



Washington Defender Association's
Immigration Project
www.defensenet.org/immigration-project

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Defending Noncitizens Charged With Failure to Obey (FTO) - RCW 46.61.022

STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
Undocumented Person (UP): <ul style="list-style-type: none"> Entered illegally and never had status; or came lawfully with temporary visa (e.g. student or tourist) that has since expired. Identify how long in the U.S. and any U.S. citizen or LPR family members. Note: many UPs (if no /prior deportations) have avenues for obtaining lawful status. 	<ul style="list-style-type: none"> Avoid ICE apprehension by getting and staying out of jail. A UP who goes to jail for even one day risks exposure to ICE, getting a detainer imposed, and ending up in ICE custody & removal proceedings. Preserve avenues to lawful status for, e.g., UPs who are married to U.S. citizens or have been in U.S. for over 10 years or who entered as children.
Lawful Permanent Residents (LPR or green card holders) & Refugees: Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status.	<ul style="list-style-type: none"> Avoid a conviction that triggers deportation. If this is not possible, preserve path to relief from deportation. There are waivers for some crimes available to LPRs with 7 years of residency, and refugees/asylees who've not yet become LPRs.
DACA (Deferred Action for Childhood Arrivals, is a program created in 2012 which grants work authorization and temporary status to certain UPs who arrived under age 16 and before 6-15-2007. ¹	<ul style="list-style-type: none"> Avoid a "significant misdemeanor" or a third "non-significant" misdemeanor (for DACA).
TPS (Temporary Protected Status)²	<ul style="list-style-type: none"> Avoid any second misdemeanor (for TPS).
Visa Holders (e.g. student & tourist visas): If current, goals = LPRs & refugees. If expired, goals = UPs. See above.	
Deportation Is Permanent – Once removed, it is virtually impossible to legally obtain/regain lawful immigration status.	
Criminal History Critical – Obtaining complete criminal history is essential to provide accurate advice.	

STEP TWO: DEFENSE STRATEGIES

Immigration Consequences of RCW 46.61.022 Failure to Obey (FTO)

FTO is not a crime involving moral turpitude (CIMT), not an aggravated felony, and does not trigger any other statutory conviction-based ground of removal (deportation) or of inadmissibility. **It will count as a last misdemeanor for DACA or TPS.**

¹ See WDAIP's advisory on DACA at the WDA website <http://www.defensenet.org/immigration-project/immigration-resources>

² TPS grants temporary work authorization. TPS holders currently include certain groups of Sudanese, Somalis, Salvadorans, Haitians, Hondurans, Nicaraguans, and Syrians. If client has TPS please get as accurate a criminal history as possible and contact the WDAIP.

Deferred Action for Childhood Arrivals (DACA):

FTO should **not** be a “significant misdemeanor” that, by itself, bars DACA. **DACA is barred by three “non-significant misdemeanors,”** and FTO could count as one of the three. DACA is a program created in 2012 which grants work authorization and temporary status to certain UPs who arrived under age 16 and before 6-15-2007.³

Temporary Protected Status (TPS):

Any second misdemeanor in the U.S. is a bar to TPS.

If you must plead to Failure to Obey

A plea statement setting forth the elements of the statute provides a sufficient factual basis to make the plea knowing, voluntary & intelligent under WA law.⁴ Elaborating additional specific facts is not required and should be avoided. **DO NOT DO AN ALFORD PLEA.** Avoid pleading to a factual basis that stipulates to dishonest, dangerous, threatening, violent or other conduct surplus to the minimum conduct required for conviction.

- ❖ Deferred sentences are **permanent convictions** for all regular immigration purposes; but might not count for DACA *once a dismissal is obtained.*⁵

Warning! Advise *all* noncitizen clients (undocumented and LPRs, etc.) not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.

Best Alternatives to Avoid Immigration Consequences

Viability of any alternative depends upon defendant’s specific immigration status & criminal history.

For DACA applicants:

If it will be a third “non-significant misdemeanor” then NVOL or some kind of diversion⁶ are the only alternatives (NVOL qualifies as a “minor traffic offense” for DACA purposes, and does not count as one of the three “non-significant misdemeanors.”⁷)

For other UPs and LPRS: all convictions will be negative discretionary factors in applications for immigration benefits.

³ See WDAIP’s advisory on DACA at the WDA website <http://www.defensenet.org/immigration-project/immigration-resources>

⁴ *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (2000) (citing *In re Personal Rest. of Hews (Hews II)*, 108 Wash.2d 579, 589 (1987)). *State v. Codiga*, 162 Wash.2d 912, 923-924 (2008); *State v. Zhao*, 157 Wash.2d 188, 200 (2006); *In re Pers. Restraint Hews*, 108 Wash.2d at 590-591. *State v. Schaupp*, 111 Wash.2d 34 (1988). See also, RCW. 9.94A.450(1).

⁵ See Citizenship and Immigration Service (USCIS) FAQs at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> §V. Q64 “Expunged convictions and juvenile convictions will not automatically disqualify you.”

⁶ See n. 6, supra.

⁷ See USCIS FAQs (cited in n. 5) at §V. Q61