

Defending Non-Citizens in Illinois, Indiana, and Wisconsin

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**with Heartland Alliance's National Immigrant Justice Center,
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“[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

DISCLAIMER

This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.

Juveniles and Immigration Consequences

Immigration Consequences for Juveniles	5-1
Juvenile Delinquency Proceedings.....	5-2
Extended Juvenile Jurisdiction (EJJ) Proceedings	5-4
Alternatives to the Court System	5-6
Certification as an Adult	5-7
Special Immigrant Juvenile Status (SIJS)	5-7

Immigration Consequences for Juveniles

Non-citizen juveniles may face immigration consequences for criminal acts. Such consequences include being placed in removal proceedings, being ordered removed, and removed from the United States, regardless of age.⁶⁰¹ The immigration consequences depend on the nature of the acts and whether the juvenile non-citizens are in juvenile delinquency proceedings, extended juvenile jurisdiction proceedings (Illinois), or have been certified to stand trial as an adult.

Under Illinois law, persons ages 17 and older may be prosecuted as adults rather than adjudicated delinquent.⁶⁰² Concurrent jurisdiction between the delinquency court and adult criminal court exists for traffic, boating, fish and game law, and city or county ordinance violations for juveniles.⁶⁰³ Juveniles ages 15 and older who are charged with murder, certain other crimes of violence, or aggravated criminal sexual assault will be prosecuted as adults.⁶⁰⁴

In Wisconsin, juveniles ages 10 to 17 may be adjudicated delinquent.⁶⁰⁵ Juveniles ages 16 and older will be prosecuted as adults for traffic, boating, snowmobile and all-terrain vehicle violations.⁶⁰⁶ Juveniles ages 14 and older may be prosecuted as adults for crimes of violence, such as homicide and robbery, and for controlled substance trafficking

⁶⁰¹ See *In re Mejia-Andino*, 23 I&N Dec. 533, 535-37 (BIA Dec. 4, 2002) (discussing the requirements for proper service of a Notice to Appear in the case of a minor); *In re Gomez-Gomez*, 23 I&N Dec. 522 (BIA Dec. 4, 2002) (regarding *in absentia* removal proceedings and removal orders for minors).

⁶⁰² See 705 ILCS 405/5-120.

⁶⁰³ See 705 ILCS 405/5-125.

⁶⁰⁴ See 705 ILCS 405/5-130.

⁶⁰⁵ See Wis. Stat. § 938.12(1); Wis. Stat. § 938.12(2).

⁶⁰⁶ See Wis. Stat. § 938.17(1).

offenses.⁶⁰⁷ In certain circumstances, juveniles ages 10 and older will be prosecuted as adults for homicide charges and other specified offenses and where they have been previously adjudicated delinquent or guilty for criminal offenses.⁶⁰⁸

Indiana law is similar to Wisconsin law. A juvenile age 14 or older who has been charged with a heinous or aggravated act or an act that is part of a repetitive pattern of delinquent acts may be charged as an adult.⁶⁰⁹ The juvenile delinquency court may also waive its jurisdiction to allow any juvenile to be charged as an adult if he is charged with an act that would be a felony if committed by an adult and he has been previously convicted of a felony or a non-traffic misdemeanor.⁶¹⁰ A juvenile age 16 or older may be charged as an adult for a controlled substance offense or for other specified felony offenses.⁶¹¹ A juvenile age 10 and older may be prosecuted as an adult for murder.⁶¹² Under the Individuals with Disabilities Education Act,⁶¹³ it may be possible for defense counsel to move for dismissal of a juvenile court petition where the non-citizen youth's behavior on school premises or a school bus is based on a disability and his special education needs have not been sufficiently addressed by the school.⁶¹⁴

Juvenile Delinquency Proceedings

Case Law

Non-citizens placed in juvenile delinquency proceedings who have been found to have committed an act of juvenile delinquency are generally *not* subject to deportation, exclusion or removal proceedings. An act of juvenile delinquency is not considered a crime and a finding of juvenile delinquency is not a conviction for immigration purposes.⁶¹⁵ Since an act of juvenile delinquency is not considered to be a crime for deportation purposes, non-citizens placed in juvenile delinquency proceedings will not be deportable for their acts of delinquency.

