



Ann Benson, Directing Attorney, abenson@defensenet.org (360) 385-2538
Enoka Herat, Staff Attorney, enoka@defensenet.org (206) 623-4321, x105
Jonathan Moore, Immigration Specialist, jonathan@defensenet.org (206) 623-4321, x104

Washington Defender Association's Immigration Project

110 Prefontaine Place S., Suite 610, Seattle, Washington 98104
www.defensenet.org/immigrationproject

Representing Noncitizen Defendants Charged With Communication with a Minor for Immoral Purposes (CMIP) - RCW 9.68A.090¹

I. THE ESSENTIALS – Immigration Status and Criminal History & Defense Goals

Immigration status and how long one has had it determine the immigration consequences: *undocumented persons (UPs)* are subject to different grounds than *lawful permanent residents (LPRs aka "greencard holders")*. UPs either entered illegally and never had status; or came in legally with temporary visa that expired. LPRs and refugees face permanent loss of status and deportation. (If defendant has some other status, identify it.) **Prior convictions affect analysis of current charges.** It is critical to have a complete history (including misdemeanors and sentences, regardless of time suspended).

DEFENSE GOALS FOR UNDOCUMENTED PERSONS (UPs): Avoid ICE apprehension by getting or staying out of jail. A UP (outside King County) who goes to jail for one day is likely to get ICE detainer and go to ICE custody & removal proceedings. If defendant does not yet have ICE detainer, getting out of jail may be the highest priority (see #2). **Preserve avenues to obtain lawful status.** Many UPs (if no prior deportations) have avenues to obtain lawful status, especially if LPR/USC spouse, parents or kids. Avoiding triggering inadmissibility and deportation grounds to preserve avenues to lawful status may be a higher priority than avoiding ICE custody & removal proceedings. If client came before age 16 & was born after 6/15/1981, investigate if eligible for *Deferred Action for Childhood Arrivals*.²

DEFENSE GOALS FOR LAWFUL PERMANENT RESIDENTS & REFUGEES: Avoid a conviction that triggers deportation grounds. Even when this is possible, advise client not to leave the U.S. or apply for lawful status/citizenship without first consulting an immigration attorney. **If this is not possible, preserve avenues for relief from deportation.** LPRs and refugees will get a hearing before an immigration judge with power to grant *discretionary* relief from removal (deportation) through one of a few legal avenues - especially LPRs with 7 years residency & refugees/asylees.

II. KEY CONCEPTS REGARDING IMMIGRATION CONSEQUENCES OF CMIP CONVICTIONS³

- **Triggers Deportation & Inadmissibility Grounds As A Crime Involving Moral Turpitude (CIMT).** CMIP is always classified as CIMT,⁴ which can trigger deportation for LPRs and refugees, and make a UP ineligible to obtain lawful status.
 - **CIMT deportation grounds:** The CIMT deportation grounds bar UPs from certain avenues to lawful status. Any *two* separate CIMT convictions after admission will trigger deportation for LPRs/refugees.
 - **CIMT inadmissibility ground:** The CIMT inadmissibility ground bars UPs from certain avenues for lawful status. For LPRs it is a basis to deny (re)admission into the U.S., and citizenship. This ground will

¹ For individual case assistance defense counsel should contact WDA's Immigration Project staff.

² See DACA advisory at the Immigration Project Resource page of the WDA website.

³ Until mid-2013, ICE charged CMIP as an aggravated felony (AF) as "sexual abuse of a minor." It should no longer be charged as an AF under that provision, due to *Moncrieffe v. Holder*, 133 S.Ct 1678 (2013) and *Descamps v. U.S.*, 133 S.Ct. 2276 (2013); cf. *Parrilla v. Gonzales*, 414 F.3d 1038, 1043 (9th Cir. 2005) (some ways of committing CMIP not "abuse").

⁴ *Morales v. Gonzales*, 478 F.3d 972 (9th Cir.2007).

not be triggered by a CMIP conviction if it is your client's *only* CIMA conviction and the actual sentence imposed (regardless of suspended time) is not more than 180 days.

