ETHICAL OBLIGATIONS TO IMMIGRANT CLIENTS PART I: PADILLA OBLIGATIONS

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PRESENTATION ROADMAP

- >Ethical Framework
- >Steps for Effective Representation
- >Summary of Best Practices

Appendix A: Resources for Clients

Appendix B: Types of Immigration Status

OUTCOME = EFFECTIVE ASSISTANCE

Defenders will recognize the steps to providing ethical representation to your non-U.S. citizen clients:

- ✓ Identify non-U.S. citizen clients early in the case.
- ✓ Consult WDA to assess immigration consequences.
- √ Advise clients of potential consequences in a meaningful way.
- ✓ Negotiate for best outcome as per client's goals.

ETHICAL RULES AND PADILA DUTIES

LANDMARK CASE: PADILLA V. KENTUCKY (2010)

- Deportation is a penalty, not a collateral consequence.
- 6th Amendment Duties to provide effective assistance include affirmative, accurate advice on immigration
- Mr. Padilla's lawyer's misadvice was IAC.
- State should give consideration to immigration consequences

PADILLA'S CORE DUTY

• Provide <u>affirmative</u>, <u>competent</u> advice regarding immigration consequences of a guilty plea, conviction at trial or other proposed resolution.

Affirmative misadvice = IAC

Silence/no advice = IAC



STATE V. SANDOVAL

WA Supremes hold:

DEPORTATION = PREJUDICE

Padilla IAC +
Sandoval prejudice
satisfies Strickland
IAC test to vacate
conviction.



PADILLA RETROACTIVE IN WAIN RETSAI/JAGANA



Because *Padilla* did not announce a new rule under Washington law, it applies retroactively.

PADILLA-RELATED RPCS

- RPC I.I Competence
- RPC I.2(a) Scope & Authority (Client objectives and means)
- RPC I.3 Diligence
- RPC 1.4: Communication
- RPC I.6 Confidentiality
- RPC 2.1 Advisor

STEPS FOR EFFECTIVE REPRESENTATION

THINK, "I. C.A.N."!

- Intake: Gather critical info from client.
- Consult WDA to determine immigration consequences.
- Advise client of potential consequences.
- Negotiate the best outcome based on goals.



STEP 1:

Intake:
Gather
critical info
from client

FIRST CLIENT MEETING

I. Identify non-U.S.-citizen clients.

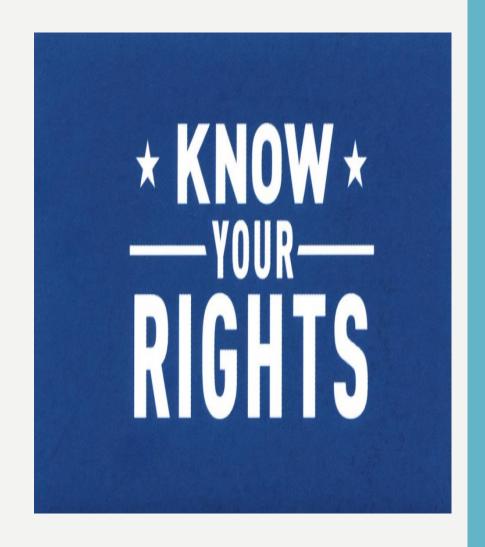
- 2. Ask all questions on WDAIP Immigration Intake form.
 - -Get "Alien Registration"/A # if they have it.
 - Get contact info for people who might have missing info. and permission to contact.

FIRST CLIENT MEETING

3. Ask client goals re: immigration.

4. Advise of rights in case of ICE contact.

5. Provide WDAKnow Your RightsAdvisory to client



1. IDENTIFY CITIZENSHIP AND IMMIGRATION STATUS

- Ask POB of all clients (include in office's intake form)
- If born outside U.S., inquire further using Qs on intake

- Important to ask all intake Qs
- Please provide as much info as you can
- If status not clear, use WDA Determining
 Immigration Status questionnaire

IDENTIFYING IMMIGRATION STATUS, CONTINUED...

