CrimImmAdvisal.com
PADILLA ADVICE FOR ATTORNEYS

t: 617-449-1040
e: contact@crimimmadvisal.com
a: *1669 Indian Falls Road, Corfu NY 14036*
(By appointment only)

MEMORANDUM

Date:	March 3, 2020
Client:	[FIRST NAME] [LAST NAME], Esq. (lay client: '[CLIENT NAME]
From	Daniel E. Jackson
Re:	Post-Conviction Relief and Immigration Options

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A. INTRODUCTION AND OVERVIEW

This memorandum is prepared for the use of [FIRST NAME] [LAST NAME], Esq. in his representation of his client in potential post-conviction criminal proceedings. This advisal is provided to comply with Mr. [LAST NAME]'s client's 6th amendment right to the effective assistance of counsel pursuant to *Padilla v. Kentucky* 130 S. Ct. 1473 (2010) and *People v. Picca*, 97 A.D.3d 170, 947 N.Y.S.2d 120 (2012)

Unlike similarly situated United States Citizens, non-citizen defendants in criminal courts may suffer dramatic collateral consequences as a result of contact with the criminal justice system.

The consequences of criminal court for a citizen may well end with the disposition and / or punishment ordered. However, a non-citizen of any type (ranging from refugees to long-term permanent residents) may suffer consequences up to and including deportation from the United States. Likewise, immigration consequences can be counter-intuitive and may ***not*** be linked to the severity of the offense as held by the criminal court.

This memorandum is prepared for the use of [FIRST NAME] [LAST NAME], Esq. in his representation of his client. Mr. [LAST NAME] has free and full permission to use the information provided within this memorandum as he pleases, however, the author accepts no liability beyond its intended recipient, Mr. [LAST NAME].

B. CASE INFORMATION

I. YOU ARE

- [FIRST NAME] [LAST NAME], Esq.
- Tel: _____
- Email: _____

II. INFORMATION ABOUT YOUR CLIENT

As ever, information about your client and their history makes a huge difference to their current status (and options to fix it). The information I have recounted below is what I have based my advice on; please get back to me if anything below is ***even a little bit*** wrong, misleading or missing additional information.

Entry and Current Immigration Status

- Your client is a 23 year old citizen and native of Mexico
- He entered the United States without inspection (commonly referred to as being "EWI" in immigration parlance for Entry Without Inspection) in 2013.[1]
- He has been continuously physically present inside the U.S. since 2013
- He has never filed any immigration applications, but may be working with an immigration attorney currently, although we are not sure exactly on what.

Immediate Relatives in the U.S.

- Client is married to a Lawful Permanent Resident (also known as green card holder).
    - **[Please confirm that this is a legal marriage executed inside the U.S. and is not, for example a purported common law marriage]**
- They jointly have a U.S. citizen infant child
- They remain in this relationship; although there are some significant issues (see criminal history section)
- [Please confirm if they live together, share finances, and / or have other indicia that they are in a real relationship]

[1] His EWI status is ***extremely*** important to this analysis, especially when domestic violence and violation of orders of protection are involved. Please triple check that he came across the border without inspection and did not, for example, come through a border crossing and just stay without permission. This would be even if he committed fraud in order to gain entry (e.g. using someone else's passport) or, he went through a border crossing point and they never looked at his documents (this is unlikely, but it does happen occasionally).

Criminal History

- Client's wife apparently has some significant mental health issues; paranoid jealousy with violent tendencies.

- There have been multiple domestic incidents, where she has accused client of cheating on her, and has then physically hit him before calling police.

    - **[Please confirm if client states he has never hit / harmed her, other than what can be expressly characterized as self-defense, such as pushing her away when she is being violent. This would also include situations where either the police were never called, or charges were never brought]**

    - **[Please confirm if we know what client's wife would be willing to say about the incidents, especially whether she will acknowledge that she was the aggressor, even if he went too far in defending himself]**

    - **Please confirm if the child was ever in danger, or alleged to have been in dangers, such as an EWOC NYPL 260.10 charge]**

- As a result of her calling the police, he has been arrested 3 times in 2018.

