

## **Immigration Consequences of Involuntary Treatment Act Proceedings<sup>1</sup>** **March 2022**

### **STEP ONE: IDENTIFY IMMIGRATION STATUS AND DEFENSE GOALS**

| Status   | Goals   |
|--|---|
| <b>Undocumented Person (UP):</b> <ul style="list-style-type: none"> <li>• Entered without inspection; never had status.</li> <li>• Entered lawfully with temporary visa (e.g., student, tourist, employment) that expired.</li> </ul>  | <ul style="list-style-type: none"> <li>• Avoid jail and risk of ICE enforcement<sup>2</sup></li> <li>• Preserve paths to lawful status and relief from removal</li> <li>• Avoid inadmissibility grounds, including health and “public charge” grounds<sup>3</sup></li> </ul>  |
| <b>In Lawful Status:</b> <ul style="list-style-type: none"> <li>• <b>Lawful Permanent Resident</b> (“green card”)</li> <li>• <b>COFA</b> (Pacific Island Compact nation Resident)</li> </ul>   | <ul style="list-style-type: none"> <li>• Maintain legal status; avoid deportability.<sup>4</sup></li> </ul>   |
| <b>Asylee, Refugee</b>   | <ul style="list-style-type: none"> <li>• Maintain status, preserve eligibility to become LPR</li> <li>• Avoid grounds of deportability and inadmissibility</li> </ul>   |
| <b>Temporary Visa Holder</b> (e.g., student, tourist, employment)<br><br><b>Other status with path to LPR status:</b> <ul style="list-style-type: none"> <li>• <b>VAWA Self-Petitioner</b></li> <li>• <b>Special Immigrant Juvenile (SIJS)</b></li> <li>• <b>T</b> (trafficked), and <b>U</b> (crime victim) visa holders</li> </ul> | <ul style="list-style-type: none"> <li>• Keep/preserve ability to renew status or return with visa</li> <li>• Preserve eligibility for relief from removal</li> <li>• Preserve eligibility to become LPR</li> <li>• Avoid grounds of deportability and inadmissibility</li> <li>• “Harmful mental or physical condition” health grounds apply when re-entering U.S., renewing current status, or applying for permanent status</li> </ul> |
| <b>Other status without path to LPR status:</b> <ul style="list-style-type: none"> <li>• <b>DACA</b> (Deferred Action for Childhood Arrivals)</li> <li>• <b>TPS</b> (Temporary Protected Status)</li> </ul>  | <ul style="list-style-type: none"> <li>• Avoid deportability and inadmissibility grounds and criminal status bars</li> <li>• Preserve future eligibility for LPR status</li> </ul>  |

### **STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES AND DEFENSE STRATEGIES**

**Note: No conviction is required to trigger these grounds of inadmissibility!**

#### **A. Physical Health-Related Grounds of Inadmissibility**

Long-term, state-provided medical care can trigger the “public charge” ground, which applies to a noncitizen, who, when applying for a visa or LPR status, “is likely at any time to become a public charge.” 8 U.S.C. § 1182(a)(4). Generally exempt are LPRs, refugees/asylees, T and U visa holders, and VAWA self-petitioners.

<sup>1</sup> This advisory is meant to serve as a quick reference guide for criminal defense attorneys representing noncitizens. Defenders are encouraged to complete the WDA Immigration Project’s [online intake form](#) for every noncitizen client.

<sup>2</sup> See RCW § 10.93.160, prohibiting jail employees’ compliance with ICE detainer requests.

<sup>3</sup> *Inadmissibility* grounds apply to noncitizens applying for immigration status or seeking admission to the U.S. *Deportability* grounds apply to noncitizens who entered the U.S. lawfully, even if now undocumented (e.g., status expired).

<sup>4</sup> Defenders *must* determine whether clients are LPRs or COFA residents! LPRs and COFA residents generally are not subject to inadmissibility grounds other than criminal grounds, which are triggered when the person returns to the U.S. after travel. A rarely used public charge ground of deportability—as opposed to inadmissibility—makes a person deportable who enters legally and becomes a public charge within five years of entry from “causes not shown to have arisen since entry.”

