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Practice Advisory on Representing Noncitizens Charged With Drug Trafficking Crimes

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SUMMARY PRACTICE POINTS:

- **GENERAL RULE: A drug trafficking conviction (except solicitation) will trigger the controlled substances ("CS," hereafter) grounds of deportation and inadmissibility and be classified as an aggravated felony under immigration law.**
- **Any conviction "relating to" a CS, including paraphernalia, makes a non-citizen who entered legally deportable, other than 1 simple possession of 30 grams or less of marijuana (MJ) for personal use.**
- **Any conviction for a CS crime makes a non-citizen permanently inadmissible. The only waiver for non-citizens seeking a greencard, is for one simple possession of 30 grams or less of MJ.**
- **Any conviction for drug trafficking will be classified as an aggravated felony. Solicitation to deliver or delivery/ PWID of marijuana are the only exceptions. Avoiding aggravated felony classification can be critical to preserving avenues to relief from removal, especially for longtime lawful permanent residents.[1]**
- **Any non-citizen whom ICE "knows or has reason to believe" (R2B) has engaged in or assisted drug trafficking will be permanently inadmissible, even if not convicted of a crime. A finding of R2B will pose a permanent legal bar to obtaining legal immigration status or US citizenship.**
- **Length of sentence is irrelevant to triggering immigration consequences in drug cases.**

I. Identify Immigration Status, Criminal History, & Defense Goals

Status Determines Consequences: Immigration *status* determines which immigration laws apply. Undocumented persons are subject to different grounds than lawful permanent residents.

Undocumented Persons (UP): Many UPs (if never deported and never left U.S.) have paths to relief from removal, especially with a U.S. citizen (USC) spouse, parent or child. 2 main types of UPs: 1) Entered illegally; never had status; 2) Came legally but status expired.

- **Defense Goal for UPs: Avoid ICE by Getting/Staying out of Jail.** A UP in jail for even one day is likely to get an ICE detainer, and go to ICE custody & deportation proceedings. If accused does not have a detainer, avoiding jail may be priority. **However**, if they have a USC spouse (or could marry partner), preserving a path to LPR status by marriage may be higher priority than release from jail.
- **Defense Goal for UPs: Preserve Paths to Lawful Status.** Many UPs have routes to lawful status. [1] Drug convictions will usually make them inadmissible and ineligible for lawful status. Evidence of trafficking can make UPs permanently inadmissible without a conviction.

Lawful Permanent Residents (LPR or green-card holders) & Refugees[2]: Face permanent loss of legal status, and deportation. Identify *how long* the person has had status and *when* entered the U.S.

[1] See the WDAIP advisory "Immigration Proceedings and Relief from Removal" on the WDA website.
[2] Refugees are persons fleeing persecution who are granted status outside the US and then permitted to enter lawfully. Asylees are persons who came to the US first and then applied for asylum to avoid persecution in their home country. Refugees and asylees are entitled to apply for LPR status after one year as a refugee/asylee.

- **Defense Goal for LPRs & Refugees: Avoid Triggering Crime-Based Removal Grounds.** LPRs and refugees convicted of offenses that fall within a crime-related removal ground will be transferred to ICE custody (if in jail) and deportation proceedings initiated against them.
- **Defense Goal for LPRs & Refugees: Preserve Avenues for Relief from Deportation.** If a crime-related removal ground cannot be avoided, defense counsel should focus next on preserving avenues to relief from deportation. *See e.g.* Practice Advisory on Cancellation of Removal for Certain Permanent Residents at www.defensenet.org/immigration-resources.

- **Get Complete Criminal History.** Prior convictions impact consequences of current charges. It is *critical* to have complete history (misdemeanors, too) and sentences (suspended or not).
- **Mandatory Immigration Detention.**[3] Drug convictions can trigger mandatory detention once a person is in deportation (removal) proceedings, which can last for months if fighting deportation. There is no public defender or appointed counsel in removal proceedings.
- **Deportation is Permanent.** It is virtually impossible to obtain/regain lawful status if deported, but especially so after a drug conviction. Illegal re-entry after deportation is the most-prosecuted federal felony and carries sentence enhancements if defendant has prior convictions.

