.⁶ WDA's Immigration Project offers technical case assistance to attorneys seeking immigration consultation regarding collateral immigration consequences. Please contact WDA's Immigration Project, [here](#).

Child welfare lawyers representing parents and child practitioners should consider assisting their clients in obtaining direct legal representation or legal advice in their immigration proceeding as soon as possible. This is particularly true when their clients are in custody and are unrepresented in potential or existing immigration proceedings.⁷

Immigration Enforcement Basics

- Any client who is not a U.S. citizen faces potential immigration consequences when they enter the child welfare system.
- Even clients with lawful immigration status can be at risk of losing their status and being placed in removal proceedings.
- All undocumented persons are at risk of being placed in deportation/removal proceedings once ICE detects their presence in the U.S.
- Many grounds of removal are conduct-based, and admissions or judicial findings in civil courts can have serious consequences.
- Admissions by clients are usually admissible against them in removal proceedings.
- Under the new enforcement priorities, all undocumented persons who have “committed acts that constitute a chargeable criminal offense” or “pose a risk to public safety” are a particular priority for enforcement, even if they have never been convicted of a crime.
- Even if placed in removal proceedings, noncitizens may still have “relief” from removal, and can be granted lawful status or be allowed to maintain their lawful status.
- Various forms of relief from removal exist, and child welfare attorneys can assist in obtaining predicate orders for one form of relief, Special Immigrant Juvenile Status.

Immigration Enforcement and Removal Procedures

Merely being present in the United States without lawful immigration status is not a crime. A person who is undocumented is in violation of civil immigration laws. The penalty for violating civil immigration laws is “removal,” also known as deportation.⁸ Civil violations of immigration laws are filed in and pursued in Immigration Court.⁹ Federal agents of the U.S. Immigration and Customs Enforcement agency (commonly referred to as “ICE”)¹⁰ enforce immigration law. In contrast, violations of criminal laws related to immigration are prosecuted by the United States Attorneys in federal district court.¹¹ Agents of ICE and U.S. Citizenship and Immigration Services (USCIS) may interview your noncitizen client to solicit adverse admissions as part of the immigration investigation or removal proceeding.¹² Any noncitizen present in Washington State *without* lawful status is subject to deportation at any time regardless of the existence of a child welfare proceeding. Do not assume that because a person is abused or a victim of crime and eligible *to request* lawful status, that ICE won’t arrest them or that the Immigration Court won’t order them to be deported.

Consular Notifications in Child Custody (Child Welfare) Proceedings

The Vienna Convention on Consular Relations requires consular notification when federal or state government agents take certain actions against “foreign nationals”¹³ within their (federal or state) borders. While it may be more widely known that consular notification is required when a “foreign national” is arrested or detained,¹⁴ consular notification is also required when a “foreign national” child is placed into guardianship.¹⁵ Guardianship means both protective custody initiated by law enforcement and orders placing “foreign national” children in non-parental custody.¹⁶ For some “foreign nationals,” consular notification is mandatory.¹⁷ If the “foreign national” is a lawful permanent resident (or, green card holder), the mandatory notification does not apply and is only required at the foreign national’s request. Child welfare practitioners should assume that law enforcement officers (making arrests, presenting individuals for detention, or placing children in protective custody) and state child welfare workers (placing children in state custody pursuant to a dependency court order) are following these policies directing them to make the necessary consular notifications. Washington State’s Children’s Administration’s policy on consular notification also requires child welfare workers to inquire about nationality and immigration status.¹⁸

Immigration law advocates rightly have concerns about law enforcement officers and CPS workers collecting and retaining nationality or immigration status data from noncitizens directly, since any knowing and voluntary admission of “alienage”¹⁹ can be used against them in removal proceedings. Attorneys should advise clients that they are not required to disclose their country of citizenship, and counsel them about the risks of disclosing citizenship information so that they may make an informed decision about seeking consular services and disclosing citizenship information to the child welfare agency.

The benefit to consular notification is that noncitizens may be entitled to receive consular visits while detained and consular services while their dependency case is pending. Consular services are country-dependent.²⁰ Some basic consular services include, among other things: the provision of replacement travel documents; advice and support to victims of serious crime; arranging for visas for family members; consular contact with incarcerated nationals; facilitating the overseas payment of social welfare benefits; registering citizen births abroad; and providing a list of local doctors and lawyers.²¹ These consular resources might be helpful as public benefits may not be available to some clients.²²

Please consider reviewing more practice advisories related to representing noncitizens in dependency actions, or contact the Incarcerated Parents Project for more information at dadre@defensenet.org.

Mitigating Negative Findings for Noncitizens in Dependency Actions (Part II)

Immigration Relief for Noncitizens With Dependency Actions (Part III)

Representing Incarcerated or Detained Noncitizens in Dependency Actions (Part IV)

¹ This advisory is authored by D'Adre Cunningham, the Washington Defender Association's Incarcerated Parents Project Attorney, in consultation with Sara Sluszka WDA's Immigration Project. More information and resources for both projects can be found at: www.defensenet.org.

² See resources under the heading, *Immigration Enforcement Issues & Presidential Executive Orders of January 25, 2017*, at <http://www.defensenet.org/immigration-project>.

³ The term, noncitizen, is used by immigration advocates to describe anyone who is not a U.S. citizen. In international treaties, a noncitizen is labelled a "foreign national," which is defined as a person who is not a citizen or national of the country in which they are living. The term "national" means "a person owing permanent allegiance to a state." 8 U.S.C. 1101(a)(21). Foreign nationals may or may not have lawful immigration status. See also definitions contained at:

https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf.