Tips for what to say to your reticent client:

- Crimes can have more serious consequences for non-U.S. citizens, so it's important for you to tell me your status.
- ❖I need to know: I) where you were born and 2) your immigration status. Will you share those with me?
- ❖ I will not tell anyone else, unless you give me permission.
- ❖I will not report you to ICE.

TYPES OF IMMIGRATION STATUS

Non-Citizens (3 Main Categories):

Undocumented:

- Entered w/o permission
- Overstayed Visa
- "Deferred Action," i.e. for victims and DACA

Temporary legal status:

- Student
- Temporary worker
- Visitor/Tourist
- TPS
- U & T visa

Permanent legal status:

- Lawful Permanent Resident (LPR)= Green Card Holder
- Asylee / Refugee
- Compact of Free Association (COFA)

U.S. Citizens:

- Born,
- Naturalized
- Acquired
- Derived

Immigration Agencies:

Department of Homeland Security (DHS)

- ☐ Immigration and Customs Enforcement (ICE)
- ☐ US Citizenship and Immigration Services (USCIS)
- ☐ Customs and Border Protection (CBP)
- ☐ Homeland Security Investigations (HSI- part of ICE)

Department of Justice:

- ☐ Immigration Court
- ☐ Board of Immigration Appeals

Department of State:

Embassies / Consulates (issue visas)

2. COMPLETE INTAKE FORM

OR fax to 206	5-623-5420	~		4 1 -
Defendant Identifier: (optional)	Date:	Secure https://defensene	t.org/case-support/immigration-project/case-assistance/online-immigration-intake-form/	6 ☆
Attorney: County_	WDA Member : □			
Email and/or Phone:		WASHINGTON DEFENDER ASSOCIATION	LOGIN DONATE	Q ≡
Immigration Status:	DOB:	CACEC	LIDDART	
☐ LPR - Lawful Permanent Resident (greencard) Since when:	POB:	CASE 5	UPPORT	
Refugee or granted asylum status Since When:	Date of Entry into US:			
Undocumented (entered illegally) Date of Entry:	ICE Detainer: ☐ YES			
☐ Previously Deported or Now In Proceedings ☐ By ICE ☐ By Immigration Judge	Defendant is: IN CUSTO			
Other:	Complete Criminal (Include offense, date of conviction a (including suspended time) for each	DEATH PENALTY ASSISTANCE PROJECT	ONLINE IMMIGRATION INTAKE FORM	
	arrests, deferred adjudications, defen	FELONY CASE		
Family Ties:	nile history, or other resolutions.	CONSULTATION IMMIGRATION PROJECT	To contact WDA's Immigration Project for case assistance, please complete the brief form below. You are also	
SPOUSE: USC LPR Undocumented PART-		ABOUT WDA'S IMMIGRATION PROJECT	welcome to call or e-mail us. Jonathan Moore and Sara Sluszka provide <i>primary assistance</i> and can be reached by email or at (206) 623-4321. Ann Benson can be emailed as well and provides back-up for technical assistance.	
NER: QUSC Q LPR Q Undocumented CHILDREN: Number Ages:		CASE ASSISTANCE		
USC LPR Undocumented MOTHER: □ USC □ LPR □ Undocumented		ONLINE IMMIGRATION INTAKE FORM	Immigration Intake Form	
FATHER: USC ULPR Undocumented USC Grandparents? Yes No		ONLINE JUVENILE IMMIGRATION INTAKE	Attorney Name *	
Defendant's Goals		FORM IMMIGRATION ATTORNEY		
Re: Immigration Consequences		REFERRALS	First Last	
■ Avoid conviction that triggers deportation		IMMIGRATION RESOURCES INCARCERATED PARENTS	Attorney Email *	
□ Preserve eligibility to obtain future immigration benefits (e.g. LPR status or citizenship)		PROJECT MISDEMEANOR CASE		
☐ Preserve ability to ask immigration judge to get/ke	en.	CONSULTATION	County where client is charged *	
lawful status & stay in U.S.	Current Charge(s):		Adams ▼	
☐ Get out of jail ASAP			Public defender/assigned counsel? *	
☐ Immigration consequences, including deportation are not a priority	Plea Offer(s):		⊚ Yes	
Other goals re: immigration consequences:			⊚ No	
			(Are you representing an indigent client in this case?)	

