



## Practice Advisory

### Mitigating Negative Findings for Noncitizens in Dependency Actions

**This practice advisory reviews practical tips for mitigating the effects of dependency findings for noncitizens in immigration proceedings and for supporting reunification for noncitizen parents with their children in dependency actions.**

#### Purpose of this Practice Advisory<sup>1</sup>

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.<sup>2</sup>

A noncitizen means anyone who is not a U.S. citizen or U.S. national.<sup>3</sup> 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.<sup>4</sup>

#### 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 attorneys 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.<sup>5</sup> Child welfare attorneys 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.<sup>6</sup> Child welfare attorneys should assist their clients in obtaining direct legal immigration advice and/or representation as soon as possible, particularly when they are unrepresented in potential or existing immigration proceedings or when they are in custody.<sup>7</sup>

## Practice Tips:

- WDA's Immigration Project offers technical case assistance to attorneys seeking immigration consultation regarding immigration consequences. Please contact WDA's Immigration Project, [here](#).
- Noncitizen clients may also contact [Northwest Immigrant Rights Project](#) ("NWIRP"), a free or low cost legal agency providing comprehensive direct legal immigration representation in Washington State.
- Be very careful about facts are developed in the court record of the client's health-related conditions.
- Be particularly vigilant about litigating whether poor parenting decisions or unsafe parenting behaviors exist.
- Try to limit evidence about incarcerated or detained parents to avoid findings of parental unfitness or parenting deficiency.
- Consider vigorously litigating orders at shelter care, dependency, disposition, permanency planning review, and dependency review hearings.
- Pay close attention to how the court ultimately enters findings that may negatively impact the client's immigration matter.
- Be cautious and strategic about creating a record of ineligibility for public insurance or public benefits.

## Conduct-Based Grounds for Deportation Triggered by Dependency Actions

In addition to the numerous grounds of inadmissibility<sup>8</sup> and deportability<sup>9</sup> under the immigration law based on criminal convictions (which we do not address here), there are additional grounds that require only evidence that a noncitizen has engaged in prohibited conduct. Noncitizen parents with lawful status may become deportable or ineligible to lawfully stay in the United States as a result of actions taken by the child welfare agency, orders issued in the child welfare action, and/or their other life circumstances changing. For example, a noncitizen parent who is lawfully present on a work visa sponsored by a particular employer (or is a spouse of someone lawfully present for that reason) may become unlawfully present if the parent loses that job and cannot lawfully adjust his/her status. As another example, a noncitizen parent lawfully present on a student visa may become unlawfully present if they leave or complete school.

A noncitizen parent may also be engaging in behavior or admitting to behaviors during the life of the child welfare case that later could form the basis of their deportation or could interfere with their request to be relieved from deportation. Unlike a criminal case, where the case and the defense attorney's responsibility to mitigate immigration consequences usually ends when the court enters the

judgment, a child welfare case may continue for years after the court enters the judgment, so the attorney must constantly be aware that changes in the client's life circumstances could potentially affect the client's immigration status. Also, when a noncitizen parent seeks to change her/his immigration status, her/his eligibility is reviewed by the federal immigration agency to evaluate whether the request should be granted.<sup>10</sup> For example, a "green card" holder may seek to naturalize as a citizen, but their application may be denied if upon review USCIS finds evidence that supports grounds for inadmissibility or lack of "good moral character."<sup>11</sup> Instead of gaining citizenship, s/he may be placed in deportation proceedings as a result of what USCIS discovers.

## **Examples of Common Conduct-Based Grounds of Inadmissibility and Deportability**

There are four health-related grounds of inadmissibility:

- The first excludes noncitizens who have "a communicable disease of public health significance."
- The second excludes noncitizens who are seeking admission as permanent residents and who were not vaccinated against certain diseases.
- The third relates to physical or mental disorders, and excludes noncitizens who have, or have had, a condition that has an associated behavior that poses a threat to the property, safety, or welfare of themselves or others. An example of this conduct might include: current suicidal tendencies, sexual predator tendencies and alcoholism. If the person no longer has the condition, it does not constitute an inadmissibility ground unless the behavior is likely to recur or the condition is likely to lead to other harmful behavior. Consular officers now may revoke a visa and refer noncitizens to a panel physician if they have either a single drunk driving arrest or conviction within the last five calendar years.<sup>12</sup>
- The fourth ground excludes drug abusers and addicts.<sup>13</sup> The Center for Disease Control ("CDC") issued the Technical Instructions for Medical Examination of Aliens, which guides medical doctors through the assessment of drug addiction or drug abuse.<sup>14</sup> Experimentation with a substance will not qualify as "drug abuse," though admissions of use could trigger the inadmissibility grounds for an offense relating to a controlled substance. Applicants found to be in remission are not inadmissible.

