

## DEFENDING NONCITIZENS CHARGED WITH BURGLARY IN THE 2ND DEGREE

### STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<p><b>Undocumented Person (UP):</b></p> <ul style="list-style-type: none"> <li>Entered without inspection; never had status.</li> <li>Came lawfully with temporary visa (e.g. student or tourist) that has since expired.</li> </ul> <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"> <li>Avoid jail. UPs in jail for even a day risk exposure to ICE by (illegal<sup>1</sup>) jail communication, and risk ICE enforcement.</li> <li>Preserve paths to legal status (relief).<sup>2</sup> Convictions and some conduct can bar relief.</li> <li>Asylum-seekers must avoid conviction for “particularly serious crimes”</li> </ul>
<p><b>Currently admitted in lawful status:</b></p> <ul style="list-style-type: none"> <li><b>Lawful Permanent Residents</b> (LPR or green card holders);</li> <li><b>Asylees and Refugees;</b></li> <li><b>COFA residents</b> (from a Pacific Island Compact nation)</li> </ul> <p>(Identify <i>how long</i> person has had lawful status.)</p>	<ul style="list-style-type: none"> <li>Avoid triggering deportation grounds.</li> <li>Avoid triggering inadmissibility.</li> <li>Preserve paths to LPR and relief from deportation.<sup>3</sup></li> <li>Preserve eligibility for naturalization. (LPRs cannot get US citizenship while on probation, and certain crimes bar “good moral character”)</li> </ul>
<p><b>Visa Holders (e.g. business, student, temporary employment or tourist visas):</b></p>	<ul style="list-style-type: none"> <li>If current, goals = LPRs &amp; refugees.</li> <li>If expired, goals = UPs. <i>See above</i></li> </ul>
<p><b>DACA recipients:</b> Felony, 3<sup>rd</sup> misd., or 1 “significant misd.” is bar; (“DV” + any misd. is probably a bar)</p> <p><b>Temporary Protected Status (TPS) holders:</b> Any second misdemeanor is a bar.</p> <p><b>Non-citizen US Nationals (American Samoa):</b> Not “aliens,” not deportable; need GMC for citizenship.</p>	

### STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES BASED ON IMMIGRATION STATUS<sup>4</sup>

#### Immigration Consequences of Burglary in the 2<sup>nd</sup> Degree (RCW 9A.52.030)

**Crime involving moral turpitude (CIMT):** Pleading to Burg 2 using language below will ensure that it is not a CIMT. Burglary has been found to be a CIMT when the intended crime is a CIMT, or it was of an occupied residence.

<sup>1</sup> Under RCW 10.93.160, jails can no longer honor ICE detainers or notify ICE of release dates, but some jails may not be in compliance. Also, if a person is already in ICE’s records (e.g. they have a prior deportation), ICE will be notified when they are booked into jail when their fingerprints are sent to the NCIC.

<sup>2</sup> 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/>

<sup>3</sup> 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/>

<sup>4</sup> This advisory is intended to serve as a quick-reference guide for criminal defense attorneys representing noncitizens. Whenever possible, defenders are advised to consult specifically with WDA’s Immigration Project on individual cases. When submitting an intake, obtaining a complete criminal history, including sentences, is essential for us to provide accurate advice. This is not intended to preclude arguments by counsel in an *immigration law* matter that burglary does not meet certain removal grounds. For more details on such arguments or to request amicus support, please contact us.

**Aggravated Felony (AF):** If a sentence of 12 months or more is imposed, a conviction for burglary 2 risks being charged as a “burglary” AF. (While there are arguments against this and it should not be conceded in an immigration case context, for purposes of criminal defense, there is still a risk of it being charged.)

**LPRs & UP:** An AF will result in virtually automatic deportation, even for LPRs, as well as a permanent bar to ever re-entering the country lawfully.

**DACA & TPS:** As a felony, burglary will be a bar to obtaining or renewing DACA or TPS.

**Particularly Serious Crime:** This would bar asylum and withholding of removal, and is based on underlying facts and sentence.

**Violent or Dangerous Crime:** There is some possibility that burglary 2 would trigger this heightened hardship standard for any discretionary application for lawful status.

### STEP THREE: USE DEFENSE STRATEGIES FOR BURGLARY CHARGES

#### Best Alternatives to Avoid Immigration Consequences<sup>5</sup>

**For LPRs and UPs:**

- **Criminal Trespass 1<sup>st</sup> Degree under RCW 9A.52.070:** Safe, even w/ DV label.
- **Malicious Mischief (MM) (any degree):** At least “physical damage to the property of another” prong is not a CIMT.
- **Theft (any degree):** To clearly avoid “theft offense” aggravated felony, keep the sentence under 12 months. To avoid CIMT, plea statement should ideally say there was no intent to permanently deprive or substantially erode property rights of another. (See separate [Theft Advisory](#) for more details)

**For DACA or TPS recipient:** You must avoid any felony and any DV label. Plead to MM3, CT1, Theft 3.

#### If you MUST plead to Burglary 2

- **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.<sup>6</sup> Elaborating additional specific facts is not required and should be avoided.
  - **Ideal language:** “I entered or remained unlawfully in a building with intent to commit a crime against property therein”.
  - Do not specify what the intended crime was (the intended crime is not an element of the offense).
  - If you must specify, identify a property crime that is not a CIMT (e.g., Mal. Misch).
- 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.<sup>7</sup> This is especially important if the police report contains allegations of gang involvement or drug activity.

**Sentence:** To avoid an aggravated felony, seek sentence of less than one year. Consider multiple counts with consecutive sentences (<1 yr each) vs. concurrent sentences. If no CIMT priors and plea is to single count of burglary, seek sentence of 180 days or less (to [arguably fit “petty offense” exception](#)). A lower sentence will also lower the likelihood of the conviction being a PSC, but it will also depend on facts of the case.

**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.

<sup>5</sup> Note: Viability of any alternative depends upon defendant’s specific immigration status & criminal history. All convictions are a negative discretionary factor in an application for immigration benefits. For that reason, an immigration-safe deferred adjudication will be a better outcome if successfully completed.

<sup>6</sup> *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (2000); *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).

<sup>7</sup> If there is a compelling reason for such a plea in your case, please contact us.