Immigration Status:	DOB:
☐ LPR - Lawful Permanent Resident (greencard) Since when:	POB:
☐ Refugee or granted asylum status Since When:	Date of Entry into US:
☐ Undocumented (entered illegally) Date of Entry:	ICE Detainer: YES
□ Previously Deported or Now In Proceedings □ By ICE □ By Immigration Judge	Defendant is: ☐ IN CUS ☐ NOT IN
□ Other:	Complete Crimina (Include offense, date of conviction (including suspended time) for each arrests, deferred adjudications, def
Family Ties:	nile history, or other resolutions.
SPOUSE: □ USC □ LPR □ Undocumented PARTNER: □USC □ LPR □ Undocumented	
STATUS DETERMINES CON	ISEQUENCES
MOTHER: ☐ USC ☐ LPR ☐ Undocumented FATHER: ☐ USC ☐ LPR ☐ Undocumented USC Grandparents? ☐ Yes ☐ No	

INTAKE: CRIMINAL HISTORY

- Ask client for criminal history anywhere (any state or country).
 - Confirm with record check, if possible.



- Include date of offense (if known), date of conviction, and sentence (including suspended time) for all priors.
- Include arrests, dismissed charges, deferred adjudications, deferred sentences, juvenile history, or other resolutions.

INTAKE: FAMILY STATUS INFO



- Ask immigration status of entire nuclear family, and grandparents (living or deceased).
- If parents or grandparents are USCs, if so, since when? (may make client USC).
- Family status tells us if client has relief to preserve.



3. IDENTIFY CLIENT GOALS

- Avoid conviction(s) that trigger deportation.
- Preserve eligibility to obtain future immigration benefits (LPR status or US citizenship).
- Preserve ability to ask immigration judge in removal proceedings to get/keep lawful status.
- Get out of jail ASAP.
- Immigration consequences not a priority.

4. ADVISE CLIENT RE: RIGHTS

Advise client:

- Remain silent (don't share your POB or status).
- Stay in contact with me during your crim. case.
- I will investigate then advise you on imm conseq.
- Consult an immigration attorney/NWIRP
- Make a <u>family safety plan</u> in case you are detained.

• **Give** them documents listed in *Defender Protocol* incl. Know Your Rights Advisory

IMMIGRATION ENFORCEMENT



KEEP WA WORKING (KWW) LEA PROHIBITIONS

Law Enforcement Agency (LEA) prohibitions:

- NO Inquiring into or collecting POB, immigration or citizenship status information unless connected to violation of state or local law;
- NO Providing ICE or CBP (Border Patrol)
 notification date and/or time of release from custody;
- NO Providing non-public personal information to ICE or CBP; includes people on community custody;

KEEP WA WORKING (KWW) LEA PROHIBITIONS

Law Enforcement Agency (LEA) prohibitions:

- NO Giving ICE/CBP access to interview people in custody about civil or criminal immigration violations without person's written consent;
- Translation requirements for to obtain written consent.