- In respect of these three incidents, he received:

    - An ACD;

    - A disorderly conduct violation; and

    - Assault 3rd sub 3

- The Assault 3rd conviction was presumptively a violation of a criminal court order of protection; we have no reason to believe that it somehow fell outside of the OOP's terms;

    - **[Please confirm if the criminal court judge stated on the record anything acknowledging that he violated the order of protection]**

    - **[Please confirm if any of the three incidents – but especially the one leading to the Assault 3rd conviction – were charged as Criminal Contempt of any degree]**

C. CURRENT IMMIGRATION EXPOSURE

In general terms, Removal proceedings can be initiated if you are ***either*** (1) deportable, based on the grounds in the Immigration and Nationality Act ("INA") § 237; 8 U.S.C. § 1227, ***or*** (2) inadmissible, based on INA § 212; 8 U.S.C. § 1227.

If you were admitted and inspected to the united states (a term of art, but basically, if you presented yourself for inspection at a proper border crossing point and were allowed in, even if that was a mistake or you used fraud to gain entry) then you are only subject to deportability grounds. The burden to prove you are deportable is on the government by clear and convincing evidence.

If you were not admitted, then you are not subject to the grounds of deportability (the first line of the section states "Any alien […] ***in and admitted to the United States*** shall, […] be removed if the alien is within […] the following classes of deportable aliens" (emphasis added) 8 U.S.C. § 1227(a). As such, for the purposes of the INA you are treated as if you are still stood at the border asking for admission.

Whenever you are an applicant for admission, or in most cases where you are applying for an immigration benefit you have a burden to prove that you are ***not*** inadmissible. 8 U.S.C. § 1361.

I. DEPORTABILITY (THE LAW CONSIDERS YOU TO BE INSIDE THE COUNTRY; CAN THEY KICK HIM OUT)

Your client does not appear to have any immigration status currently. As such, even if he had no criminal convictions, he would be deportable for being present in violation of law pursuant to 8 U.S.C. 1227(a)(1)(B).

Assuming that he truly entered the country without inspection, then as mentioned, he is not subject to the grounds of deportability. This is ***extremely*** important to clarify because if he was, he may be criminally deportable already for two, separate reasons:

- **Conviction for a crime of domestic violence** pursuant to 8 U.S.C. § 1227(a)(2)(E)(i) [although there would be an ***incredibly*** strong argument that criminal negligence is insufficient to constitute a crime of violence under 18 U.S.C. § 16(a) based on *Voisine v. United States*, 136 S. Ct. 2272, 195 L. Ed. 2d 736 (2016)]; and

- **Violation of an order of protection** pursuant to 8 U.S.C. § 1227(a)(2)(E)(ii) based on his assault 3rd conviction constituting acts in violation of the prior order of protection. He may be able to argue against this one, as the statute requires "*the court [to] determine [that he] has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury*". In this case the conduct appears to contravene the OOP, however, he was not convicted of criminal contempt and it is therefore possible that even though his guilty plea, the court never actually made a determination that it additionally violated the OOP.

As mentioned above, provided he was never admitted and inspected (including if he came through a border with false documents) then he is not subject to these grounds. This is helpful because there are no grounds of inadmissibility which correspond to the crime of domestic violence or violation of an order of protection.

In summary, he does not appear to be deportable, but only because he is removable for another reason.

II. INADMISSIBILITY (THE LAW TREATS YOU AS IF YOU ARE OUTSIDE THE U.S.; CAN THEY KEEP YOU OUT?)

Entry Without Inspection

Your client ***is currently*** inadmissible and subject to removal proceedings pursuant to:

- 8 U.S.C. § 1182(a)(6)(A)(i) for being present without being admitted or paroled.

This means that if your client does nothing (e.g. does not affirmatively apply for some form of immigration status), he is immediately at risk of being placed into removal proceedings. If he is encountered by ICE at any time, this is extremely likely to happen.

An important point to note is the difference between admissibility and eligibility to adjust status (i.e. get a green card), which will be explained further below. This is because your client is both inadmissible because he EWI'd (which is waivable), and *separately* ineligible to adjust his status in most circumstance because he was not previously admitted (which is not waivable, but can be addressed through a separate process).

Because waiving the EWI ground of inadmissibility would not cure his ineligibility for a green card based on that same EWI, the waiver is not helpful to him.

Crime Involving Moral Turpitude

Your client is both currently an applicant for admission (because he was never admitted previously) and will be if he applies for adjustment of status in the future. That means that he has an affirmative burden to prove that he is ***not*** inadmissible.

One of the grounds of inadmissibility is for ***admitting*** that he committed the material elements of a Crime Involving Moral Turpitude ("CIMT"), not just being convicted of it, under 8 U.S.C. § 1182(a)(2)(A)(i).