II. The Definitions of Controlled Substance & of Drug Trafficking

Controlled Substance ("CS") Defined. The Immigration Act uses the federal definition of a CS at 21 USC 802. Conviction for a substance listed *only* on a state CS schedule but not also on the federal schedule, is not for a "controlled substance," and will not trigger the CS deportation and inadmissibility grounds. ICE will be unlikely to meet its burden of proof (BOP) to establish deportability for a drug possession conviction against anyone who is an LPR (or was otherwise lawfully admitted) where the record of conviction (R/C) does not identify a specific CS.[4]

Drug Trafficking Defined. The aggravated felony definition for CS trafficking includes: "… any illicit trafficking in a controlled substance (as defined in [21 USC 802]), including any drug trafficking crime (as defined in section 924(c)(2) of title 18, United States Code)…."[5] A state CS conviction can qualify as an aggravated felony in either of two ways:

- It may constitute "illicit trafficking" as generally defined: a crime with inherent commercial element.
- A state offense may still be a "drug trafficking crime" if identified in 18 USC 924(c)(2), which in turn refers to the Controlled Substances Act.[6] To be an aggravated felony under this test, it must be a "felony punishable under" the CSA. For example, obtaining a CS by prescription fraud, even if for personal use is an aggravated felony.

It does not matter for immigration purposes if the crime is classed as misdemeanor or a felony under state law; a state misdemeanor can be an aggravated felony. However, a state simple possession felony is not an aggravated felony under either prong of the above definition because: 1) the CSA punishes simple possession as a misdemeanor, and, 2) it has no commercial element.[7]

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[3] 8 USC §§ 1226(c)(1)(A)-(B)
[4] *Ruiz–Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir.2007); *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965). WDA staff have not found divergences between the federal and Washington State drug schedules.
[5] 8 USC § 1101(a)(43)(B).
[6] 21 USC 802 et.seq.
[7] Though not an issue under the RCW, convictions under state "recidivist" drug possession statutes involving a 2nd or subsequent simple possession conviction *for which a previous conviction is an element* of the state crime will also qualify as aggravated felonies under prong (2) above. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010).

III. The "Record of Conviction" (R/C) for Immigration Purposes

The "Record of Conviction" (R/C) for immigration purposes, is the set of documents an immigration judge can consult to determine if a conviction triggers inadmissibility and deportation grounds or if it will be classified as an aggravated felony.[8]

The R/C created during the criminal proceedings is often a critical factor in determining whether a conviction triggers removal or bars relief from removal or other immigration benefits. The R/C for immigration purposes includes: Charges pleaded to, jury instructions, J&S, plea agreement, factual findings by court, plea colloquy, and any documents stipulated to as the factual basis for a plea.

Police reports and probable cause certificates *are not* included unless defense counsel stipulates to their admission as the factual basis for the plea – which should not be done without consultation with WDAIP staff.[9] The R/C includes an admission by the accused at a plea colloquy, but not statements made only by a prosecutor. Dropped charges are not part of the R/C.

IV. Immigration Consequences of Drug Trafficking Offenses

A. Inadmissibility & Deportation Grounds Triggered By Drug Trafficking Convictions

With the few exceptions outlined here, *any* conviction relating to a CS (including simple possession) triggers the CS grounds of deportation and inadmissibility. A conviction under RCW 69.50 401 will trigger these deportation and inadmissibility grounds and any conviction (other than delivery of or PWID marijuana) will also be classed as an aggravated felony under immigration law. Note that LPRs will not face the grounds of inadmissibility if they never depart the US or apply for citizenship.