KEEP WA WORKING (KWW) PROHIBITIONS

Law Enforcement Agency prohibitions:

- NO Taking or holding someone in custody based on an ICE Detainer or civil immigration warrant;
- NO Denying someone services, benefits, privileges or opportunities due to presence of an ICE detainer, notification request, immigration warrant;
- NO Contract for, or accept for free, language services from ICE/CBP;

KEEP WA WORKING (KWW) WA DEPT. OF CORRECTIONS

DOC Exceptions for people in Physical Custody

- CAN inquire re: POB, Immigration/citizenship status;
- CAN notify ICE/CBP of release date;
- CAN provide non-public personal information;
- CAN permit ICE/CBP interview if person consents.

Exceptions DO NOT apply to people on community custody through DOC.

KEEP WA WORKING (KWW) LEA PROHIBITIONS

Attorney General to Issue Model Policies for LEAs to implement by May 21, 2020

All County/City LEAs required to adopt AG model policies OR

Provide reasons why not & alternative policies

KEEP WA WORKING (KWW)

WDA's IMPLEMENTATION ADVOCACY

 Contact WDA's Immigration Project Team for updates & assistance and/or to participate on your LEA's implementation of KWW policies

 Partnering with WA Immigrant Solidarity Network, local defenders, Attorney General and other justice system stakeholders.

ICE DOCUMENTATION

Despite prohibitions on LEAs honoring ICE detainers or immigration warrants ICE/CBP continue to file them with local jails.

- Request any ICE documents filed with the jail on your client.
- Advise client DO NOT talk to ICE/CBP, consent to interviews or sign documents

ICE ENFORCEMENT TARGETS

 Dramatic increase in ICE enforcement under Trump Administration

- Who is being targeted?
 - ANY person suspected of being undocumented or subject to removal is targeted.

Traffic offenses most common crime among alleged "criminal aliens".



ICE ENFORCEMENT

The good news: "Sanctuary" policies are working. Detainer requests <u>issued</u> increased by 65% in FY 2017, BUT:

➤ Jails Rejecting ICE Detainers up by 125%

Of the over 8,000 people whose detainers were declined, only 6% were later apprehended by ICE.

ICE/CBP ARRESTS AT WA COURTHOUSES

People coming & going from courthouses to attend hearings, seek protection and conduct business now targets for ICE/CBP arrests.

FROM 2016-2019:

- 50+ documented arrests in 16 WA Counties
- Most with no/minor criminal history



WHAT HAPPENS WHEN ICE ARRESTS A CLIENT?

Possible ICE actions:

- Initiate Removal Proceedings with Notice to Appear:
 - *Release on own recognizance
 - Detention at transfer to Northwest Detention Center in Tacoma
- Hearing before Immigration Judge

WHEN ICE ARRESTS CLIENT,

No right to a hearing before a judge If:

- Administrative Removal
- Reinstatement of removal (reentered after deported
- Execution of outstanding removal order (if never left)

NORTHWEST IMMIGRANT RIGHTS PROJECT

Legal Orientation Program (LOP) (free to everyone)

- Group KYR (on court process, bond, removal defenses)
- Individual consultations
- Direct representation (in a few cases, not assured)

To have client seen by **NWIRP**:

Anyone can call (253) 383-0519 (voicemail only) or email Tacoma at tacoma@nwirp.org. Provide the client's name and, if possible, the "A number."



"I know nothing about the subject, but I'm happy to give you my expert opinion."

(Beware: Not every immigration attorney is an expert in consequences of crimes.)

STEP 2:

Consult
with WDA
or other
crimimm
expert

CONSULT AN IMMIGRATION EXPERT IN EVERY CASE:

- Each client's situation is unique.
- The law is constantly changing.
- Can't rely on advice for other clients;
- ➤ Practice advisories & trainings insufficient.



- WDA's immigration experts work for you.
- No question too "basic" ask away!

TIPS FOR CONSULTING WDA

- Answer all questions on <u>intake</u> (either online, email or fax).
- Send us intake as early as possible.
 - Calls are less efficient, but are ok in a pinch.
- Include any relevant documents (criminal history, immigration papers).

