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Immigrants with Prior Criminal Record Risk Removal from the United States—Impact on Asian Immigrants

Elizabeth R. OuYang, Esq.†

Lawful permanent residents in the United States with a criminal record can face double jeopardy, jail time, and removal from the United States. The case of Qing Wu underscores this dilemma. At the age of five, Qing Wu emigrated from China to the United States with his parents as a lawful permanent resident. Growing up in a crowded tenement building in Manhattan's Chinatown, Wu—like many low-income Asian male teenagers living there—began hanging out with the wrong people and got in trouble with the law. After accepting a plea bargain, Wu was convicted of robbery in October of 1996 and sentenced to three-to-nine years of imprisonment. Intent on turning his life around, Wu earned his General Education Degree (GED) in prison. After three years in a juvenile detention facility, he worked as a systems administrator with the Police Benevolent Association, obtained his Associate's Degree in Technology at New York City College of Technology, and worked his way up from a junior network administrator to Vice President of Technology at a major real estate asset management firm. He applied to become a U.S. citizen on his own, and, at age twenty-nine, was engaged to Anna Ng, a U.S. citizen. This is a classic example of someone who turned his life around and pursued the American Dream. Why, then, does his story not end on a happy note?

Many immigrants, including Asians, are now targets of aggressive immigration policies enforced after the September 11, 2001 terrorist

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1. Qing's aunt petitioned for his father, and Qing received his green card as a derivative child on his father's application.
attacks. Wu's citizenship application was denied because of his 1996 juvenile conviction. He was unaware of two immigration laws passed that year: the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Anti-Terrorism and Effective Death Penalty Act (AEDPA). These laws make it mandatory for Wu to be removed from the United States because of his prior conviction. The IIRIRA changed the definition of an "aggravated felony" for a violent crime from a five-year prison term to a one-year term, and the AEDPA eliminated discretionary relief for a lawful permanent resident convicted of a crime designated as an aggravated felony. Prior to 9/11, Immigration and Customs Enforcement (ICE) was not aggressively enforcing the 1996 laws. However, after 9/11, ICE changed this practice.

After his citizenship application was denied, Wu was ordered to report to immigration. When he appeared, he was arrested by ICE and detained in a New Jersey jail, where he awaited mandatory removal to China. Legal remedies to save Wu from removal were a longshot. Under the Immigration and Nationality Act, only a pardon by a state governor or the President of the United States for an aggravated felony could stop the removal proceedings of a lawful permanent resident.

While the chances were remote to none, a pardon application was filed on Wu's behalf. The application was stacked with favorable letters: on top of the stack was a letter from Judge Michael Correiro, the judge who sentenced Wu nearly 15 years ago; elected officials, including U.S. Representative Nydia Velazquez; Wu's employers; several friends and

4. The first was an effort to have the local district attorney's office reopen Qing's criminal record from nearly fifteen years ago because his criminal defense attorney did not inform him of the immigration consequences of his plea. However, at the time Qing was detained by Immigration, the U.S. Supreme Court decision in Padilla v. Kentucky was imminent. In Padilla, the U.S. Supreme Court had to decide whether the failure to affirmatively advise a defendant of the immigration consequences of a criminal conviction violated the Constitution. With the Supreme Court decision pending, the local district attorney opted instead to support the pardon petition to the Governor. Meeting with representatives of the Manhattan District Attorney's Office, (Feb. 12, 2010). After Governor Paterson granted the pardon on March 5, 2010, the Supreme Court ruled in Padilla on March 31, 2010 that a criminal defense attorney's failure to advise their client about the immigration consequences of the criminal case constitutes ineffective assistance of counsel. The Court stated that "because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important." Padilla v. Kentucky, 130 S. Ct. 1473, 1478-80 (2010).
6. Kendrick Nguyen, Esq. filed the pardon petition pro bono on Qing Wu's behalf.
7. Nydia Velazquez is the U.S. Representative for the 12th Congressional District in New York. Congresswoman Velazquez is the first Puerto Rican woman elected to the U.S. Congress and has been a staunch supporter of immigration reform.
family members; community groups; and an online petition signed by
thousands. With the unrelenting advocacy of Anna Ng and Wu's family, the
support of OCA-NY leading the community advocacy and media strategy, and a New York Times article, "Judge Keeps His Word to Immigrant Who
Kept His," published on February 18, 2010, Governor Paterson granted
Wu's pardon application on March 5, 2010. At that time, Wu's pardon was
one of only two pardons Governor Paterson had ever granted during his
tenure. As a result of Wu's case, on May 3, 2010, Governor Paterson
announced the establishment of a Special Immigration Board of Pardons
(SIBP). This Board was created to review cases of legal U.S. residents who
are at risk of being removed from the country because of minor or old
convictions. An estimated 1,100 pardon applications have been received
by the SIBP.