The **controlled substance deportation ground**[10] applies to a non-citizen here after a lawful admission, even if currently out-of status.[11] It is triggered by conviction for "a violation of . . . any law or regulation of a state, the United States or a foreign country relating to a controlled substance." A noncitizen who becomes deportable can lose lawful status and become ineligible for important avenues of relief from removal, resulting in deportation from the US. The only drug conviction that does not trigger this ground is a single simple possession of **30 grams** or less of MJ for personal use, and, in the 9th Circuit only, solicitation to commit a drug offense under RCW 9A.28.030. *See, infra* §V.

Other than the exceptions outlined here, **any conviction relating to drug trafficking will be classified as an aggravated felony.**[12] A conviction classed as an aggravated felony drug-trafficking offense trigger virtually automatic removal, eliminate eligibility for almost all forms of relief from removal and result in substantially less due process for many noncitizens. Avoiding an aggravated felony may be highest priority, especially for any LPR client.

The **controlled substance inadmissibility ground**[13] triggers removal for the undocumented and is a bar to future lawful status. It prevents future lawful entry or re-entry into the US.

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[8] Supreme Court decisions in 2013 have clarified that when determining removability the R/C is only to be consulted to identify the offense of conviction; e.g., if it contains separate crimes, or in other words is "divisible."

[9] *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005)

[10] A noncitizen who has been a drug addict or abuser after admission to the US is deportable, without a conviction. 8 USC 1227(a)(2)(B)(iii). This ground is rarely charged.

[11] 8 USC § 1227(a)(2)(B).

[12] 8 USC 1101(a)(43)(B).

[13] 8 USC § 1182(a)(2)(A)(i)(II). A limited waiver is available for certain persons applying for lawful status where single conviction for simple possession of 30 grams or less of MJ.

ANY evidence (including police reports) deemed credible, substantial and probative that establishes that that a noncitizen knowingly and consciously engaged in or knowingly assisted, dealing or selling a controlled substance will trigger the **"reason to believe" (R2B) *inadmissibility* ground** [14] This is a conduct-based ground and does not require a conviction. The inquiry is not limited to the R/C.

Drug trafficking crimes, *including solicitation to deliver*, are also classified as **crimes involving moral turpitude (CIMTs)** for immigration purposes.[15] As such, they can trigger the CIMT inadmissibility and deportation grounds unless they fall within one of the CIMT exceptions.[16]

Both **political asylum** and another avenue to lawful status, called **withholding of removal**, are barred to a person with a particularly serious crime (PSC). Drug-trafficking, regardless of the sentence, is presumptively a PSC and the analysis is not limited to the statute or R/C.[17] A PSC will not bar a person from requesting relief under the Convention Against Torture (CAT).

B. Effect of Reduction from Drug Trafficking Charge to Simple Possession

A reduction to felony possession under RCW 69.50.4013, or attempt or conspiracy to possess, *is NOT a safe alternative*. It will still trigger the CS deportation and inadmissibility grounds.[18] In cases of LPRs with 7 years of legal status it will preserve the ability to request a discretionary waiver in removal proceedings (cancellation of removal) and so may be a viable alternative to a drug trafficking conviction that would be an aggravated felony (and make them ineligible for this waiver). For all others it will not be a viable alternative that avoids triggering deportation and inadmissibility grounds. In addition, such a plea will also make them ineligible for most avenues to obtain/retain lawful status.

C. Exception: Solicitation Convictions under RCW 9A.28.030

Solicitation under RCW 9A.28.030 is not a CS crime, nor a drug trafficking aggravated felony, in the 9th Circuit only and can be a useful safe haven for permanent residents accused of trafficking (and for some undocumented people accused only of simple possession). [19] See § V, *infra*.

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[14] 8 USC § 1182(a)(2)(C). *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004); *Matter of Casillas-Topete*, 25 I&N Dec. 217 (BIA 2010). *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992). A noncitizen believed to have engaged in drug trafficking or have knowingly aided or abetted it is *permanently* inadmissible. Relatives who only knowingly benefitted from trafficking of a spouse or parent are only inadmissible for 5 years after receipt of benefit.