⁶⁰⁷ See Wis. Stat. § 938.18 (regarding process for prosecutor to seek a waiver of juvenile court jurisdiction and reference to offenses qualifying under the waiver).

⁶⁰⁸ See Wis. Stat. § 938.183.

⁶⁰⁹ See IC 31-30-3-2.

⁶¹⁰ See IC 31-30-3-6.

⁶¹¹ See IC 31-30-3-3; IC 31-30-3-5.

⁶¹² See IC 31-30-3-4.

⁶¹³ See 20 U.S.C. § 1400 et seq. (1997).

⁶¹⁴ The Pacer Center, Inc., a non-profit parent training center in Minneapolis, Minnesota has a special project entitled the Juvenile Justice Project which works with juveniles with disabilities in the juvenile justice system. The staff can provide training and assistance to public defenders as well as coordinate with other agencies. The Juvenile Justice Project has published a useful resource entitled *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System*, 1999, 2nd edition, updated 2003. The Pacer Center, Inc. is located at 8161 Normandale Blvd., Minneapolis, MN 55437, (952) 838-9000. To contact the Juvenile Justice Project, call (952) 838-9000 or visit <http://www.pacer.org/jj/index.asp>.

⁶¹⁵ See *In re Devison*, 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001); *In re De La Nues*, 18 I&N Dec. 140 (BIA Oct. 5, 1981); *In re Ramirez-Rivero*, 18 I&N Dec. 135 (BIA Oct. 5, 1981); 22 C.F.R. § 40.21(a)(2) (1998).

Non-citizens in juvenile delinquency proceedings may, however, be found to be inadmissible based on their conduct and consequently deportable. A non-citizen juvenile is inadmissible:

- 1) For an adjudication or admission involving controlled substances other than minor drug offenses relating to simple possession or use of controlled substances which occurred under age eighteen;⁶¹⁶
- 2) If the DHS has “reason to believe” that he is or has been a drug trafficker, drug abuser, or drug addict;⁶¹⁷ or
- 3) If he was involved in prostitution within 10 years of the date of his or her application for adjustment of status to become a lawful permanent resident.⁶¹⁸

A non-citizen juvenile may also be inadmissible under I.N.A. § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E) and deportable under I.N.A. § 237(a)(1)(E), 8 U.S.C. § 1127(a)(1)(E) for having knowingly encouraged, induced, assisted, abetted, or aided another non-citizen to enter the United States.

In addition, certain dispositions for juvenile delinquency bar applicants from adjusting to become lawful permanent residents through Family Unity under the 1986 Amnesty and 1988 Special Agricultural Worker (SAW) Programs. If an act of juvenile delinquency which if committed by an adult would be a felony involving violence or the threat of physical force against another person, then the juvenile disposition is a bar to Family Unity benefits granted or extended after September 30, 1996 under IMMACT 1990 § 301(e) as amended by IIRAIRA § 383.⁶¹⁹ In such a case, the DHS can deny the application of the juvenile for Family Unity and place the juvenile in removal proceedings based on the juvenile’s unlawful entry into the U.S. or time in the U.S. beyond any period authorized by the DHS.

Practice Tips

In cases involving the trafficking or manufacturing of controlled substances, smuggling of non-citizens, or prostitution, the juvenile court records should be sealed to avoid immigration consequences. Even though the juvenile disposition is not a “conviction” for immigration purposes, a juvenile non-citizen may still be found to be inadmissible in these cases which may result in the juvenile being found deportable and subsequently deported or removed from the United States.

⁶¹⁶ See 9 FOREIGN AFF. MAN. 40.21(b) N2.1 (1996).

⁶¹⁷ See *id.*; I.N.A. § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).

⁶¹⁸ See I.N.A. § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

⁶¹⁹ See “Implementation of Hernandez v. Reno Settlement Agreement; Certain Aliens Eligible for Family Unit Benefits after Sponsoring Family Member’s Naturalization; Additional Class of Aliens Ineligible for Family Unity Benefits,” 65 Fed. Reg. 43677 (2000) (amending 8 C.F.R. § 236.13).