•





STEP 3:

Advise client of potential consequences and options

COMMON MYTHS

- "Misdemeanors are safe."
 - The Reality: Even simple misdos can trigger removal grounds: e.g., patronizing a prostitute; use/possession of drug paraphernalia; any third misdo (for DACA clients).
- "Marijuana is legal in WA, so it can't have immigration consequences."
 - The Reality: Marijuana possession is still illegal under federal law., and doesn't require a conviction to trigger deportation.
- "Undocumented clients are going to get deported anyway, so it doesn't matter what happens in their criminal case."
 - The Reality: There are various defenses to deportation, even if a person is deportable; deportation proceedings have two stages.
- "Clients who have lived here for a long time and/or have US citizen family will not be deported."
 - The Reality: Cancellation is discretionary, and some people are not eligible.

MYTHS, CONT.

- "LPRs can't be deported."
 - The Reality: Even simple possession of a controlled substance (including paraphernalia) will trigger deportation.
- "Juvenile offenses have no immigration consequences."
 - The Reality: Juvenile offense can trigger conduct-based grounds of removal, and can negatively affect discretionary relief.
- "Clients who are already deportable and/or already have a conviction for the same crime they are now facing will not be harmed by a new conviction."
 - The Reality: If they weren't advised on consequences of past crimes, it's possible those convictions could be vacated, so you should avoid new ones that will trigger additional grounds of removal to lessen the number of convictions they have to reopen.

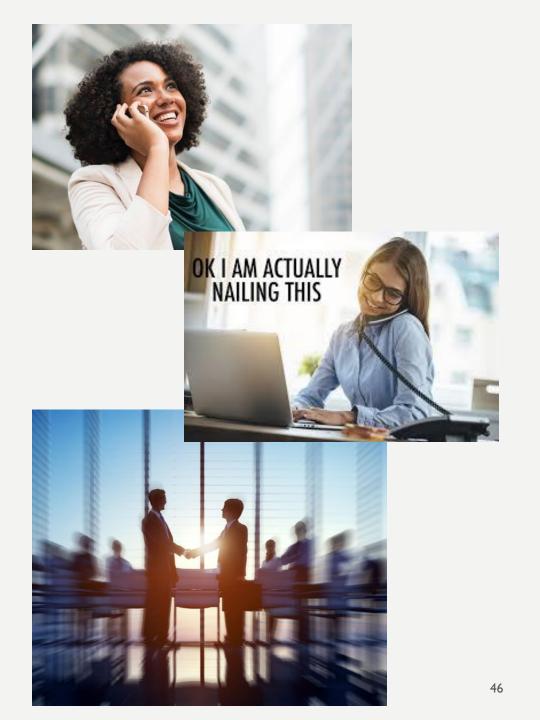
COMMUNICATING POSSIBLE CONSEQUENCES

DO:

- Give client a copy of WDA's written analysis.
- Be as clear as possible about the risks.
- Be aware of reasons client may not be fully considering consequences.
- Emphasize how final deportation is, vs. serving time in jail or prison.

DON'T:

- Give boilerplate plea advisal on pattern plea form or have the judge advise your client that there may be consequences (not enough to fulfill duty).
- Assume no consequences b/c client has priors for same crime, or based on previous case.



STEP 4:

Negotiate the best outcome.

NEGOTIATE CASE ACCORDING TO CLIENT'S GOALS

- I. Avoid triggering clear grounds for deportation or bars to lawful status.
- 2. Avoid making client more of an enforcement target for ICE.
- 3. Mitigate harm for discretionary decisions or federal prosecution.

DEALING W/ TOUGH PROSECUTORS

Reasons for refusal to negotiate imm-safe plea:

- Violates Equal Protection and is special treatment of non-U.S.-citizens.
 - Rebuttals: WA Supreme Ct. says equal does not mean identical. Deportation is a disproportionate penalty for <u>non</u>-USC defendants.
 - SCOTUS says both sides benefit b/c it's about justice.
- Deportation is a collateral consequence.
 - Deportation is not a collateral consequence; it's a direct penalty (*Padilla*).

