

# WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

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## FEATURED TOPIC

### Criminal Activity and Protection from Persecution



An overview of how criminal convictions can bar or terminate refugee and asylee status, including particularly serious crime findings and discretionary denials. The article highlights key misconceptions and recent case law affecting removal and adjustment to permanent residence.

*Continued on page 2...*

### Pro Bono Opportunity: Immigration Habeas Cases Training

Attorneys have expressed interest in handling immigration cases pro bono. Lawyers are needed in habeas matters, in particular, since the federal government takes the position that noncitizens must remain detained during the pendency of their removal proceedings. If you are among those interested, here is information about a training on March 3:

[https://www.nacdl.org/Event/Habeas-as-the-Last-Line-of-Defense-for-Detained-Im?\\_zs=balhSI&\\_zl=hxro8](https://www.nacdl.org/Event/Habeas-as-the-Last-Line-of-Defense-for-Detained-Im?_zs=balhSI&_zl=hxro8)

### Policy Update

#### Refugee & Asylum Processing Paused

Federal memoranda pause refugee green card and asylum processing, expand discretionary review for travel-ban nationals, and authorize detention for refugees who fail to timely adjust. (p. 8)

#### Case Watch

##### Birthright Citizenship

The Supreme Court will hear *Trump v. Barbara* on April 1, 2026, addressing nationwide injunctions and the scope of the 14th Amendment's Citizenship Clause. (p. 5)

### Federal Update

#### Harboring Statute Update and Caution for Counsel

To date, we are not aware of any prosecutions under 8 U.S.C. § 1324 in the WDNY, SDNY, or EDNY. Nonetheless, defense attorneys should exercise caution if noncitizen clients are confronted by ICE in your presence. (p. 6)

# Criminal Activity and Protection from Persecution

(Updates of WNYRIAC articles from July 2023 and February 2024)

By Sophie Feal, Managing Attorney, WNYRIAC, Legal Aid Bureau of Buffalo

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The WNYRIAC is funded by the NYS Office of Indigent Legal Services to support mandated criminal, appellate, and family defense providers in the 7th and 8th Judicial Districts. Following *Padilla v. Kentucky*, defense counsel must advise noncitizen clients on potential immigration consequences before a plea. We provide no-cost support to help attorneys meet these obligations.

There is a common misconception that refugees and asylees cannot be deported to the country from which they fled persecution. This is untrue. While there are many privileges to having refugee or asylee status, criminal activity can lead to removal for them just like it can for any noncitizen. It can also be the basis to deny them this protected status in the first place.

*Arrests may lead to an adverse exercise of discretion even without a conviction, and a DWI-alcohol conviction, while not deportable, can still result in denial of relief.*

## Refugee vs. Asylee Status

It is important to understand that the most significant difference between an asylee and a refugee is where the status is granted. The protection claims of refugees are adjudicated and granted status outside of the United States, in a third country, and if granted, they are then admitted to the U.S. in refugee status with the right to work authorization, a pathway to lawful permanent residency and then to naturalization. The current federal Administration has set a historically low annual refugee admission rate and has prioritized the admission of South African Afrikaners.

Those who seek asylum are in the United States already, having entered by various means, and they apply for asylum here. The method of entry to the country does not affect asylum eligibility. Applications are made to either U.S. Citizenship and Immigration Services (USCIS) or before an immigration court if the person is in removal proceedings. If an immigration judge or USCIS determines that an asylum applicant has met their burden of proof and is granted the benefit, then they will be deemed an asylee with a pathway to lawful permanent residency and U.S. citizenship, like refugees. There is no limit to the number of people who can be granted asylum each year as there is with refugees.

## Asylum-Specific Criminal Bars

However, there are asylum-specific criminal bars. If an applicant has an “aggravated felony” conviction, such as one for murder, rape, sexual abuse of a minor, certain crimes of violence or theft, or drug trafficking, for example, they will be statutorily barred from being granted asylum. A conviction for a “particularly serious crime” is also a bar to asylum, and asylum may be denied in

the “exercise of discretion” if the adjudicator believes the applicant is undeserving of the benefit. To make matters more confusing, as stated above, all aggravated felony convictions are deemed particularly serious crimes, but then not all particularly serious crimes are aggravated felonies. Cont'd on page 4

## NYLAG Launches Standby Guardianship Project for Immigrant Parents

The New York Legal Assistance Group (NYLAG) has established a project to draft stand-by guardianships for immigrant parents who are worried that they may be separated from their child because of an immigration action, such as an arrest, detention, or deportation. These noncitizen parents should consider making a plan now for the future care and custody of their children. While NYLAG's project primarily serves New York City residents, they may handle some cases Upstate, if remote access is available.