## **Attorneys Should Pay Close Attention to Findings of Fact in All Court Orders**

The following factual circumstances that are commonly alleged as part of child welfare petitions may trigger grounds of inadmissibility or deportability: violation of a DV protection order; the fact that one is likely to become a public charge;<sup>15</sup> false claims to U.S. citizenship<sup>16</sup> or use of false documents<sup>17</sup>; admissions to conduct that is not "moral behavior"; admissions to child abuse, child neglect, or child abandonment; or admissions to other conduct that constitutes criminal activity (such as drug trafficking) or criminal/gang association, even if that conduct is not charged.

Child welfare attorneys should be very careful with regards to the record of health related conditions, such as mental health diagnoses and addiction, suicide attempts or threats to harm self or others, and sexual behaviors which may either not be “moral behavior” or which may constitute criminal acts. Although immigration officials do not often seek the records of a child welfare case as part of the regional practice here in Washington, access to the records of a juvenile or other parties in a child welfare case (juvenile non-offender proceeding) generally are available upon application by law enforcement under RCW 13.50.100.

### **Attorneys Should Seek to Limit Record of Parental Unfitness or Problem Behaviors in Children**

Child welfare attorneys representing noncitizen parents and children should be particularly vigilant about litigating whether poor parenting decisions or unsafe parenting behaviors exist. If poor parenting behavior is found to exist over the client’s objection, then attorneys should litigate what services tailored to the noncitizen parent or child should be offered and provided. If tailored services are court ordered, then attorneys should litigate *how* noncitizen clients will access and engage in those services. Court orders describing the service plan for noncitizen clients should also explicitly describe how the noncitizen client will show progress has been made or correction in their parenting decisions or behavior has occurred.<sup>18</sup>

Child welfare courts may hold hearings at which negative findings about noncitizen parents and children and orders for remedial services may be entered. These hearings may occur at any point during the course of the action. Children’s attorneys should note that when the court orders noncitizen children to address their own alleged maladaptive behaviors,<sup>19</sup> it must find that the child’s behavior contrary to their health, safety, or welfare or contrary to their own best interests.<sup>20</sup> Immigration officials can compel noncitizen clients to answer questions related to these issues under penalty of perjury. Again, admissions to maladaptive behaviors may, once discovered, prevent the noncitizen from remaining lawfully in the country,<sup>21</sup> from adjusting his/her immigration status,<sup>22</sup> or from avoiding deportation.<sup>23</sup>

For example, a forensic mental health evaluation may label a noncitizen parent or child with a chronic mental illness or a substance use disorder (drug addiction) and the court may order ongoing mental health treatment. Such a court order may prevent the noncitizen from remaining lawfully in the country,<sup>24</sup> from adjusting his/her immigration status,<sup>25</sup> or from avoiding deportation.<sup>26</sup> Therefore, attorneys should give great consideration to how they litigate orders at shelter care, dependency, disposition, permanency planning review, and dependency review hearings and how the court ultimately drafts such orders.

### **Noncitizens May Have Limited Access to Remedial Services**

The primary barrier to indigent noncitizens (in need of remedial services<sup>27</sup>) successfully navigating the child welfare system is gaining access to culturally competent narrowly-tailored services. Unlike most indigent citizen parents in the child welfare system, indigent noncitizen parents are often

ineligible for a broad range of federally funded “safety net” services. Examples of services, from which governments may categorically or conditionally exclude noncitizens include: federally funded public benefits;<sup>28</sup> federally managed health care and federal health insurance benefits;<sup>29</sup> federally funded housing programs.<sup>30</sup> Once appropriate service providers are identified, indigent noncitizen parents, particularly the indigent ones, often need the State to provide payment for those services.<sup>31</sup>

Noncitizen children are eligible to receive public funded health insurance through the Foster Care to 26 Medicaid program and Temporary Assistance to Needy Families (“TANF”) assistance. Noncitizen children unlawfully present do not usually qualify for any additional public or educational assistance unless the assistance is provided by their city or county; cities and counties vary on what is provided based on local funding resources. It should be noted that child development services, early learning services, and hands-on child-parent therapies are often funded through the *child’s* public medical insurance, so these remedial services should still be made available to these dependent children and/or their noncitizen parents.