[15] Because of the Supreme Court ruling in *Moncrieffe v. Holder* 133 S.Ct 1678 (2013), PWID or Delivery of a CS--but especially marijuana-- where minimum conduct does not require remuneration or quantity but merely transfer of any amount, should not be categorically a CIMT. However there is no decision saying this and published cases do not so far distinguish between distribution and sale, treating both as a *per se* CIMTs.

[16] There is an exception to the CIMT deportation ground if it is defendant's only CIMT conviction, and was not committed within five years of the date of lawful admission. There is also an inadmissibility exception but it applies only to misdemeanor offenses, and, thus, has little utility here. See 8 USC §§ 1227(a)(2)(A)(i) & 1182(a)(2)(A)(ii).

[17] *Matter of Y-L-*, 23 I. & N. Dec. 270, 274 (Atty Gen. 2002); *Anaya-Ortiz v. Holder*, 594 F.3d 673 (9th Cir. 2010).

[18] Although extremely unlikely, reduction to simple possession of 30 grams or less of marijuana *would* avoid triggering the CS *deportation* ground and not be classified as a drug trafficking aggravated felony.

[19] *Leyva-Licea* 187 F.3d 1147 (9th Cir 1999); *Coronado-Durazo v. INS*, 123 F.3d 1332 (9th Cir. 1997) (only attempt and conspiracy specified in statute). The 9 states of the 9th Circuit include: WA, OR, CA, ID, MT, HI, AK, AZ, NV. The Board of Immigration Appeals (BIA) applies a contrary rule everywhere outside the 9th Circuit. *Matter of Beltran*, 20 I&N Dec 521 (BIA 1992), *rev'd by Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). The BIA treats *Beltran* as good law outside the 9th Circuit. *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). It reaffirmed *Beltran* in *Matter of Zorilla-Vidal* 24 I&N Dec. 768 (BIA 2009); *see also Peters v. Ashcroft*, 383 F.3d 302 (5th Cir. 2004). The law that controls is that in effect where the deportation hearing occurs.

D. Exception: Delivery or PWID of Marijuana in Washington

Under RCW 69.50.401(c) a conviction for manufacture of marijuana will trigger the CS deportation and inadmissibility grounds *and* be classified as an aggravated felony. A conviction for delivery or possession with intent to deliver marijuana will also trigger the CS grounds but will *NOT* be classified as an aggravated felony, a critical difference for many lawful permanent residents.

The statute governing delivery or possession with intent to deliver (PWID) MJ in Washington does not distinguish between commercial delivery and the non-remunerative transfer of a small amount (social sharing). Under the Controlled Substances Act (CSA) distributing "a small amount of marijuana for no remuneration shall be treated as" simple possession, which is a federal misdemeanor.[20] The aggravated felony ground will only be triggered if actual dealing is an element, *or* if the conviction would be a felony under the CSA. Because RCW 69.50.401(c) does not make these into separate offenses, a conviction for delivery or PWID MJ is not an aggravated felony.

V. The 9th Circuit's Solicitation Exception

A. What is the Solicitation Exception? [21]

Under 9th Circuit case-law, a conviction for solicitation to deliver a CS under a generic statute such as RCW 9A.28.030 is **not a CS conviction that triggers the CS deportation ground and cannot be classified as a drug trafficking aggravated felon**y, even where the record establishes that the crime solicited involved drug trafficking.[22] The CS inadmissibility and deportation grounds and the aggravated felony definition, specifically *do* include "attempt" and "conspiracy."[23] Thus, attempt and conspiracy convictions will trigger these grounds and are not safe alternatives.

Although not a CS conviction, solicitation to deliver under RCW 9A.28.030 will normally trigger the "**reason to believe**" (**R2B**) inadmissibility ground. See §IV.A., *supra*. Solicitation to *possess* under RCW 9A.28.030 should not by itself provide R2B that a person trafficked. If plea language is crafted and all the underlying documents (including police reports, original information, or CDPC) support that there was no participation in trafficking, a plea to solicitation to possess could avoid triggering R2B.