Extended Juvenile Jurisdiction (EJJ) Proceedings

Effective January 1, 1999, the state of Illinois implemented provisions for extended jurisdiction juvenile prosecutions (EJJ), habitual juvenile offenders, and violent juvenile offenders.⁶²⁰ Unless otherwise provided, the extended jurisdiction juvenile statute enables a juvenile court judge to place a juvenile offender on probation for up to five years or until he or she turns 21 years old, whichever is less.⁶²¹ Since the statute was enacted, it is unclear whether a juvenile has a “conviction” for immigration purposes. As of May 15, 2007, neither the Board of Immigration Appeals nor the Seventh Circuit Court of Appeals has decided any case involving hybrid statutes, including cases resulting under the Illinois EJJ statute, or the issue of inadmissibility and deportability for adjudications or executed sentences under these statutes.

State Statutes

In the absence of Board of Immigration Appeals and Seventh Circuit Court of Appeals case law regarding extended juvenile jurisdiction, defense counsel representing juveniles in extended juvenile jurisdiction (EJJ) proceedings should treat the juvenile’s case as though the juvenile were an adult for purposes of evaluating whether the juvenile may face subsequent immigration consequences.⁶²² Under Illinois statute, a juvenile alleged to have committed a felony offense may be placed in EJJ proceedings by the court after a petition or motion by the prosecutor and hearing by the court.⁶²³ If the EJJ prosecution results in a guilty plea, verdict of guilty, or a finding of guilt, the court shall impose one or more juvenile sentences *and* an adult criminal sentence with a stay of execution.⁶²⁴ If the juvenile then violates the conditions of the juvenile sentence, the court may order the execution of the adult criminal sentence OR continue the juvenile on the existing juvenile sentence, with or without modifying or enlarging the conditions.⁶²⁵ If the juvenile commits a new offense, the court shall order the execution of the adult criminal sentence.⁶²⁶ Once the stay of execution is revoked and the adult criminal sentence is executed, then the juvenile’s extended jurisdiction status and juvenile court jurisdiction are terminated.⁶²⁷ Ongoing jurisdiction for adult sanctions is with the adult court.⁶²⁸

Adjudication under the Illinois EJJ statute differs from the New York youthful offender statute considered by the Board of Immigration Appeals.⁶²⁹ Under the New York statute, a conviction is entered and immediately vacated, a youthful offender adjudication is substituted for the conviction, and a youthful offender sentence is imposed.⁶³⁰ The Board of Immigration Appeals found that adjudication under the New York youthful offender

⁶²⁰ See 705 ILCS 405/5-801.

⁶²¹ See 705 ILCS 405/5-810(4); 705 ILCS 405/5-710(a); 705 ILCS 405/5-715(1).

⁶²² Wisconsin and Indiana do not have EJJ proceedings.

⁶²³ See 705 ILCS 405/5-810(1)-(2).

⁶²⁴ See 705 ILCS 405/5-810(4).

⁶²⁵ See 705 ILCS 405/5-801(6).

⁶²⁶ See *id.*

⁶²⁷ See *id.*

⁶²⁸ See *id.*

⁶²⁹ See *In re Devison*, 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001).

⁶³⁰ See *id.* at 4.

statute does not constitute a conviction for immigration purposes.⁶³¹ It is unclear whether the Board of Immigration Appeals will consider adjudication under the Illinois EJJ statute to be a conviction for immigration purposes due to the statutory requirement that a guilty plea, a verdict of guilt, or a finding of guilt be entered in conjunction with the imposition of a juvenile sentence and an adult criminal sentence.⁶³² Only upon successful completion of the juvenile sentence does the Illinois court vacate the adult sentence.⁶³³

Since immigration consequences may attach where the EJJ juvenile violates probation and the adult sentence is executed, an attorney should assume that the EJJ juvenile may violate probation. Therefore, the felony charges must be evaluated for possible grounds of deportation and inadmissibility, including whether the conviction will be considered to be a crime involving moral turpitude and/or an aggravated felony. In this situation, the analysis regarding immigration consequences will be the same for juvenile non-citizens as for adult non-citizens.