None of the criminal dispositions he has suffered will make him criminally inadmissible as a CIMT. ***However***, if he were to admit the conduct in, for example, an arrest report which stated something like "he intentionally punched me in the face", he could be.

Whether he admits to all material elements would be governed by *Matter of C, 1* I&N Dec. 14 (BIA AG 1940), but they would have to be very specific about the mental elements of the offense for admissibility to be triggered. For example: Q "Did you assault her" A: "yes" would probably not be enough; it would need to be an exchange more like a detailed plea colloquy.

If he is applying for any kind of immigration benefit – whether affirmatively with USCIS or in the context of removal proceedings - he can definitely expect to be asked detailed questions. For example, the arrest and charges for Assault 3rd (sub 1 of which ***does*** count as a CIMT) have already made their way to the NCIC database, which ICE has instant access to.

As such, if he is placed into removal proceedings and applies for discretionary relief, or leaves the country and attempts to re-enter, he will be required to answer ***any*** questions if asked about the ***details*** of what happened.

The concern is then that, even though he has a good disposition that is not a ***conviction*** for a CIMT, that he:

1) Is asked questions about what happened and refuses to answer (he will therefore be denied entry on the basis that he failed to meet his burden under 8 U.S.C. § 1361)

2) He answers and admits to the material elements of a CIMT, even though he was not convicted of one (and then he has made himself criminally inadmissible under 8 U.S.C. § 1182(a)(2)(A)); or

3) He lies, which is both a federal crime and will make him separately inadmissible for immigration fraud.

It is for this reason that it is extremely important to clarify that he did nothing more than the dispositions of each charge. For example, in the Assault 3rd, clarification that he was acting in self defense, but then was criminally negligent and caused injury to her with a deadly weapon would be fine. Admitting intentional assault that got plead down to sub section 3 would not.

Unlawful Presence

Your client is *also* inadmissible under:

- 8 U.S.C. § 1182(a)(9)(B)(i)(II) for having been unlawfully present in the U.S. for more than one year and seeking a new admission;

There are two ways to get around this: (1) the ground is not applicable if your unlawful presence is connected to abuse you suffered at the hands of your LPR spouse under 8 U.S.C. § 1182(a)(9)(B)(iii)(IV), or (2) obtaining a waiver under 8 U.S.C. § 1182(a)(9)(B)(v) upon showing of extreme hardship to a U.S. Citizen or lawful permanent resident spouse or parent.

From what you have told me, it seems like the exception (unlawful presence being connected to the abuse) would most likely not apply, but the waiver might. If he applies for normal adjustment of status, however, this would cure the inadmissibility, but not the ineligibility.

III. GOOD MORAL CHARACTER

Some applications require you proving you have good moral character, such as cancellation of removal for non-permanent residents and victims of domestic violence.

First you have to show you are not subject to any of the statutory bars, then you have to show you are generally a person of GMC.

The statutory bars under 8 USC 1101(f) include if any of the following apply (for non-LPR cancellation, the lookback period is within the 10 years before applying; for VAWA cancellation it is 3):

- Being a habitual drunkard
- Being inadmissible under the criminal grounds (on which see above);
- ***Committing*** a drug offense; and
- Being incarcerated for an aggregate period of 180 days.

Based on the information you have provided, and for much the same reasoning as the criminal inadmissibility grounds, I do not think the criminal ***dispositions*** bar him from establishing GMC (unless he was incarcerated for more than 180 days within the applicable lookback period).

However, just with inadmissibility, another of the statutory bars is having committed (i.e. not just having been convicted of) a crime involving moral turpitude or controlled substance offense. As a result, if they ask him questions about the incidents (which again, they will) he is required to provide answers about what actually happened. If he reveals that he really did commit 'turpitudinous' conduct (such as endangering the welfare of a child or intentional assault), he would again have three options:

1) Tell the full truth; that he intentionally committed EWOC/Assault (and then he may have just admitted to a CIMT, which would bar him for the duration of the applicable lookback period)
2) Say nothing about the incident (and then he has failed to meet his burden to show that he is a person of GMC); or
3) Lie (and then he will be prosecuted for lying and held to be barred for lying);

As discussed in the admissibility section, provided the worst he did was in fact negligently assault his wife in the course of trying to defend himself, then he should be fine regarding the bars.

<u>However</u>, regardless of what you do, all of the incidents will weigh against him for overall consideration of whether he is a person of GMC. As discussed, if there were any objective evidence

that, notwithstanding his convictions, your client was in fact the victim of violence (such as from the sister), then this would help a lot.