The courts have held that drug trafficking crimes are **crimes involving moral turpitude** (CIMT). [24] There is no CIMT exception for solicitation. Solicitation to deliver convictions will trigger CIMT inadmissibility and deportation grounds if they apply to your client. There is an argument that PWI-MJ is not a CIMT. So, where possible, specify in the plea that this was the underlying offense.

B. Undocumented Defendants And The Solicitation Exception

Solicitation to deliver will not be viable alternative if client is undocumented because it will trigger the R2B inadmissibility ground, which cannot be overcome and is a permanent bar to lawful status in the US. See § IV.A., *supra*. Additionally, a solicitation delivery conviction can result in a 12 or 16-level

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[20] Compare 21 USC §§ 841(a)(1) and (b)(1)(4); 21 USC § 844(simple possession); *Moncrieffe v. Holder* 133 S.Ct. 1678, 1685-1687 (2013).

[21] The analysis here focuses on solicitation to deliver, but is also applicable to convictions involving solicitation to possess. For more information on drug possession convictions, see WDA's Immigration Project resources webpage.

[22] *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997) (deportability ground); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (aggravated felony). No case applies this rule to the CS inadmissibility ground, but since it is phrased analogously to the deportation grounds, a drug solicitation conviction should also not trigger the CS inadmissibility ground.

[23] See 8 USC § 1101(a)(43)(U) (aggravated felony); 8 USC § 1227(a)(2)(B) (deportability ground); 8 USC § 1182(a)(2)(A)(i)(II) (inadmissibility ground).

[24] Simple possession of a CS is not a CIMT. *Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (BIA 1968).

sentence enhancement as a "drug trafficking offense" if she returns to the US and is prosecuted for the crime of illegal re-entry after deportation.[25]

C. Lawful Permanent Residents and the Solicitation Exception

- **Is a Conviction for Solicitation Delivery a Safe Haven that Avoids Removal?**

For some LPRs, a plea to solicitation to deliver is a safe haven. A solicitation delivery conviction will NOT trigger the CS deportation grounds, nor be classified as an aggravated felony. However, it will still be classified as a CIMT. Consequently, this option will only save client from removal if it is her only CIMT conviction and it occurred more than 5 years after date of her lawful admission to the US.[26] When pleading to a solicitation delivery counsel should make a record of defendant's *reliance* on current 9th Circuit case-law.

EXAMPLE: David is charged w/PWID cocaine. He has been an LPR since 1999 and has no priors that trigger deportation grounds. A plea to solicitation to deliver will not trigger any deportation ground, including the CIMT deportation grounds and David can keep his LPR status (green card). If David had only become an LPR in 2010, solicitation to deliver would trigger the CIMT deportation ground.

- **Limitations on the Solicitation to Deliver Safe Haven**

Do Not Leave US or Apply for Citizenship. Inadmissibility grounds cannot be used to remove LPRs (unlike UPs). But they apply to LPRs who *depart the US and return*.[27] They will also apply to persons seeking US citizenship (LPRs may apply after 5 years).[28] Although there is no case on point, a solicitation delivery conviction should not trigger the CS inadmissibility ground, for same reasons that it does not trigger the analogous CS deportation ground. However, it *would* trigger the R2B inadmissibility ground, for which there are no exceptions or waivers. See §IV.A., *supra*. Instruct your client on these limitations and advise him to NEVER leave the US or seek citizenship without consulting immigration counsel.