**B. Physical or Mental Disorders with Associated Harmful Behavior**

An applicant for admission who has a **current** physical or mental disorder with associated harmful behavior or a **past** physical or mental disorder with associated harmful behavior “likely to recur or lead to other harmful behavior” is inadmissible. “**Harmful behavior**” is behavior that “may pose, or has posed, a threat to the property, safety, or welfare of the applicant or others.” 8 U.S.C. § 1182(a)(1). This ground can be waived.

**C. Drug Abuser or Addict**

An applicant for admission who is determined to be a drug abuser or addict is inadmissible. 8 USC § 1182(a)(1). This ground cannot be waived if the noncitizen is deemed a **current** drug abuser or addict but can be overcome if the civil surgeon certifies the abuse/addiction is in remission.

| ITA Hearings   |   |
|--|---|
| <b>ITA Findings</b>  | <b>Inadmissibility Ground Implicated</b>  |
| <ul style="list-style-type: none"> <li>• Needs outpatient behavioral health treatment (BEST)</li> <li>• Grave disability (BETTER)</li> <li>• Harmful to self, others (<b>AVOID</b>)</li> </ul>   | <ul style="list-style-type: none"> <li>• Physical or mental disorder that poses a threat to safety of self or others</li> </ul>   |
| <ul style="list-style-type: none"> <li>• “. . . as a result of substance use disorder” (<b>AVOID</b>)</li> </ul>   | <ul style="list-style-type: none"> <li>• Drug abuser or addict</li> </ul>   |
| Best Practices for ITA Hearings  |   |
| <ul style="list-style-type: none"> <li>• Agreeing to treatment may be best, if it means avoiding “bad facts”</li> <li>• How avoidable and what are consequences of a criminal conviction?</li> </ul>   | <ul style="list-style-type: none"> <li>• Seal mental health evaluation?<br/> <b>Con:</b> evaluation may help your client obtain appointed counsel in immigration court<br/> <b>Pro:</b> record inaccessible to immigration authorities.</li> </ul>  |
| ITA Impact on Noncitizens  |   |
| <ul style="list-style-type: none"> <li>• Undocumented Clients</li> <li>• LPRs</li> </ul>   | <ul style="list-style-type: none"> <li>• UPs can be deemed inadmissible if applying for LPR status based on public charge, health-related, or drug abuser/addict ground. These grounds do not apply to UPs seeking “cancellation of removal.”<sup>5</sup></li> <li>• Factor considered (but not a bar) for LPR seeking US citizenship.</li> </ul> |
| <ul style="list-style-type: none"> <li>• Refugees/Asylees</li> <li>• Student and other temporary visa holders</li> </ul>   | <ul style="list-style-type: none"> <li>• Refugees/asylees may be inadmissible under health or drug grounds but are exempt from public-charge ground.</li> <li>• Temporary visa holders must continue to fulfill requirements of status (e.g., students need to stay or be reinstated in school)</li> </ul>  |
| Noncitizens in Removal (Deportation) Proceedings   |   |
| <ul style="list-style-type: none"> <li>• Following a class-action lawsuit, immigration courts in California, Arizona, and Washington must provide legal representation to detained noncitizens who are deemed by the judge to be incompetent to represent themselves.</li> <li>• Deportation charges against noncitizens deemed incompetent are <b>not</b> dismissed or stayed. <b>No</b> competency restoration process exists in immigration court. Even severely mentally ill immigrants are deported.</li> <li>• If you have a client who is incompetent and will be detained, call the Northwest Immigrant Rights Project (NWIRP) at (206) 957-8660 or email Tim Warden-Hertz (directing attorney in Tacoma) at tim@nwirp.org.</li> </ul> |   |

<sup>5</sup> For more about this relief see: <https://defensenet.org/resource-category/cancellation-of-removal-for-undocumented-persons/>