The term "national of the United States" means "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." See 8 USC 1101(a)(22). Examples of U.S. nationals who are not U.S. citizens are persons born either in American Samoa or on Swains Island to parents who are not U.S. citizens.

⁴ "A stateless person is someone who, under national laws, does not enjoy citizenship – the legal bond between a government and an individual – in any country. Stateless persons can still be detained and ordered deported, but usually will not be subject to physical deportation from the U.S. While some people are de jure or legally stateless persons (meaning they are not recognized as citizens under the laws of any state), many people are de facto or effectively stateless persons (meaning they are not recognized as citizens by any state even if they have a claim to citizenship under the laws of one of more states.)" See <https://www.state.gov/j/prm/policyissues/issues/c50242.htm>.

⁵ Rule of Professional Conduct 1.1 (Competence); Rule of Professional Conduct 1.2 (a) (Scope of Representation, *inter alia*); Rule of Professional Conduct 1.3 (Diligence); Rule of Professional Conduct 1.4 (b)(Communication).

⁶ Criminal defense counsel's failure to correctly advise, or seek consultation to correctly advise, her client about the impact of a criminal conviction on that client's immigration status falls below the standard of "reasonableness under the prevailing professional norms" enunciated in *Strickland v. Washington*. *Padilla v. Kentucky*, 559 U.S. 356, 368-69 (2010); *State v. Sandoval*, 171 Wn.2d 163, 171-72 (2011).

⁷ Under federal law, any legal aid or nonprofit legal association receiving Legal Services Corporations funding are prohibited from using the funds to represent people who are undocumented, or are incarcerated in federal, state, and local prisons (including jails). 45 CFR 1637.1. There are limited exceptions. In 2017, some local jurisdictions in WA created funding sources to pay for immigration representation for detained residents of their cities or counties. There is a referral list of immigration lawyers on the [Washington Defender Association's Immigration Project website](#). It should be noted the only low or no cost legal agency providing comprehensive direct legal immigration representation in Washington is the [Northwest Immigrant Rights Project](#) ("NWIRP").

⁸ 8 USC 1229a(a)(1). The federal statute on "Removal Proceedings" provides, "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."

⁹ Immigration judges of the Immigration Court are appointed by the Executive Office of Immigration Review ("EOIR"). The Executive Office of Immigration Review ("EOIR") is an agency housed within the U.S. Department of Justice. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.

¹⁰ When Congress created the Department of Homeland Security ("DHS") in 2003, it broke the Immigration & Naturalization Service (or "INS"), the agency that *had been* responsible for immigration, naturalization, and deportation, since 1933, into three (3) parts: U.S. Citizenship and Immigration Services (USCIS); U.S. Immigration and Customs Enforcement (ICE); and U.S. Customs and Border Protection (CBP). USCIS is now responsible for the administration of immigration services including permanent residence, [naturalization](#), asylum, and other functions. ICE is now responsible for the investigations, deportation, and intelligence functions of the legacy INS. CBP is now responsible for the border functions of legacy INS. They conduct patrols at and alongside points of entry into the United States (including international train terminals, international ferry terminals, sea ports, international bus terminals, and international airports).

¹¹ Some common examples of criminal immigration, nationality and citizenship offenses include improper entry, 8 U.S.C. §1325(a); illegal re-entry, 8 U.S.C. §1326(a); fraudulent marriage, 8 U.S.C. §1325(c); fraud or misuse of immigration documents, 18 U.S.C. §1546(a); misuse of citizenship papers, 18 U.S.C. §1423; impersonation or misuse of papers in a naturalization proceeding, 18 U.S.C. §1424; unlawful procurement of citizenship, 18 U.S.C. §1425; falsification of naturalization papers, 18 U.S.C. §1426; and unlawful sale of citizenship papers, 18 U.S.C. §1427.

¹² Some prior procedures including interviewing applicants applying for lawful status may be declining in favor of new accelerated review process, but interviews, i.e. admissions, could be happening at any time during the child welfare case.

¹³ “Foreign national” is the legal term used in the international treaty. In this section of the advisory the term can be equated to the term “noncitizen.”

¹⁴ Vienna Convention on Consular Relations, Article 36 (1)(b), at 15. See text online at: <http://www.fuech.eu/pdf/viennaconvention.pdf>.

¹⁵ Vienna Convention on Consular Relations, Article 37 (1)(b), at 16. See text online at: <http://www.fuech.eu/pdf/viennaconvention.pdf>.

¹⁶ Notification would normally be required in the following situations: (1) A foreign national is taken into protective custody, either an individual or a government agency; (2) A petition to appoint a guardian for a foreign national is filed with a court; or (3) Legal proceedings are initiated in which a foreign national minor is named as a party and the individual’s parent or guardian cannot be located.

Consular Notification & Access Manual, U.S. Department of State publication, Office of the Legal Adviser and Bureau of Consular Affairs, 4th ed., revised August 2016, 10.

¹⁷ https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf.

¹⁸ This policy requires the CA social worker to interview family members about their citizenship status. CA Practice and Procedures Guide, No. 4211. <https://www.dshs.wa.gov/ca/4000-child-welfare-services/4211-notification-foreign-consulates>.

¹⁹ Alienage is the term used in U.S. federal immigration law to describe noncitizens.

²⁰ We have compiled a list of the five countries of nationality in Washington State with the largest total number of noncitizens and largest number of youth entering into deportation proceedings in Seattle Immigration Court to provide consular services information.

²¹ Consular assistance does not normally include translation and interpreting services; legal advice or legal advocacy; or negotiating of special treatment, bail, or early release from prison.

²² See discussion below.