REASONS AND REBUTTAL, CONT.

- The consequence is too speculative.
 - Rebuttal: Even when we cannot know with certainty that a conviction will have a particular bad result for the client, if the client's goal is avoiding all risk, it will be necessary to avoid that conviction.

PLEA STRATEGIES

"CONVICTION" =

I. Formal judgment of guilt entered by a court;

2. Plea of guilty; or

3. D has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment.

"RECORD OF CONVICTION"

AKA "Shepard Documents" (Shepard v. United States, 544 U.S. 13 (2005))

- Judgment and Sentence
- Charging document (e.g., indictment)
- Plea agreement
- Plea colloquy in which the defendant confirmed the elements of the offense of conviction
- Jury instructions
- Comparable judicial record

TIP: KEEP OUT EXTRANEOUS FACTS! ONLY PLEAD TO MIN ELEMENTS

STRAIGHT PLEA TIPS

Statement of Defendant on Plea of Guilty

- "The elements are": Select, "as follows" (NOT "as set out in the charging document"); use minimum elements from statute.
- Statement of Facts:
 - Don't check the box stipulating to the police report as the factual basis.
 - Write out the "facts" based on the minimum elements of the crime and nothing more.

STRAIGHT PLEA TIPS, CONT.

<u>Judgment and Sentence</u>

- RCW/ordinance citation on each count:
 - Make sure to specify the specific prong of a statute <u>if</u>
 <u>favorable to client</u>.
 - Don't specify if client is actually convicted of bad prong.

DEFERRED ADJUDICATIONS

Will be CONVICTIONS if agreement requires --

- X admission of guilt or
- X stipulation to "facts sufficient" for finding a guilt or admission of/stip. to police report

E.g. Deferred Prosecution and Deferred Sentence



DEFERRED ADJUDICATIONS

- "Immigration Safe" agreements are OK
- Are the agreements immigration safe? (varies by jx)
- See WDA advisory & model language



IN RE BARR PLEAS

- •In Re Barr (1984); State v. Zhao (2010)
 - Plead to an alternative offense with no or insufficient factual basis
 - D concedes factual basis to bring original (dismissed)
 charge (but does not admit guilt of that charge or truth of the allegations)
 - Result is conviction for only the new crime
- Critical to carefully craft record/plea statement pursuant to WDAIP sample in <u>In Re Barr Practice</u> <u>Advisory</u>.

IMPORTANCE OF SENTENCES IN CRAFTING A SAFE PLEA

• "Sentence" includes suspended time!

- "Imposed" vs. served
 - -Sentence *imposed* of 180 days or less => CIMT "petty offense"
 - Serving 180 days or more => bar to "good moral character"



SENTENCES, CONT.

 Accumulating 5 years' total sentences => ground of inadmissibility (try for min. sentence possible, not max. of 364/364 susp.)

• 364-day sentence can avoid some aggravated felonies (not all).

SUMMARY OF BEST PRACTICES

BEST PRACTICES

- ✓ Identify non-U.S. citizen clients early.
- ✓ Consult WDA to assess immigration consequences.
- ✓ Advise clients of potential consequences in a meaningful way.
- ✓ Negotiate for best outcome per client's goals.