While Wu's outcome resulted in a pseudo-happy ending, how many
other Asian, lawful permanent residents have been and could be at risk of
mandatory removal from the United States because of a prior or minor
criminal conviction?

To begin with, there have been a few notable, high-profile cases. Sentenced Home, a 2006 documentary film by Nicole Newnham and David
Grabias, depicts the plight of three Cambodian male refugees: two were
deported to Cambodia because of juvenile crimes; one, Many Uch, still
fights to remain in the United States. In 1994, Uch was relocated from a
refugee camp in the Philippines to a high-crime urban area known as Park
Lake Homes in Seattle, Washington. For protection, he joined a gang. Uch
was convicted of first-degree robbery with a deadly weapon for a crime in
which he was the getaway driver. Uch spent forty months in state prison,
twenty-eight months in detention, and now sits in removal proceedings.
Like Qing Wu, Uch has become a positive member of society. He works
full-time, coaches a youth baseball team, and started a pool hall for at-risk
youth. With his fiancée, Uch has a U.S.-born daughter. On June 11, 2009,
in a packed courthouse full of Uch's supporters, the Clemency and Pardon
Board of Seattle unanimously recommended to Washington Governor
Christine Gregoire that Uch be granted a pardon. In June of 2010,

8. OCA was formerly known as "Organization of Chinese Americans." It now goes by the acronym "OCA" because the organization is becoming more pan-Asian.
12. SENTENCED HOME (Sentenced Home Productions 2006).
Governor Gregoire pardoned Many Uch.\textsuperscript{14}

Eddy Zheng is a Chinese immigrant who came to the United States in 1982 at the age of twelve. Four years later, he pled guilty to robbery and received seven years to life in prison. Zheng spent nineteen years in prison, from age sixteen to thirty-seven, before being transferred to immigration detention for two additional years. While in jail, he learned English, earned his GED and Associate's Degree, and created the first San Quentin poetry slam. He joined S.Q.U.I.R.E.S., a mentoring program for at-risk youth, and has been promoted a third time to project manager in charge of nine staff members at Community Response Network, an advocacy organization that trains people in conflict mediation. Zheng is currently challenging his deportation order in federal court on the basis of ineffectiveness of counsel in his 1986 conviction.\textsuperscript{15}

Kevin Auyeung emigrated from China to the United States at age fourteen. Three years later, he was convicted of robbery. While serving his prison term, Auyeung earned his GED and later established his own cellular communications service company. Because of his criminal record, he was placed in immigration detention in 2006; he was later placed under immigration community supervision because ICE was unable to obtain travel documents for him. Nevertheless, Mr. Auyeung managed to maintain steady employment and continued volunteering as an interpreter for elderly persons in Chinatown throughout this time period. He was subsequently granted an unconditional pardon from Governor Paterson as a result of the newly created Special Immigration Pardons Panel.\textsuperscript{16}

Tam Phan, a Vietnamese immigrant, came to the United States in 1981 at the age of six. He grew up in Midwood, Brooklyn, joined a gang in high school, and was subsequently convicted for his involvement in a series of armed robberies. He went to prison at age of seventeen. During his seventeen years of incarceration, he earned an Associate's Degree from Bard College and Sage College of Albany, and a Bachelor's Degree from Canisius College. He is now pursuing a graduate degree in urban policy and administration at Brooklyn College while working part-time at the Fortune Society, a non-profit organization that helps ex-convicts re-enter society.\textsuperscript{17}

