

# Defending Noncitizens Charged with Misdemeanor DV Protection Order Violations<sup>1</sup> - RCW 26.50.110

January 2018

## IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<p><b>Undocumented Person (UP):</b></p> <ul style="list-style-type: none"> <li>Entered illegally and has never had status.</li> <li>Came lawfully with a temporary visa (e.g. student or tourist) that has since expired. <ul style="list-style-type: none"> <li>➤ Identify how long they have been in the U.S. and any U.S. citizen or LPR family members.</li> <li>➤ Identify criminal history.</li> </ul> </li> </ul> <p><b>Note: many UPs have avenues to obtain lawful status.</b></p>	<ul style="list-style-type: none"> <li>While many counties no longer honor ICE detainers, avoiding ICE arrest and detention is still an important goal.</li> <li>Preserve avenues to obtain lawful status. There are paths to legal status for UPs married to U.S citizens, or who have been in the U.S. for over 10 years and have an LPR/USC spouse, parent or child.</li> <li>A DV NCO determination will make them ineligible for some of these remedies.</li> </ul>
<p><b>Lawful Permanent Residents (LPR or green card holders) &amp; Refugees:</b></p> <ul style="list-style-type: none"> <li>Face permanent loss of their lawful status and deportation (“removal”). <ul style="list-style-type: none"> <li>➤ Identify how long person has had lawful status.</li> <li>➤ (LPR <i>card</i> expires; LPR <i>status</i> does not expire but can be abandoned outside US or revoked by an immigration judge)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Avoid conviction or judicial “determination” that triggers deportation.</li> <li>If this is not possible, preserve avenues for relief from deportation. There are waivers of deportation available to LPRs with 7 years of continuous residence,<sup>2</sup> and refugees/asylees who have not yet become LPRs.</li> <li>Advise client not to leave the U.S., renew green card, or apply for LPR status/citizenship without first consulting immigration attorney.</li> </ul>
<p><b>Student, tourist, temp. work visas:</b> If current, goals = LPRs &amp; refugees. If expired, goals = UPs. See above.</p>	
<p><b>Criminal history is critical</b> – <i>Obtaining complete criminal history, with sentences, is essential</i> to provide accurate advice.</p>	
<p><b>Deportation is permanent</b> – Once removed, it is virtually impossible to regain lawful immigration status.</p>	

<sup>1</sup> Referred to as DV-VNCO (violation of a no-contact order) throughout this advisory. This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible, defenders are advised to consult specifically with WDA’s Immigration Project on individual cases.

<sup>2</sup> See WDAIP Quick Guide to “LPR Cancellation” at <http://www.defensenet.org/immigration-project/immigration-resources>.

## Immigration Consequences of DV-VNCO Determination<sup>3</sup>

### LPRs:

- Triggers deportation ground, so LPR can be placed in removal proceedings at any time.

### Refugees:

- Triggers deportation.
- But if no crime involving moral turpitude (CIMT) convictions, can apply for LPR status w/o a waiver.

### UPs (undocumented):

- Bars 10-year cancellation of removal waiver of deportation for UPs, who are already removable just for lack of status.

## What Triggers the DV-VNCO Deportation Ground?

- If the underlying protection order was issued under RCW 26.50 or 10.99, a DV conviction for violating the order will trigger this ground (see below for tips on pleading); however *a conviction is not necessary*. Any *determination by the court of conduct that violated the order* will be enough;
- A finding of contempt for violating a DV protection order;
- Even conduct not “inherently violent, threatening, or harassing in nature,” such as a phone call or consensual contact, triggers the DV- VNCO ground, if the order itself is a DV protection order that prohibits such conduct.<sup>4</sup>

## What Does *Not* Trigger the DV-VNCO Deportation Ground?

- If the underlying protection order was issued under RCW §§ 7.40, 7.92, 7.90, 9A.46, 9.94A, 26.09, 26.10, 26.26, or 74.34, even a “DV”-labeled conviction under 26.50 of that order *should not* trigger the DV-VNCO deportation ground. Violation of a non-DV anti-harassment order will not trigger the ground.
- **If the originating order was under RCW 26.50 or 10.99, but offer is to plead to a non-DV NCO violation**, DHS can use any “probative and reliable evidence” in or outside the record of conviction to establish that a court “determined” a DV-NCO violation occurred.<sup>5</sup> It would be necessary to keep any reference or link to originating DV order out of the record, but that might not be sufficient.<sup>6</sup> That, *plus* language that “**the defendant understands that the court has not determined that he engaged in conduct that violated a DV protection order,**” in plea statement or plea agreement would be much more likely to avoid triggering the ground.

## If You Must Plead Guilty to DV-VNCO

- **If the underlying order was filed under RCW 10.99 or 26.50:**  
This can be assumed to trigger the DV-VNCO ground. Best practice is to sanitize the record as much as possible. In pleading, do not identify statute under which the order was issued. Instead, state that defendant knew an NCO was in place, and knowingly violated it, but do not identify the originating statute. This is probably insufficient if the charging document lists either 10.99 or 26.50.<sup>7</sup> It at least gives an immigration attorney arguments why a conviction with this plea language should not trigger the DV-VNCO deportation ground.
- **If the underlying order was not filed under RCW 10.99 or 26.50:**  
It should not trigger the DV-VNCO Deportation ground. It is best to explicitly put in plea statement which non-10.99/26.50 statute the order was issued under (e.g. “D knowingly violated an order issued under 9A.46.”).
- **To extent possible:**  
Do not plead or stipulate to more than a minimum, non-threatening, non-forceful violation; do not plead to the provisions “prohibiting acts or threats of violence” or stalking, under 26.50.110(1)(a)(i).

## Best Alternatives to Avoid Immigration Consequences

CT1-DV; disorderly conduct-DV; MM3-DV; obstructing; A4-DV; should not trigger any conviction-based ground of deportation or inadmissibility. Plea to non-DV order might work, only if no mention of or link to an original DV order.

<sup>3</sup> Violation of a strict liability DV-NCO is not a crime involving moral turpitude (CIMT). Nor is it a “crime of violence” and so is not a deportable “Crime of DV” nor aggravated felony COV. This is not as clear for felony violation under 26.50.110(4) by assault. *But see State v. Armstrong*, 188 Wash. 2d 333, 340–41, 394 P.3d 373, 377 (2017) (felony violation of court order, which includes a recidivist misdemeanor provision, is an alternative means crime.) Therefore assault is not a required element of the felony.

<sup>4</sup> *Alanis-Alvarado v. Mukasey* 558 F.3d 833 (9th Cir. 2009); *Szalai v. Holder*, 572 F.3d 975, 982 (9th Cir. 2009). The Board of Immigration Appeals (BIA) agreed in *Matter of Strydom*, 25 I&N Dec 507 (BIA 2011).

<sup>5</sup> *Matter of Obshatko* 27 I&N Dec 173,176 (BIA 2017) (Elements-based, or “categorical,” analysis does not apply to this ground.)

<sup>6</sup> So a plea under *In Re Barr*, which links to the original charge or CPDC to establish a minimal factual basis, might not work here.

<sup>7</sup> A charge that says only “violated a protection order under RCW 26.50.110(1) (a)” is better, since it includes non-DV orders. The originating order also should not be in anything stipulated to as providing a factual basis for plea, or “real facts” for sentencing.