ADDITIONAL BEST PRACTICES

- > Plead only to minimum conduct
- Keep harmful records out of the "record of conviction" to prevent them from being used against the client.
- Make records available for clients
- Notify NW Immigrant Rights Project if client is detained
- Coordinate with immigration counsel, if any

CONTACT US

For Technical Case Assistance: http://www.defensenet.org/immigration-project/case-assistance

Resources: http://www.defensenet.org/immigration-project

Become a member: https://defensenet.org/about/renew-your-membership-or-become-a-wda-member/



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APPENDIX A: RESOURCES FOR CLIENTS

RESOURCES FOR CLIENTS

- Guide to Immigration Proceedings for Criminal Defendants (English & Spanish)
- Your Rights When Questioned by Immigration Agents in Jail (English & Spanish)
- NWIRP: A Guide to the Northwest Detention Center
- NWIRP: Una Guía al Centro de Detención
- NWIRP: Guide for Detained Immigrants (English & Spanish)
- Protect Yourself From Immigration Raids (English & Spanish)
- ILRC: Family Preparedness Plan (English & Spanish)
- IDP: Emergency Preparedness (English and Spanish)

For advisories on immigration consequences of specific crimes and other resources, visit: https://defensenet.org/resource-category/immigration-resources/

APPENDIX B: TYPES OF IMMIGRATION STATUS

UNDOCUMENTED PERSONS (UP)



Entered unlawfully



Entered on a visa that has expired

Any UP who has been arrested is deportable and an enforcement priority.

Some UPs have paths to lawful status; crimes can bar these paths.

Main Goals (if client wants to stay in U.S.):

- Avoid ICE apprehension and placement in removal proceedings.
- Avoid triggering crime-based bar to obtaining lawful status.

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

Benefits:

- Defers deportation
- Work permit available



Current DACA news:

- Policy was rescinded by Trump in 2017, but cts. enjoined.
- Ongoing federal litigation pending...
- For more info: https://defensenet.org/update-deferred-action-for-childhood-arrivals/

TEMPORARY STATUS ("NON-IMMIGRANTS")

- Visa can be revoked by Dept. of State after even just an arrest.
- Students also have to worry if school expels them => revocation
- Revocation of visa not same as deportable; can stay until date on I-94 (unless issued Notice to Appear/placed in removal proceedings)

Main Goals (if client wants to stay in U.S.):

- Avoid triggering crime-based ground for losing lawful status.
- Avoid triggering crime-based bar to gaining permanent status.
- Avoid revocation of visa (connect client w/imm atty).

LPR, REFUGEE, COFA RESIDENT

(admitted in lawful status)



Has a "Green Card"





Main Goals:

- Avoid conviction triggering crime-based deportation grounds.
- Avoid triggering inadmissibility grounds.
- Preserve paths to keep lawful status.



COMPACT OF FREE ASSOCIATION

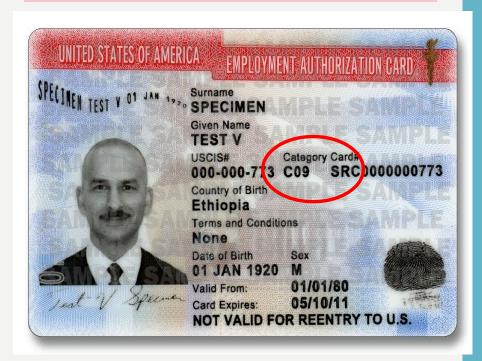
- Citizens of the Free Associated States (Marshall Islands, Federated States of Micronesia, and Palau) are allowed to live, work and study in the U.S. indefinitely and without visas, under the Compact of Free Association.
- They are subject to removal under the criminal grounds of *deportability*, just like lawful permanent residents (LPRs).
 - Unlike LPRs, they cannot waive deportation if they trigger a ground.
- If they travel outside the U.S. and seek to return here, they will be subject to the criminal grounds of *inadmissibility*.

"GREEN CARD" VS "EAD"

PERMANENT RESIDENT CARD (I-551)



EMPLOYMENT
AUTHORIZATION DOCUMENT



EMPLOYMENT AUTHORIZATION

- Legal Permanent Residents (LPRs) and COFA are authorized to work.
- Some temporary status permit Employment Authorization Document (aka "work permit") Valid for a certain period of time
- Sometimes get Employment Authorization while application pending.
- If Employment Authorization can get Social Security Number.
- If no legal status and no application pending, then usually no work permit.