Application to Cases

Case of Marlo from Italy

In 2005, Marlo entered the United States at age sixteen as a lawful permanent resident with his parents who opened a chain of bakeries to obtain their lawful permanent residence. He got into a fight on the soccer field eight months later and punched another player in the face, breaking the player's nose. The prosecutor filed a petition to place him in EJJ proceedings under 705 ILCS 405/5-810(1) which the court granted. Marlo was adjudicated guilty of aggravated battery. The court imposed a juvenile sentence and suspended the execution of an adult sentence of two years. Two months later, Marlo was arrested for allegedly stealing a can of Freon from the local gas station. His probation was revoked and his adult sentence was executed.

Analysis: Marlo may be deportable for having been convicted of an aggravated felony. He has been adjudicated under the EJJ statute for a crime of violence for which an adult term of imprisonment of one year and one day has been imposed and executed. Unless he has a claim of persecution for withholding of removal to Italy (which is unlikely in his case), he may be found to be deportable for having been convicted of an aggravated felony and will be removed from the United States. No waivers are available to Marlo.

Practice Tips

In EJJ proceedings, a juvenile is technically supposed to admit to a felony offense and receive an adult felony sentence of a year or more in addition to a juvenile sentence.⁶³⁴ To

⁶³¹ See *In re Devison*, 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001).

⁶³² See 705 ILCS 405/5-810(4); see also, Definition of Conviction, *supra* at 2-3.

⁶³³ See 705 ILCS 405/5-810(4). Furthermore, the vacatur of the adult sentence is likely to be considered rehabilitative and therefore, the state court order of vacatur will not eliminate immigration consequences under *In re Pickering*, 23 I&N Dec. 621 (BIA Jun. 11, 2003). See also, Post-conviction Relief, *infra* at 8-12 to 8-24.

⁶³⁴ See 705 ILCS 405/5-810(4); see also, 730 ILCS 5/5-1 *et seq.*

avoid an aggravated felony conviction for immigration purposes, defense counsel should petition or motion the court to transfer the juvenile's case from EJJ proceedings to juvenile proceedings. If this is not possible, negotiate for a period of probation or an adult sentence for 364 days or less with the prosecution.⁶³⁵

Alternatives to the Court System

Defense counsel may want to consider restorative justice and court diversion programs when evaluating the immigration consequences of offenses by juvenile non-citizens. Due to a decrease in recidivism for youth who participate in these programs, they are becoming a much more common alternative to entering the criminal court system. One such program based in Chicago is called the Community Panels for Youth and is coordinated by the Community Justice for Youth Institute.⁶³⁶ There are similar community panel programs in Racine, Burlington, and Waterford, Wisconsin.⁶³⁷ In Indiana, the Indianapolis Restorative Justice Program works with first time youth offenders under the age of 14 facing charges of assault, criminal mischief, disorderly conduct, shoplifting and theft.⁶³⁸

In an alternative program, youth offenders go before a panel of trained community volunteers who help come to a resolution instead of appearing before a judge within the court system. These resolutions aim to repair the harm caused to the community by the offense while stressing accountability and skill-building for the youth offender. Actions to be taken by the youth offender may involve community service, written apologies, face-to-face interaction with the victim of the offense, and other activities or products that demonstrate accountability and restitution.⁶³⁹

Not only do these alternative justice programs help youth understand the full extent of their criminal actions and connect with their community, they also may help avoid convictions that could be detrimental, especially in the case of non-citizen youth. For example, possession of marijuana on school grounds is a serious offense in Illinois and qualifies for automatic transfer from juvenile court to criminal court. However, in the case of the 14 year old offender who committed this offense, he participated in the Community Panels for Youth program and never appeared in any court. He accepted responsibility for his actions and made restitution to the community in a way that built on his skills and interests by making a video about the consequences of drug dealing which he then viewed and discussed with youth at a local community center.⁶⁴⁰ If his case had been transferred to a criminal court, he could have been tried as an adult and convicted of drug trafficking which is an aggravated felony offense.

⁶³⁵ For a list of aggravated felonies, see *Aggravated Felonies*, *supra* at 3-34.

⁶³⁶ See "Responding to Young Offenders," *MacArthur Newsletter*, www.macfound.org, Fall 2005.