Travel Outside the 9th Circuit Risks Deportation/Removal. Solicitation to deliver under RCW 9A.28.030 does not trigger the CS deportation ground and cannot be classified as aggravated felony, but *only in the 9th Circuit*. Immigration courts outside the 9th Circuit will hold it triggers those grounds.[29]

D. Defendants with Refugee/Asylee Status and the Solicitation Exception

Defendants in refugee/asylee status have been legally admitted and are subject to the grounds of deportation, so solicitation can be a limited but important safe haven – one that is likely to buy them time. Although it will avoid triggering the C/S deportation ground, a solicitation delivery conviction will trigger the unwaivable R2B inadmissibility ground that will bar refugees and persons granted asylum from obtaining LPR status (which they are entitled to do after 1 year in refugee/asylee status).

Although ineligible to obtain LPR status, a refugee with a solicitation delivery may be able to stay indefinitely in refugee status if she never travels outside the US or the states of the 9th Circuit. An asylee risks termination of her status regardless of any departures since asylee status can be terminated for a

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[25] *U.S. v. Beltran-Ochoa* 2013 WL 5313434, 1 (9th Cir.2013); U.S.S.G §§ 2L1.2(b)(1)(A)(i), (B); n.1(B)(iv)
[26] There may be limited routes to relief from removal available to a client with a solicitation to deliver conviction. Counsel should consult with WDA's Immigration Project to see if they exist and if solicitation can preserve them.
[27] 8 USC §§ 1101(a)(13)(c), 1227(a)(1)(A)
[28] 8 USC §§ 1427(a), (d)-(e); 8 USC 1101(f)(3); 8 CFR §§ 316.2, 316.10
[29] *Matter of Beltran*, 20 I&N Dec 521, 528, (BIA 1992), *rev'd by Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). *Beltran* is good law outside the 9th Circuit. See *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999); and *Matter of Zorilla-Vidal* 24 I&N Dec. 768 (BIA 2009).

"particularly serious crime" (PSC).[30] A solicitation delivery conviction is nearly certain to be deemed a PSC, which makes the utility of this option of limited value for asylees.

VI. Strategies for Pleas to Drug Trafficking Offenses

A. Plea to Solicitation Under RCW 9A.28.030 -- See §V, *supra.*

B. Barr/Zhao Plea Alternative

In re Barr and *State v. Zhao* permitted a defendant to plead to a substitute charge that is legal fiction to receive the benefit of a plea bargain.[31] The substitute charge is a legal fiction because there is no factual basis for the plea, or factual basis is insufficient. The plea must be knowing, voluntary and intelligent and the court must find enough factual basis for *original dismissed charge*, that the risk validates a plea to something else. A *Barr/Zhao* plea is different from an *Alford* (*Newton*) plea (which is NOT recommended) because the defendant is not explicitly asserting actual innocence to a charge *to which she pleads*; rather she just pleads guilty to an alternative charge. Crafting the plea is critical**.** Check WDAIP resources and consult staff before doing a *Barr* plea.

C. Rendering Criminal Assistance (RCA) Alternative – RCW § 9A.76.050-090

For LPR clients, RCA to a drug crime may avoid deportation. It is not a deportable CS conviction nor a trafficking aggravated felony, even if principal offense involved sale. However, where sentence imposed is 12 months or more, an RCA will be classified as an aggravated felony as a crime "relating to obstruction of justice." [32] RCA is only a viable alternative if the sentence is less than 12 months. Additionally, RCA is almost certain to be classified by ICE as a CIMT.[33] Counsel must determine if an RCA conviction will trigger the CIMT deportation ground.

As with solicitation to deliver, RCA and evidence of associated conduct can or will trigger the unwaivable R2B inadmissibility ground. Thus, LPRs pleading to RCA should never leave the US. RCA to trafficking will not usually help UPs. For refugees, it will be the same as for solicitation, see §V.D, *supra*.

D. Controlled Substance Prescription Fraud Charges - RCW 69.50.403

This can be an aggravated felony. Simple possession under RCW 69.50.4013 avoids this, but still triggers CS deportation and inadmissibility grounds. It may be a viable option for LPRs eligible to ask for a waiver to stay in the US. If a possession plea is not a viable option, consult the WDAIP staff about crafting a plea to a subsection of the statute that does not have a federal CSA counterpart. This will at least preserve legal arguments for the client to contest removal charges based on the conviction.

