

On January 25, 2017, an executive order (EO) titled “Enhancing Public Safety in the Interior of the United States” was issued. This EO indicates a number of significant changes to the federal government’s approach to immigration enforcement, particularly for noncitizens who have contact with the criminal justice system. There are many things we simply don’t yet know about the EO’s intended effect and implementation. This practice advisory provides basic information about the EO and highlights practical steps that public defenders can take to protect their noncitizen clients as the new enforcement approach develops.

Not all noncitizens are removable from the United States. Many noncitizen clients have lawful status in the United States, and the EO does not—and cannot—change that. These individuals may be lawful permanent residents (also known as green card holders), may be in refugee or asylee status, or may hold any of a dozen types of visas authorizing their presence in the United States (including student visas and work visas). **If a noncitizen client has lawful status, the defense priority should be ensuring that they are not convicted of a removable offense.** *See* 8 U.S.C. § 1182(a)(2); 8 U.S.C. § 1227(a)(2).

As of right now, the Deferred Action for Childhood Arrivals (DACA) program has not been rescinded. Unless and until it is, people with DACA status should not be at risk of removal. However, a person can lose their DACA status as a result of a conviction, even if the conviction is not for a removable offense. **If a client has DACA, the first defense priority should be avoiding a conviction that will result in the loss of DACA status. Failing that, the priority should be avoiding a conviction that makes the client either removable or inadmissible.**

Noncitizens who are undocumented, or not in lawful status, are at the greatest risk under the new EO. The EO states that the following people are considered “enforcement priorities,” meaning they will be arrested and placed in removal proceedings if identified and/or encountered by Immigration and Customs Enforcement (ICE):

- 1) Anyone who is removable or inadmissible from the United States based on a criminal conviction
- 2) Anyone who is removable for any reason, and
 - Has been convicted of any crime
 - Has been charged with any crime, where the charge has not been resolved
 - Has “committed acts that constitute a chargeable criminal offense”
 - “In the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security”

This represents a significant change from the policies of the last several years, and is likely to lead to more undocumented noncitizens being arrested by ICE as a result of even minor contact with the criminal justice system. Undocumented noncitizens in counties willing to share information with ICE, hold people on detainer requests, and otherwise collaborate with ICE are particularly at risk. Presumably ICE will not have the resources to arrest everyone who is considered a removal priority, but with no further information about who ICE will actually target, all persons who fall within a removal priority should be considered equally at risk.

This does not mean that that there is no way to help protect undocumented clients, or that everyone arrested by ICE will be removed. There are several things public defenders can do to decrease the likelihood that noncitizen clients will be arrested by ICE, and to help make sure that they have a fair chance at defending themselves if they are placed in removal proceedings.

- 1) **Avoid convictions for offenses that make the client removable or inadmissible whenever possible.** *See* 8 U.S.C. § 1182(a)(2); 8 U.S.C. § 1227(a)(2). This increases the likelihood that the client will be eligible for relief from removal. To the extent that ICE rationally prioritizes their enforcement efforts, it should also decrease the likelihood that the client will be arrested and placed in removal proceedings.
- 2) **Keep undocumented clients out of jail to the greatest extent possible.** Undocumented people in jail are extremely vulnerable to targeting and arrest by ICE. Though counties that do not actively cooperate with ICE are relatively safer, fingerprints are still shared with ICE. Where appropriate, clients should consider sentencing alternatives such as higher fines, suspended sentences, and deferred judgments,* and should take advantage of any jail alternative programs. (*Note that in some circumstances, taking a deferred judgment rather than a fixed sentence can make a conviction a removable offense when it would otherwise not be. Taking a deferred judgment for the sake of avoiding jail time does little good under those circumstances.)
- 3) **Encourage clients to take safety precautions.** Any noncitizen client who could be considered a removal priority should take certain precautions in the event they are arrested by ICE. They should:
 - **Establish contact with an immigration attorney** or advocacy group who could provide assistance in the event of arrest by ICE.
 - **Gather documentation** of their presence in the United States, as well as documentation that would support any forms of relief they might be eligible for.
 - **Keep multiple copies** of documentation in safe places where someone else can get it if the client is in detention.
 - **Know their rights** with regard to ICE, and **develop a plan** in the event of a raid.

- Be aware of the **immigration bond process** (namely, that there is one), and prepare for it as much as possible.

Public defenders should also make sure to get alternative contacts who will know what is going on with the client. If a person is arrested and detained by ICE, alternative contact information may help us reach the client and resolve their criminal case cooperatively with their immigration case.