Information and resource guides in several languages may be found [here](#), and referrals may be made at [vendrell@nylag.org](mailto:vendrell@nylag.org).

## Particularly Serious Crime Determinations

When a conviction is not for an aggravated felony, what constitutes a “particularly serious crime” (PSC) is made on a case-by-case basis by the adjudicator, though there is precedential case law that gives us guidance. Recently, the Board of Immigration (BIA) held that there is no presumption that a misdemeanor is not a PSC, modifying previous caselaw. *Matter of E-A-S-O*, 29 I&N Dec. 422 (BIA 2026). Also, the BIA and most federal circuit courts have held that an offense may be deemed a PSC even if it is not an aggravated felony. The determination is made with following considerations: the elements of the offense as well as all reliable information, including the record of conviction and sentencing information, such as the nature of the conviction, the circumstances and underlying facts for the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the individual will be a danger to the community. According to the BIA, adjudicators are not required to analyze the mitigating circumstances

surrounding the offense, and, in fact, the BIA discourages such considerations, explaining that “offender characteristics” are irrelevant because they “may operate to reduce a sentence but do not diminish the gravity of a crime.”

Offenses against a person such as assault, carjacking, kidnapping in the third degree, burglary in the first degree, manslaughter, attempted robbery in the third degree, first degree sexual abuse, and rape in the first degree have all been deemed PSCs. Offenses against property are less likely PSCs, but burglary in the first degree and grand larceny in the fourth degree have been deemed so. Firearms offenses may be PSCs, and criminal contempt in the first degree has also been found to be a PSC.

In August 2025, the Second Circuit Court of Appeals held that two noncitizens granted asylum could not become lawful permanent residents because their asylum statuses had been terminated when an immigration court found that convictions for third-degree stalking, in violation of New York Penal Law §120.50, and child endangerment, in violation of New York Penal Law §260.10, were “particularly serious crimes,” as

defined by immigration law. In a second case, the immigration court terminated asylum status after finding that two DWI convictions, three years apart, constituted “particularly serious crimes,” both individually and together.

## Discretion and “Bad Acts”

In addition, asylum, like most other types of immigration benefits, is subject to discretion. This allows an adjudicator to determine whether the applicant merits the benefit as a matter of discretion. Hence, applicants have the burden of proving both statutory and discretionary eligibility for relief and are required to provide the relevant records to establish a favorable exercise of discretion. The underlying facts of a “bad act” may be the subject of questioning, such as allegations in a Family Court petition of abuse, neglect or abandonment of a child. Arrests may also lead to an adverse exercise of discretion, even without a conviction. And while a DWI-alcohol conviction is not a deportable offense, it can lead to a negative exercise of discretion.

## Adjustment of Status and Grounds of Inadmissibility

When those granted asylum or refugee status apply to become lawful permanent residents (green card holders), they will

## Birthright Citizenship Case Set for Supreme Court Argument

The “birthright citizenship” case, *Trump v. Barbara*, (No. 25-365), which arose from a class action lawsuit filed in New Hampshire's District Court, is scheduled for oral argument on April 1, 2026. This past summer, the federal court in the *Barbara* case granted a preliminary injunction that protects birthright citizenship for all children born on U.S. soil, prompting the Trump administration’s appeal to the U.S. Supreme Court. The government has filed its briefs in the case and argues that the 14th Amendment's Citizenship Clause was meant to confer citizenship only to formerly enslaved people and their children. They further argue that it applies only to those who “owe primary allegiance” to the U.S. and not to those in the U.S. temporarily or unlawfully. The Justice Department's brief dives deeply into 19<sup>th</sup> century debates about the 14th Amendment seeking to “restore the original meaning of the Citizenship Clause.” Cecillia Wang, the national legal director of the American Civil Liberties Union and a second-generation American, will argue this landmark case on behalf of the respondents / appellees. [Read more here.](#)

be subject to the grounds of inadmissibility pursuant to Immigration and Nationality Act (INA) §212. There are several grounds of inadmissibility for criminal convictions, and even some criminal acts that do not require a conviction. There are waivers available for criminal grounds of inadmissibility for asylees and refugees, and those waivers are more encompassing than waivers for other immigrants, but they too are discretionary. Should a waiver be denied, the applicant will be denied permanent residence and placed in removal proceedings. If they were already in removal proceedings, then they will be ordered removed unless another form of relief is available to them.

As this article indicates, immigration law is complex. Let the RIAC experts help you determine your client's status and the consequences of any plea.