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[30] 8 USC §§ 1158(c)(2)(B), (b)(2), (b)(2)(A)(ii), (c)(3); 8 CFR 208.24(b)(3)

[31] *In re Barr* 102 Wn.2d 265 (1984); *State v. Zhao* 157 Wash.2d 188 (Wash., 2006). See WDAIP *Barr* plea advisory at: http://www.defensenet.org/immigration-project/immigration-resources/navigating-and-crafting-pleas-for-noncitizen "Using *In Re Barr* Pleas as a Strategy for Noncitizen Defendants"

[32] *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (conviction for accessory after the fact (AATF) to CS trafficking not offense related to a controlled substance, but was aggravated felony as crime "relating to obstruction of justice" with a sentence of a year or more).

[33] The 9th Circuit held that AATF is not a CIMT. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074-75 (9th Cir. 2007)(*en banc*) (Reinhardt, J., concurring). The Board of Immigration Appeals takes a contrary position that AATF is a CIMT when the underlying crime is a CIMT. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

E. Possession Plea to Preserve Relief from Removal for Certain LPRs

For an LPR of over 7 years, **pleading to simple possession** of any CS (other than flunitrazepam) will preserve your client's eligibility to ask the immigration judge for a waiver, once in removal proceedings.[34] (A solicitation to possess any CS or a conviction for simple possession of 40 grams or less of MJ (with *amount less than 30 grams stated in the plea*) will avoid triggering any deportation ground altogether.)

F. Not Identifying the Substance

Not naming a specific CS is unusual in a Washington drug plea, but sound if the plea is knowing, intelligent and voluntary, and defendant fully apprised of charges.[35] Courts have held that, where the BOP is on the government to establish deportation (as in the case of an LPR with a drug conviction), if a state's definition of a CS is broader than the federal definition, *supra*, and the CS is not identified in the record, the ICE cannot meet its BOP and person cannot be deported for the conviction.[36] There is no case on the differences between the federal and Wash. State drug schedules, and we have not identified any. However, an LPR (or refugee/asylee) who gets such a disposition will have a viable argument to fight deportation, since it may be hard for ICE to meet its BOP that the drug schedules match up.

G. Pleas Involving Legend Drugs Under RCW § 69.41.030

A plea to a Legend Drug *not specified as a CS in record of conviction* should not trigger the CS or aggravated felony grounds of deportation. [37] It would not prevent an R2B finding based on police reports or the original charge. Sale or delivery of non-CS Legend drug, or crimes involving fraud risks still be classed as CIMTs.

H. Avoid Creating a Record that Establishes "Reason to Believe"

Credible drug trafficking allegations can trigger the R2B inadmissibility ground, creating an insurmountable obstacle to UPs ever getting legal status. But it may help a UP to challenge the R2B allegation if you establish that charge was reduced from trafficking because there was no, or weak evidence that can be controverted, of trafficking, or is less than substantive and probative (e.g., allegation came only from unreliable criminal informant).

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[34] To qualify for "cancellation of removal" one must have 5 years of LPR status and 7 years of continuous residence after lawful admission in any status (e.g., student visa) prior to commission of CS crime. See http://www.defensenet.org/immigration-project/immigration-resources Quick Guide to LPR Cancellation

[35] See, e.g., *State v. Kjorsvik* 117 Wash.2d 93, 103, 812 P.2d 86, 91 (Wash.,1991)

[36] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Circuit 2007).

[37] RCW 69.41.030(1); but see RCW 69.41.072 (Violation of 69.50 not to be charged under 69.41). An alternative charge based on agreement with prosecution and accompanied by a knowing, intelligent and voluntary plea to legend drug crime should be accepted by most Courts; or *In re Barr* plea to a (non-CS) legend drug may work.