- **Triggers Crime of Child Abuse (COCA) Deportation Ground.**⁵ This makes an LPR deportable and makes a UP ineligible for certain avenues to obtain legal status.
- **CMIP is a registration offense.**⁶ Will be a major negative discretionary factor in any application for immigration benefits (lawful status, relief from removal, U.S. citizenship). A conviction for Failure to Register will be a CIMA.⁷
- **CMIP can be a “particularly serious crime (PSC).”** PSC bars political asylum and related protections.
- **CMIP can be a “significant misdemeanor”** which bars DACA (Deferred Action for Childhood Arrivals).
- **Felony CMIP** will always make UPs inadmissible/removable as a CIMA; one *by itself* will not make LPR deportable *as a CIMA* unless committed w/in 5 years of admission, and if never departs U.S.
- **Mandatory Immigration Detention.** CMIP conviction can trigger this once in removal proceedings.
- **Relief from Removal If CMIP Conviction:** LPRs with 7 years status and refugees can qualify to ask immigration judge for waivers if no prior aggravated felony convictions. If granted, keep LPR/refugee status.
- **Removal (Deportation) is Permanent.** Only tiny fraction of people will ever obtain or regain lawful status if deported. Illegal re-entry after deportation is now most-prosecuted federal felony and carries heavy enhancements for persons with prior criminal convictions.

III. BEST PRACTICE STRATEGIES TO AVOID/MITIGATE IMMIGRATION CONSEQUENCES

- **Plead to an alternative offense.**⁸ The following crimes do not trigger any grounds of deportation or inadmissibility (including CIMA, COCA) nor do they bar paths to lawful status, particularly using the suggested wording of the plea statement. Always plead to minimum conduct using statutory language whenever possible to satisfy factual basis for elements of the crime.
 - **Assault 4th Degree:** Plead only to “offensive or unconsented touching”. Preferable w/out sexual motivation enhancement (S/M); *but even with S/M, A4 preferable to CMIP.* A4 will not trigger COCA. A4 is *not* a CIMA; but unclear (no caselaw) whether S/M makes A4 into a CIMA. A4 with S/M not a registration offense.
 - **Disorderly Conduct** and/or **Criminal Trespass.**
 - **Assault 3rd Degree (or attempted Assault 3rd) with negligence** (§(d) or (f) only): Will not trigger any deportation/inadmissibility ground, even w/minor victim & S/M. Registration offense. Felony is bar to DACA.
 - **Harassment (non-DV)**⁹: Plead to §§(1)(a)(ii) (property) or (iii)(restrain). Avoid §(i) & (iv).
- **If pleading to CMIP:** Where possible, sanitize record, especially plea to avoid admissions to the following:
 - ✓ Alleged victim (a/v) was under 16;
 - ✓ Defendant was related to a/v;
 - ✓ That the communication was understood by a/v;
 - ✓ That a/v was affected in any way, or put at risk.
 - ✓ Do not do Alford plea or incorporate police report or affidavit of probable cause into plea as factual basis.
 - ✓ **Sentence:** Advocate strongly for 180 day sentence (including suspended time), not 364. Unless CIMA priors, this ensures that conviction falls w/in the inadmissibility exception.
- **If doing Barr/Zhao Plea:** down from more serious sex offense, critical to consult WDAIP Barr/Zhao advisory.

⁵ The issue of whether CMIP is a COCA is undecided by the courts, but ICE is currently charging it as such.

⁶ RCW § 9A.44.130(10)(a)(iii).

⁷ *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007) rev'd by *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir 2008) rev'd on methodological grounds by *Marmolejo-Campos v. Holder*, 558 F.3d 903(9th Cir 2009) (*eb*). Last word on this not spoken.

⁸ If a deferred adjudication (e.g. SOC) is available, see WDIAP Deferred Adjudications memo.

⁹ Prior to entering a plea to harassment it is necessary to consult WDAIP staff or our practice advisory for harassment, available on the immigration project resources page of the WDA website.