Beyond these cases, ICE's current statistics show nothing beyond an

\textsuperscript{14} Posting of Austin Jenkins to The Crosscut Blog, http://crosscut.com/blog/crosscut/ (July 8, 2010).
\textsuperscript{17} He applied for a pardon, but was not on the list of immigrants pardoned in the December 6, 2010 or December 24, 2010 release from the New York State Office of the Governor. Semple, supra note 11.
astounding number of Asian immigrants officially removed on the basis of a criminal record. According to the "2009 Yearbook of Immigration Statistics," approximately 10,600 out of 45,920 Asian immigrants who were deported from 2000 to 2009 had a criminal conviction. However, it is difficult to know precisely how many Asian immigrants living in the country could be subjected to removal for a previous criminal conviction.

Prior to 9/11, it was not a common practice for immigration enforcement and the criminal justice system to share and coordinate information when an immigrant defendant was released from a state jail. Rather, a lawful immigrant resident convicted of a crime, like Qing Wu, served his time in state prison and was released. Now post-9/11, once the criminal sentence is completed, an immigrant is transferred directly from state prison to immigration detention to face removal proceedings. So the exact number of people who served their time and were released, and now could face the retroactive application of the 1996 immigration laws is unknown.

Before the 2010 Supreme Court decision in Padilla, Legal Aid Society and other public defender agencies did not track data on a client's immigration status. Other than anecdotal interviews from defense attorneys or from the immigrant defendants themselves, there is no paper trail. Many Asian defendants, in particular, sought the legal services of private criminal defense attorneys. Because of attorney/client privilege, these records are not available for public research.

Yet, despite these obstacles, the estimated number of Asian immigrants who are currently and could potentially be impacted by the 1996 immigration laws subjecting them to removal because of a criminal record remains significant.

For instance, the number of nationals from China who became lawful permanent residents (LPR) from 2000-2004 ranged from 40,000 to 61,082 each year. Most LPRs are eligible to apply for citizenship in three years if they received the green card through a U.S. spouse; otherwise, there is a five-year wait before one is eligible for citizenship. However, from 2004

18. See U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 97-105 (2010). To arrive at these numbers, statistics were used from the following regions and countries of nationality: Bangladesh, Burma, Cambodia, People's Republic of China, Hong Kong, India, Indonesia, Japan, Kazakhstan, Korea, Laos, Malaysia, Mongolia, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Taiwan, Thailand, Uzbekistan, and Vietnam. Some data regarding the number of criminals deported from certain regions and country of nationality was withheld by immigration to limit disclosure.
19. Telephone Interview with Jojo Annobil, Esq., Legal Aid Soc'y (Sept. 23, 2010).
20. Id.
to 2009, the number of nationals from China who became U.S. citizens ranged from 27,309 to 40,017 each year.\textsuperscript{23} From these numbers, it appears many LPR's from China are not applying for or being granted U.S. citizenship and therefore could be subjected to mandatory removal if they commit crimes that trigger the 1996 immigration laws.

Asian youth with LPR status from low-income families are the most vulnerable. For more than two decades, joining gangs has been a growing lure for poor Asian immigrant youth whose parents either work long hours and/or leave them at home unsupervised. This has led to arrests of Asian youth for gang-related activity or to Asian youth being profiled or targeted for gang activity.\textsuperscript{24} In a study done of 62 Asian youths in gangs, half of the children stated "[m]oney" was the reason for joining gangs; twenty-three declared it was for "[p]rotection"; eighteen said it was for "[f]un"; and fifteen said it was for "[b]rotherhood."\textsuperscript{25}

Of this specific age group, Southeast Asian refugee youth are particularly at risk because of their lower socioeconomic status. In 1990, Southeast Asians represented 1.5 percent of the total population of California, but composed 4.5 percent of those held in the 9,000 wards of the California Youth Authority System: most were admitted because of gang wars.\textsuperscript{26} After 9/11, the U.S. government simultaneously increased deportation rates\textsuperscript{27} and pressured Cambodia to sign a repatriation agreement that would retroactively accept deportable Cambodian immigrants.\textsuperscript{28} As a result, many Cambodians who committed a crime as much as twenty years ago are now being sent back to Cambodia.