The State’s obligation to provide *remedial services*, especially court-ordered and *necessary ones*, to correct deficient parenting skills, may seem elusive,<sup>32</sup> but the court may order the child welfare agency to pay directly for services necessary for parents or children (regardless of immigration status).<sup>33</sup> Ultimately, attorneys for noncitizen parents should be careful and strategic about what record is created about the client’s ineligibility to qualify for public insurance or public benefits.<sup>34</sup> To assist noncitizen parents with reunification<sup>35</sup> and to reduce their risk of permanent deprivation of their child-parent relationship, parent attorneys should try to limit evidence about incarcerated or detained parents to avoid findings of parental deficiency.

**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](mailto:dadre@defensenet.org).**

Dependency Immigration Basics (Part I)

Immigration Relief for Noncitizens with Dependency Actions (Part III)

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

---

<sup>1</sup> 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](http://www.defensenet.org).

---

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

<sup>3</sup> 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](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.

<sup>4</sup> “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. 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.)” U.S. Department of State webpage, <https://www.state.gov/j/prm/policyissues/issues/c50242.htm>. Stateless persons can still be detained and ordered deported, but usually will not be subject to physical deportation from the U.S.

<sup>5</sup> Rules of Professional Conduct 1.1 (Competence); Rules of Professional Conduct 1.2 (a) (Scope of Representation, *inter alia*); Rules of Professional Conduct 1.3 (Diligence); Rules of Professional Conduct 1.4 (b)(Communication).

<sup>6</sup> Indeed, 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); see also *State v. Sandoval*, 171 Wn.2d 163, 171-72 (2011). [WDA’s Immigration Project](#) offers technical case assistance to attorneys seeking immigration consultation regarding collateral immigration consequences.

<sup>7</sup> 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 created funding sources to pay for immigration representation for detained residents of their cities or counties.

<sup>8</sup> “Inadmissibility” is a term of art in the INA (See 8 U.S.C. 1182). Grounds of inadmissibility serve four distinct purposes in immigration law:

1. They are the grounds under which undocumented persons are deported from the U.S.
2. They preclude people outside of the U.S. from gaining lawful entry.
3. They preclude legal permanent residents from gaining citizenship.
4. They act as a legal bar to legal permanent residents gaining discretionary relief from deportation if they are placed in deportation proceedings.

<sup>9</sup> Grounds of deportability are the grounds by which individuals who already have lawful status are deported from the U.S. (See 8 U.S.C. 1227).

<sup>10</sup> Seeking advice from an immigration attorney is preferable because each scenario is highly fact-dependent. Please contact WDA’s Immigration Project, [here](#).

<sup>11</sup> A finding of “good moral character” is required to gain U.S. citizenship and certain other immigration relief, and people whose convictions or juvenile dispositions trigger crime-related inadmissibility grounds lack good moral character as a matter of law.

<sup>12</sup> See <https://fam.state.gov/fam/09FAM/09FAM040311.html>.

<sup>13</sup> See INA 212(a)(1)(A)(iv).

<sup>14</sup> See <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/mental-civil-technical-instructions.html>.

<sup>15</sup> The reference to public charge means likely to be on public assistance.

<sup>16</sup> INA § 212(a)(6)(C)(ii); INA § 237(a)(3)(D).

<sup>17</sup> INA § 237(a)(3)(C).

<sup>18</sup> The child welfare court may also order children involved in these proceedings to address maladaptive or antisocial behaviors the court deems contrary to their health, safety, or welfare or contrary to their own best interests. Examples of behaviors children are often ordered to remediate include, but are not limited to: symptoms of depression, skipping school, engaging in drug use, running with antisocial peers, and engaging in antisocial behavior (crimes).

