

DEFENDING NONCITIZENS CHARGED WITH MALICIOUS MISCHIEFⁱ

Malicious Mischief (any degree) under the property destruction prong should not trigger any ground of inadmissibility or deportation even with a DV designation. It is “immigration safe.”

STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<p>Undocumented Person (UP):</p> <ul style="list-style-type: none"> Entered without inspection; never had status. Came lawfully with temporary visa (e.g. student or tourist) that has since expired. <p>(Identify how long they have been in the U.S., if any LPR or USC family, and prior deportations or ICE contact.)</p>	<ul style="list-style-type: none"> Avoid jail. UPs in jail for even a day risk exposure to ICE by (illegalⁱⁱ) jail communication, and risk ICE enforcement. Preserve paths to legal status (relief).ⁱⁱⁱ Convictions and some conduct can bar relief. Asylum-seekers must avoid conviction for “particularly serious crimes”
<p>Currently admitted in lawful status:</p> <ul style="list-style-type: none"> Lawful Permanent Residents (LPR or green card holders); Asylees and Refugees; COFA residents (from a Pacific Island Compact nation) <p>(Identify <i>how long</i> person has had lawful status.)</p>	<ul style="list-style-type: none"> Avoid triggering deportation grounds. Avoid triggering inadmissibility. Preserve paths to LPR and relief from deportation.^{iv} Preserve eligibility for naturalization. (LPRs cannot get US citizenship while on probation, and certain crimes bar “good moral character”)
<p>Visa Holders (e.g. business, student, temporary employment or tourist visas):</p>	<ul style="list-style-type: none"> If current, goals = LPRs & refugees. If expired, goals = UPs. <i>See above</i>
<p>DACA recipients: Felony, 3rd misd., or 1 “significant misd.” is bar; (“DV” + any GM is probably a bar)</p> <p>Temporary Protected Status (TPS) holders: Any second misdemeanor is a bar.</p> <p>Non-citizen US Nationals (American Samoa): Not “aliens,” not deportable; need GMC for citizenship.</p>	

STEP TWO: IMMIGRATION CONSEQUENCES AND DEFENSE STRATEGIES

Immigration Consequences of Malicious Mischief (MM) ^v
<ul style="list-style-type: none"> ❖ MM under any of the “physical damage to property of another” prongs is not a crime involving moral turpitude (CIMT),^{vi} nor a “crime of violence.” It will not trigger any other ground of deportation or inadmissibility, even with a DV label. The required property damage can be ANY “diminution in the value to property as the consequence of an act”.^{vii} MM3 under the graffiti prong is also safe. ❖ However, it will count as a misdemeanor for purposes of the bars to DACA and TPS (above). A DV designation may also risk making it a “significant misdemeanor” for DACA purposes (as an “offense related to domestic violence”). ❖ A sentence on any conviction (even if suspended) will also count toward 5-year total inadmissibility.^{viii} ❖ Any conviction is a negative discretionary factor. Counsel should advise clients to comply with all conditions, to ameliorate this negative impact on future applications for immigration benefits. <p>Warning! Advise <i>all</i> noncitizen clients (undocumented and LPRs, etc.) not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.</p>

Best Plea Practices for MM (any degree)

- ❖ **Plead to the minimum conduct of the statute only.** 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.^{ix} Elaborating additional specific facts is not required and should be avoided. It is best practice to **avoid incorporating the charging documents, police report, or CDPC** as the basis for the plea. For this reason, you should **generally avoid *Alford* pleas.**^x
- ❖ **Best plea language:** “I damaged property with intent to vex or annoy,” or “I caused [physical damage to] (or) [a diminution in the value of] the property of another in an amount exceeding \$XX, [with intent to annoy].”
- ❖ **Seek the lowest possible sentence:** To avoid triggering the 5-year total sentence ground of inadmissibility, seek the lowest sentence possible. A sentence to the max is not ideal, even if time will be suspended (suspended time still counts toward the 5 years).

ⁱ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen clients. Defenders are advised to consult with WDA’s Immigration Project on individual cases by completing an intake form online at: <http://www.defensenet.org/immigration-project/case-assistance>. When submitting an intake, **obtaining a complete criminal history, including sentences, is essential** for us to provide accurate advice. Immigration attorneys or representatives are encouraged to contact us for possible legal arguments to challenge a removal charge or other consequence in an immigration matter. If in doubt, don’t concede!

ⁱⁱ See RCW 10.93.160

ⁱⁱⁱ UPs may have paths to lawful status. See, e.g., WDAIP advisory on “10-year cancellation of removal,” the principal form of relief, but there are many others: <https://defensenet.org/resource-category/cancellation-of-removal-for-undocumented-persons/>

^{iv} There are waivers for some crimes, for LPRs with 7 years residence, and refugees/asylees seeking LPR status See our advisory on Cancellation of Removal for Lawful Permanent Residents: <https://defensenet.org/resource-category/cancellation-of-removal-for-lawful-permanent-residents/>

^v The “impairment of public service” prongs are unsafe and not covered here.

^{vi} *Rodriguez-Herrera v. INS* 52 F.3d 238 (9th Cir.1995). NB: a felony is a bar to Deferred Action for Childhood Arrivals (DACA).

^{vii} See definition of MM at RCW 9A.48.100.

^{viii} See 8 USC 1182(a)(2)(B) (multiple convictions for which aggregate sentences to confinement are 5 years or more). This ground applies to anyone “seeking admission,” including LPRs returning from a trip abroad.

^{ix} *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). See also, RCW. 9.94A.450(1).

^x If there is a compelling reason for such a plea in your case, please contact us.