## Harboring Statute Update and Caution for Defense Counsel

In our April 2025 newsletter we published an article on the harboring provision of 8 USC §1324 and indicated that the case law on harboring varies from circuit to circuit. In January 2026, we reported on the conviction of a Milwaukee, Wisconsin judge who had been charged with violations of 18 USC §1505 (obstruction) and 18 USC §1071

(harboring a fugitive). We have learned recently that there have been no prosecutions under 8 USC §1324 in the SDNY, EDNY or WDNY. Nonetheless, we continue to believe that defense attorneys may want to exercise caution if noncitizen clients are confronted by ICE in your presence. For more information, we invite you to read [Safe Harbors: When the Federal "Alien" Harboring Statute 8 U.S.C. §1324 and the Constitution Collide](#) by Zoe Chang. Ms. Chang raises the concern that "when it comes to the legal professionals, the constitutional rights that are at stake are not just those of the attorney, who owe constitutional and ethical obligations to noncitizen clients, but also a noncitizen client, who holds a Sixth Amendment right to effective assistance. Of course, it has always been against the law and against the ethical rules for a lawyer commit a crime or assist another in committing a crime. But a broad definition of harboring — one that criminalizes giving accurate legal advice, issuing appropriate cautions, or even worse, criminalizes the failure to affirmatively turn clients in or advance a client's interests in good faith — threatens to undermine the foundations of a good, effective, and constitutional lawyer client relationship."

## Hochul Bill Would Limit Local ICE Contracts but Falls Short of New York for All

In late January, Governor Hochul proposed a bill, “Local Cops, Local Crimes Act” that would ban cities and counties in New York from entering into certain contracts with Immigration and Customs Enforcement (ICE). However, this proposal is not as broad as the “New York for All” legislation, which would also stop local authorities from recognizing administrative detainers, and alerting ICE when a noncitizen is being released from jail when ICE. The Bronx Defenders, among other advocates, state that while they appreciate that the Governor recognizes the harm of New York law enforcement colluding with ICE, a comprehensive solution, as presented in “New York for All,” is what is necessary.

Governor Hochul’s proposal would prohibit 287g agreements, which deputize local officers to enforce federal immigration law, and would dissolve contracts that allow federal immigration authorities to use county jails to hold noncitizens, but there are concerns

raised by immigration advocates that the bill does not address. Moreover, Hochul’s proposed law would sunset in three years, July 1, 2029, which gives the false impression that only the current federal administration has engaged in problematic enforcement of U.S. immigration laws.

For more information, see:

[\*Hochul Proposed Banning ICE Collaboration Contracts. Here’s What You Need to Know\*](#), and [\*New York for All Coalition Responds to Governor Hochul’s Proposed Bill Addressing Protections for Immigrants and Calls for Passage of the New York for All Act\*](#)

### Cheektowaga Resolution Limits ICE Cooperation

The Cheektowaga Town Board recently passed a resolution limiting the use of town resources, including police personnel and funding, for federal civil immigration enforcement activities, except where required by law. Officials stated the measure is intended to clarify that the town is not a “sanctuary” jurisdiction while also setting boundaries on local cooperation with federal immigration authorities. For more information, [please see the linked article.](#)

## Clarifying Recent Federal Memos on Refugee Admissions

There is confusion about the various memos issued by the federal government on refugee admissions. We hope to briefly clarify the situation:

On 11/21/2025, a memo was issued stating that the applications for permanent residency of refugees admitted between 1/21/2021 and 2/20/2025, when Biden was president, would be placed on hold and reviewed.

Six days later, another memo was issued stating that nationals of the 19 "travel-ban" countries who apply for permanent residency in general (not as refugees) would have their applications scrutinized for adjudication in the exercise of discretion.

On 12/2/2025, a memo was issued stating that all asylum applications (those who apply for protection from persecution in the U.S.) filed with USCIS would be placed on hold.

A 1/9/2026 memo states that USCIS commenced reexamining thousands of refugee cases through an operation called PARRIS (Post-Admission Refugee Reverification and Integrity Strengthening). It is initially focusing on 5,600 refugees in Minnesota who have not yet adjusted to lawful permanent resident status.

On 2/18/2026, the Administration issued a memo stating that ICE would detain refugees who did not apply for permanent residence after one year as they are required to do. The Immigration and Nationality Act states that such refugees, who, at the end of the one year period have not acquired permanent residency, "shall be returned to the custody of the Department of Homeland Security for inspection and admission to the U.S. as an immigrant." It is the position of the government that such individuals are subject to detention. A 2010 memo from a previous Administration had halted this practice, but that memo was rescinded.

Read more [here](#).

## How We Support Mandated Defense Counsel

- Immigration advisals on pleas and dispositions
- Assistance communicating advisals to clients
- Language access support & interpreter referrals
- Help identifying a client's immigration status
- Written or oral advisals for courts or prosecutors
- CLEs on immigration consequences of crimes
- Participation in case conferences
- Referrals to deportation defense counsel

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