D. RELIEF FROM REMOVAL (I.E. AVAILABLE DEFENSES IF PLACED IN REMOVAL PROCEEDINGS)

I. OVERVIEW & CLARIFICATION OF THINGS HE IS NOT ELIGIBLE FOR

Your client is not eligible for cancellation of removal for non-permanent residents under 8 U.S.C. § 1229b(b) because he has not been continuously physically present inside the United States for more than 10 years. 8 U.S.C. § 1229b(b)(1)(A).

You have not stated that your client has a fear of returning to Mexico, but even if he did, it is extremely unlikely he would be eligible to apply for asylum as you must file within 1 year of entering the United States. 8 U.S.C. § 1158(a)(2)(B).

As discussed above, for most routes to adjustment of status, you need to have been previously admitted in non-immigrant status because of 8 U.S.C. § 1255(a), which states:

> "(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa
>
> The status of an alien **who was inspected and admitted or paroled into the United States** or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed" (emphasis added).

Because he was never admitted, he is not eligible for *most* forms of adjust of status.

II. VAWA CANCELLATION OF REMOVAL

Under 8 U.S.C. § 1229b(b)(2)(A)(i), if your client were placed into removal proceedings, he could defensively apply for cancellation under the Violence Against Women Act. The criteria in relevant part for him would be:

- He has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident;

- He has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;

- He has been a person of good moral character during those 3 years;

    - Unless any the act or conviction in question was connected to the alien's having been battered or subjected to extreme cruelty and the court determines that a waiver is otherwise warranted.

- His deportation would result in extreme hardship to him or his child.

Based on the information you provided, it appears that he would have a prima facie defense to removal if he were placed into proceedings. A successful application results in a green card. Importantly, this form of relief is only available defensively; you cannot apply for it if you are not in proceedings.

III. DEFENSIVE ADJUSTMENT OF STATUS THROUGH A VAWA SELF-PETITION

A defense to removal proceedings is adjustment of status. As discussed above, because he was not previously admitted to the U.S., he is not *eligible* for the normal forms of adjustment for this reason alone (which is a separate question than admissibility).

An exception is if you apply for adjustment as a battered spouse through the VAWA provisions of the INA. He would be eligible for this form of relief if:

- He is married to a lawful permanent resident abuser;

- He has suffered battery/extreme cruelty by his U.S. citizen or permanent resident spouse;

- The abuse or battery occurred during the relationship;

- The spouses must have entered into the marriage in good faith and not for immigration purposes;

- They must have lived together at some point; and

- He must be a person of good moral character for at least the past 3 years.

Based on the information you have provided, it seems like he is eligible to file a VAWA self-petition for a green card. Assuming you have good evidence that he was physically attacked by her, the biggest impediment is likely to be good moral character (on which see above).

E. POSSIBLE AFFIRMATIVE IMMIGRATION OPTIONS

I. ADJUSTMENT OF STATUS REQUIRING SUPPORT FROM HIS LPR WIFE

You have stated that, despite the problems and the incidents which have occurred, your client is in a real relationship with his wife and she may well be willing to petition for him to gain status. This would be done on form I-130, which allows LPR's to petition for their spouses to join them in the United States and receive green cards themselves.

In order to obtain either an immigrant visa (where the beneficiary is outside of the U.S.) or adjustment of status (where they are inside), the priority date for that class of immigrant must be current.[2] Some classes, such as spouses of US citizens, never have any delays in this process because they are not subject to a cap. Others have long waits until their priority dates become current. As the spouses of an LPR, your client would be considered an F2A second preference. Based on the March 2020 visa bulletin, there is currently no wait time for F2A beneficiaries. This means that, were he otherwise eligible (which he is not because he has never admitted), he and his wife could file the I-130 petition and adjustment of status petition immediately. Upon filing, he would have good immigration status while it is pending, and once approved would end up with a green card.

Unfortunately, if he left the United States (in order to get an "admission" to make him eligible to adjust) and sought to reenter, he would trigger several grounds of inadmissibility. Without waivers – he would not be allowed back in, whether he (1) attempted to come back in non-immigrant status and then adjust once he is here, or (2) obtained an immigrant visa to be admitted as a lawful permanent resident.

Specifically, upon his return, he would be subject to the prior unlawful presence bar [8 U.S.C. § 1182(a)(9)(B)(i)(II)][3] and if he tried to come back as a non-immigrant, would be barred under the immigrant intent clause of 8 U.S.C. § 1184(b) (a necessary condition to be admitted as

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[2] More information about the different classes is available on the Department of State's visa bulletins. The March 2020 edition can be found at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-march-2020.html

[3] Unless he was applying at least 10 years after his departure

a non-immigrant is you prove you have no immigrant intent; if he wants a green card, he has immigrant intent).