The trajectory of many who have entered the criminal justice system because of gang activity is that it serves as a temporary rite of passage for many Asian youth living in urban areas. Once they reach adulthood, there is a low level of recidivism as they leave for college, enter marriages, raise children, and lead productive lives.\textsuperscript{29} The tragedy is that now, like Qing, they face removal from the United States because of their juvenile criminal record.

Enforcement of the draconian 1996 immigration laws are tearing apart Asian American families and destroying productive lives. With more states

\textsuperscript{23} U.S. DEP'T OF HOMELAND SEC., \textit{supra} note 18, at 53.
\textsuperscript{25} LO-LIN CHIN, \textit{CHINATOWN GANS} 108 (1996).
\textsuperscript{26} Bill Ong Hing, \textit{Detention to Deportation: Rethinking the Removal of Cambodian Refugees}, 38 U.C. DAVIS L. REV. 891, 939 (2005) (citing TONY WATERS, CRIME & IMMIGRANT YOUTH IX (1999)).
\textsuperscript{27} \textit{Id.} at 970.
\textsuperscript{28} \textit{Id.} at 899.
\textsuperscript{29} Telephone Interview with Chanwoo Lee, Esq (Oct. 22, 2010).
entering into the Secure Communities Agreement with the Department of Homeland Security, an agreement that requires local police to report the identity of all persons they arrest to the federal government, more Asian immigrants with a prior criminal record will be subjected to mandatory removal. Discretion to consider rehabilitative factors and family unity must be restored to immigration judges in removal proceedings.

This issue affects all lawful permanent residents, not simply Asian immigrants. Asian immigrants, their families, and community organizations must unite with local and national immigrant advocacy organizations to fight for comprehensive immigration reform. New York is at the forefront of advocating for such reform. Governor Paterson's bold leadership in creating the Special Immigration Pardons Panel is a step in the right direction in responding to a broken federal immigration system, and other states should follow in creating similar panels. Before he left office, the Governor, based on the recommendations from this special panel, pardoned thirty immigrants with old or minor criminal records. The New York Immigration Coalition, with its two hundred member organizations, including Families for Freedom and Northern Manhattan Coalition for Immigrant Rights, is relentless in its pursuit of justice to restore discretion in immigration judges. The vision of The New York Community Trust's Fund for New Citizens in funding the Legal Aid Society, Bronx Defenders, Brooklyn Immigrant Defense Project, and Immigrant Defense Project to provide quality and affordable legal representation and advice to immigrants facing removal because of a criminal conviction is essential. The private bar, including the role of Cleary, Gottlieb, Steen & Hamilton LLP, and the New York State Defenders Association in helping to provide pro bono counsel to applicants filing pardon petitions with the Special Immigration Pardons Panel is a strong example of coalition building between the private bar and community immigrant organizations, and should serve as a national model to replicate for other states that create Special Immigration Pardons Panels.

All immigrant communities must be educated on the importance of becoming U.S. citizens after obtaining LPR status, including LPR parents filing for naturalization on behalf of themselves and their minor immigrant children to avoid being vulnerable to removal from the United States because of a criminal record. Most importantly, advocates must emphasize the importance of becoming a U.S. citizen, to exercise their constitutional right to vote so that elected officials can be held accountable for unjust

30. Press Release, New York State Office of the Governor (Dec. 6, 2010) (on file with author) (describing six immigrants who were issued a pardon from the Governor); see also Press Release, New York State Office of the Governor (Dec. 24, 2010) (on file with author) (mentioning twenty-four immigrants who were issued a pardon).
immigration laws.