⁶³⁷ See Amanda Farr Marrazzo, "Community Panel on Youth Offenders Considered," *The Milwaukee Journal Sentinel*, www.findarticles.com, Feb. 27, 2000.

⁶³⁸ For more information, see Indianapolis Restorative Justice Program at http://www.findyouthinfo.gov/cf_pages/programdetail.cfm?id=27.

⁶³⁹ See *id.*; Stephanie Potter, "Juvenile Program More than Token Gesture," *Chicago Daily Law Bulletin*, Dec. 8, 2006, p. 1; "Responding to Young Offenders," *MacArthur Newsletter*, Fall 2005, www.macfound.org; Amanda Farr Marrazzo, "Community Panel on Youth Offenders Considered," *The Milwaukee Journal Sentinel*, www.findarticles.com, Feb. 27, 2000.

⁶⁴⁰ See "Responding to Young Offenders," *MacArthur Newsletter*, Fall 2005, www.macfound.org.

Certification as an Adult

Where the possibility exists that a juvenile non-citizen may be certified to stand trial as an adult, then the case must be analyzed as if the juvenile were an adult. For example, a juvenile court may transfer the case of a juvenile offender for prosecution under the criminal laws of Illinois under 705 ILCS 405/5-805 (mandatory and discretionary transfers), 705 ILCS 405/5-815(a) (habitual juvenile offender) or 705 ILCS 405/5-820(g) (violent juvenile offender). A juvenile non-citizen with an adult conviction and sentence will be treated as having been convicted for immigration purposes.

Special Immigrant Juvenile Status (SIJS)

Unaccompanied non-citizen children who have been abused, neglected, or abandoned may be eligible for a form of immigration relief called Special Immigrant Juvenile Status (SIJS). This status allows a non-citizen child to become a lawful permanent resident and gain employment authorization if it is determined not to be in his best interest to return to his country of nationality or last habitual residence. Children who are eligible for SIJS are generally identified through social workers, teachers, police officers, and caretakers. They may also be identified by attorneys working on their abuse or neglect proceedings, dependency actions, and delinquency proceedings. As such, it is important that defense counsel is aware of this option for relief.

In order to be eligible for SIJS, a non-citizen must:

- Be unmarried and under 21 years of age;
- Be declared a dependent of a juvenile court;
- Be considered eligible by the court for long-term foster care, meaning that parental reunification is not possible due to past abuse, neglect, or abandonment;
- Continue to be dependent on a juvenile court and eligible for or currently under long-term foster care; and
- Have been the subject of administrative or judicial proceedings through which it has been determined that it is not in his best interest to returned to the country of his nationality or last habitual residence.⁶⁴¹

Where a non-citizen is under age 21 and may be eligible for SIJS, contact an immigration attorney immediately to determine the child's options.⁶⁴² A child who has been

⁶⁴¹ See 8 C.F.R. § 204.11.

⁶⁴² The National Immigrant Justice Center (NIJC) has an Immigrant Children's Project which may be able to provide assistance. Contact the NIJC at (312) 660-1370 or nijc@heartlandalliance.org. The manual entitled *Midwest Immigrant & Human Rights Center's (currently NIJC) Guide for Pro Bono Attorneys Representing Children Seeking Special Immigrant Juvenile Status in Illinois* may also be downloaded at <http://www.immigrantjustice.org/probonoinfo.asp>. The Immigrant Legal Resource Center (ILRC) also has a manual covering SIJS that can be purchased at www.ilrc.org. Additional information about SIJS and non-citizen children is available through the U.S. Committee for

abused or neglected by parents or a legal guardian may be eligible for a T or U visa, asylum, and/or relief under the Violence Against Women Act (VAWA).⁶⁴³

Refugees and Immigrants National Center for Refugee and Immigrant Children at <http://www.refugees.org/article.aspx?id=1559#Manuals>.

⁶⁴³ See “U Visa/Deferred Action,” *infra* at 6-72; “T “Trafficking Visa,”” *infra* at 6-74; “VAWA Visa Self-petition,” *infra* at 6-67; “VAWA Cancellation of Removal,” *infra* at 6-70; “Asylum and Refugees,” *infra* at 6-31.