These issues, however, can be cured with minimal interruption through the I-601A waiver process.

I-601A Waiver

This process was created to allow individuals such as your client to obtain pre-approval for the needed waivers while they are inside the country, so that they can leave for a short period of time and return with a green card.

Specifically, if a Form I-130 is approved, he cannot adjust his status (because of his lack of prior admission), but also cannot leave and be readmitted without a waiver (because he will be subject to the unlawful presence bar). Rather than complete the waiver process outside of the country, which may take many many months, Form I-601A allows you to apply for a waiver of this bar if denial would cause your US Citizen / LPR spouse or parent "extreme hardship".

Based on your preliminary information, forcing a mentally ill mother to take care of an infant child is presumptively "extreme hardship" and therefore he may be a good candidate.

Two important things to note: (1) the hardship can only be to a parent or spouse - as such, the fact that the infant child will suffer is only relevant insofar as your client can prove this will correspondingly affect his wife, and (2) this is a discretionary application, meaning that even if he proves the sufficient hardship, they can deny it if they do not think you deserve it. As such, similar considerations to good moral character will apply.

II. AFFIRMATIVE ADJUSTMENT OF STATUS THROUGH A VAWA SELF-PETITION

This is identical to the defensive adjustment of status, apart from USCIS adjudicates both the form I-360 (to prove he is a battered spouse) and the I-485 adjustment of status application.

Very importantly, unlike the standard adjustment of status in the previous section, there is no requirement for a prior admission – as such he would not need to leave the country at all.

III. U VISA

Domestic violence is technically a qualifying crime, but the information you have provided does not suggest that he would have a strong claim.[4]

Basically, my advice here is that with either a VAWA-based self-petition, or (if the couple stay together) a standard adjustment with an I-601A waiver available, do not bother with the U Visa route.

F. POST-CONVICTION RELIEF OPTIONS

We discussed that you were reviewing the Assault charge in particular to see if (1) vacatur would help him and (2) if there were any viable routes to doing so.

Based on the analysis above, it is my opinion that PCR in general terms would not be helpful to him ***unless*** you could either get:

1. The case vacated and thereafter dismissed on the basis of factual innocence; or

2. You could get something into the criminal record which contextualizes his actions and makes him less morally culpable.

In the case of option 2, what I had in mind is either seeking vacatur on the basis of newly available evidence under CPL 440.10(1)(g) (for example the wife recanted / the sister has now come forward and said she repeatedly witness him getting beaten, showing he did in fact have a viable claim to self-defence), or an IAC claim based on failure to advise even assault sub section 3 could have immigration consequences (even though the defender clearly knew to plead away from sub 1).

In short, I am not sure either of these outcomes – even if successful - would help him a great deal, and with a renewed criminal case, could even bring him to the attention of ICE more quickly.

This is because most of your clients immigration problems are not from the dispositions of the cases, but the accusations of bad acts contained therein; the convictions merely flag up that something happened. As such, to the extent you can get additional evidence showing he could have run a self-defense claim and the wife was in fact the bad actor, this can simply be used to support

[4] See further: https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status

him in the immigration application; vacating the conviction would not help a great deal if he really did commit the conduct underlying them.

Likewise vacatur based on IAC would not cure the true issue: whether or not he actually committed the conduct.

In short, it is a judgement call whether pursuing a 440 would actually give your client a benefit, but based on the information I have so far, I would lean towards no.

G. CONCLUSION

Your client appears to be eligible for a green card through a VAWA self-petition (if the wife continues the abuse) or a green card via the I-601A process (if they reconcile).

However, if he is encountered by ICE, he is extremely likely to be detained because he is presently removable. If this happens, his options will become more limited, but more importantly much more difficult. As such, he should be warned to avoid any possible situation in which he could be discovered – any federal building, bus and train stations,[5] and most importantly criminal courthouses. For this reason, I believe that any benefit post-conviction relief would provide may well be outweighed by the risks of his arrest by ICE.

Anyway, as ever - call if there are any follow up questions!

- Dan

Daniel Jackson

[5] Although Greyhound have recently announced they are doing the right thing now: https://www.vox.com/policy-and-politics/2020/2/22/21148698/greyhound-customs-border-patrol-cbp-warrantless-searches