<sup>19</sup> Examples of behaviors children are often ordered to remediate include, but are not limited to: symptoms of depression, skipping school, engaging in drug use, associating with antisocial peers, and engaging in antisocial behavior (crimes).

<sup>20</sup> In the case of medical services, children age 13 and older are permitted to consent and refuse those services. A youth’s (13 and older) specific consent is required for release of their own medical information. Children’s attorneys should be explicit that

---

their child client is not waiving their rights to medical confidentiality. See RCW 71.34.530 (Mental Health Services-Age of Consent); RCW 70.02.130 (Consent by Others).

<sup>21</sup> Discussed infra.

<sup>22</sup> Adjusting immigration status may be changing from unlawful to lawful status; or it may be changing between lawful status, i.e. from a nonimmigrant visa to a so-called green card or from a “green card” to naturalized citizen.

<sup>23</sup> Discussed infra.

<sup>24</sup> Discussed infra.

<sup>25</sup> Adjusting immigration status may be changing from unlawful to lawful status; or it may be changing between lawful status, i.e. from a nonimmigrant visa to a so-called green card or from a “green card” to naturalized citizen.

<sup>26</sup> Discussed infra.

<sup>27</sup> “Remedial services include individual, group, and family counseling; substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary child care and therapeutic services for families; and transportation to or from any of the above services and activities.” RCW 13.34.025(a). See also In the Matter of Parental Rights to J.L. Q-R., et al., 193 Wn.App. 1047 (May 5, 2016) (Div. 3)(unpublished opinion), \*1. (Note: to cite this opinion in future legal pleadings, it should be designated with the following disclaimer: Pursuant to GR 14.1 (a), this unpublished opinion of the Court of Appeals has no precedential value and are not binding on any court, but may be cited as a nonbinding authority, and the opinion may be accorded such persuasive value as the court deems appropriate. GR 14.1 (a)).

<sup>28</sup> Including food, cash, and educational/vocational assistance.

<sup>29</sup> Such as Social Security disability benefits or public health insurance for adults through the expansion of Medicaid under the Affordable Care Act, which currently pays for adult dental care, (inpatient and outpatient) chemical dependency treatment, mental health treatment, parenting in treatment housing programs. This group of parenting in treatment housing programs includes parenting inpatient programs as well as transitional housing programs providing intensive outpatient services) and some effective child-parent therapies.

<sup>30</sup> Only a small group of noncitizens are able to receive publicly funded housing assistance.

<sup>31</sup> Demonstrating a positive change in parenting behavior is required to successfully resolve the underlying child welfare case. Most parents demonstrate positive parenting after accessing remedial services. Most families involved in the child welfare system in Washington State are indigent. Indigent child welfare-involved parents tend to rely upon public medical insurance to engage in court-ordered services.

<sup>32</sup> In the Matter of Parental Rights to J.L., 193 Wn.App. 1047, 2016 WL 2593878, \*7, unpublished, (May 5, 2016).

<sup>33</sup> “As a condition for receiving funded remedial services, the court may inquire into the parent’s ability to pay for all or part of such services or may require that the parent make appropriate applications for funding to alternative funding sources for such services.” RCW 13.34.025(b).

<sup>34</sup> It should be noted that child development services, early learning services, and hands-on child-parent therapies are often funded through the child’s public medical insurance, so these remedial services should still be made available to these children and their parents. Noncitizen children are eligible to receive public funded health insurance through the foster care to 26 Medicaid program and TANF assistance. However, children unlawfully present do not usually qualify for any additional public or educational assistance unless provided by their county or city; counties and cities vary on what is provided based on local funding sources.

<sup>35</sup> Once State intervention lapses or closes, a parent is free to choose where the child lives long-term. See also In Re Guardianship of D.S., 178 Wn.App. 681, 690 (Div. 3 2013); In re S.G., 140 Wn.App. 461, 468-69 (Div. 3 2007) (“The court must first conclude that the parent is deficient before it can terminate the parent’s legal relationship with his child...Without a problem, there can be no solution.”); In re Dependency of R.W., 143 Wn.App. 219, 222 (Div. 2 2008) (holding court must determine whether parental placement with father, who was the noncustodial parent prior to dependency, was in children’s best interests over the maternal grandmother; court must not consider the impact of such placement on the prior custodial parent, here, the mother).