

## DEFENDING NONCITIZENS CHARGED WITH DRIVING UNDER THE INFLUENCE (DUI)<sup>1</sup>

### 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>2</sup>) jail communication, and risk ICE custody &amp; removal proceedings.</li> <li>Preserve paths to legal status (relief). UPs may have paths to lawful status.<sup>3</sup> Convictions and even conduct can bar such 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. There are waivers for some crimes, for LPRs with 7 years residence, and refugees/asylees seeking LPR status.<sup>4</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 GM is probably a bar)  <b>Temporary Protected Status (TPS) holders:</b> Any second misdemeanor is a bar.  <b>Non-citizen US Nationals (American Samoa):</b> Not “aliens,” not deportable; need GMC for citizenship.</p>	

### STEP TWO: DEFENSE STRATEGIES FOR DUI CHARGES

Immigration Consequences of DUI
<p>❖ A plain alcohol DUI with no other elements should not trigger any statutory, criminal conviction-based ground of inadmissibility or deportability under current laws (a DUI should not be a “crime involving moral turpitude” (CIMT) or aggravated felony). This assumes it does not trigger the mandatory “child passenger” provision and the DUI is not drug- or THC-related, which we address separately below.</p>

<sup>1</sup> 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. When in doubt, don’t concede!

<sup>2</sup> See RCW 10.93.160

<sup>3</sup> 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>4</sup> See our advisory on Cancellation of Removal for Lawful Permanent Residents: <https://defensenet.org/resource-category/cancellation-of-removal-for-lawful-permanent-residents/>

- ❖ Two or more DUI convictions now<sup>5</sup> create a presumption of lack of “good moral character.”
- ❖ Even single DUIs are disfavored for discretionary purposes, and can be especially harmful to an immigrant visa application made through a US consulate, or for a person seeking release on bond from immigration custody. For those reasons, it is always best for an undocumented person to avoid a DUI.

**Crime Relating to a Controlled Substance & “Drug DUIs”:**

- ❖ Conviction of a law “relating to a controlled substance” (CS) triggers deportation & inadmissibility for all non-citizens.
- ❖ Marijuana *is* a federally Controlled Substance. Thus, a DUI under the influence of marijuana risks triggering the CS deportation and inadmissibility grounds.<sup>6</sup>
- ❖ DUI for being under the influence of a “drug” that is *not* a scheduled CS *cannot* trigger the CS ground.

**Per se bar for people with certain status:**

- ❖ A DUI conviction is a *per se* bar to DACA,<sup>7</sup> the program which grants temporary work authorization and temporary status to certain UPs who arrived under age 16.
- ❖ Any **second misdemeanor** or **any felony** in the U.S. is a bar to TPS.<sup>8</sup>

**Health Grounds Of Inadmissibility and “Prudential” Visa Revocation**

- ❖ “Recent or multiple” DUI arrests and/or convictions can indicate a mental disorder (alcohol use disorder) with harmful behavior (drunk-driving), which can trigger inadmissibility under a health-related ground as a Class A medical condition.<sup>9</sup>
- ❖ This can be a concern for non-immigrant visa holders who face “prudential” revocation<sup>10</sup> of visas by the issuing consulate, or when a UP is applying for LPR status through family at a consulate<sup>11</sup> or inside the U.S.<sup>12</sup> Medical re-exam can cause delays, and consular decisions are unreviewable.

**Immigration Consequences of Passenger under 16 (RCW 46.61.5055(6))**

May be charged as a **CIMT** or a deportable **crime of child abuse** (COCA). Note: If your client is not formally being charged with the child passenger enhancement under RCW 46.61.5055(6), and it is just a fact alleged in the police report and used by the judge as a discretionary sentence factor under 46.61.5055(7), we do not believe this could lead to the same removal grounds.

<sup>5</sup> See new U.S. Attorney General decision in *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019).

<sup>6</sup> Caveat for immigration counsel: There is a strong argument that this statute is overbroad and not divisible.

<sup>7</sup> It will be a *per se* “significant misdemeanor” See DACA Advisory at Immigration Project Resources link at the WDA website.

<sup>8</sup> TPS grants temporary status and work authorization. TPS is currently granted to citizens of certain countries. The list can be found here: <https://www.uscis.gov/humanitarian/temporary-protected-status>.

<sup>9</sup> See Foreign Affairs Manual, 9 FAM 302.2-2 and 302.2-7.

<sup>10</sup> See 8 USC 1182(a)(1)(A)(iii) (establishing health-related grounds of inadmissibility) and 9 FAM 403.11 (granting authority to revoke visa based on information of “an arrest or conviction of driving under the influence, driving while intoxicated, or similar arrests/convictions (DUI) that occurred within the previous five years.”). □ Clients may receive an email or letter cancelling their visa; they should contact immigration counsel if this occurs, as it may be possible to get a new visa.

<sup>11</sup> All LPR applications by UPs unable to apply from inside the U.S. are processed at a U.S. Consulate. UPs who must apply at a U.S. Consulate will be referred to a panel physician if they have an “alcohol related” arrest or conviction within the last 5 years at the time of their consular interview; multiple “alcohol related” arrests or convictions with the past 10 years; or “[i]f there is any other evidence to suggest an alcohol problem.” A waiver of health inadmissibility is complicated to obtain.

<sup>12</sup> According to DHS, which decides such applications inside the U.S., “a record of criminal arrests and/or convictions for alcohol-related driving incidents may constitute prima facie evidence of health-related inadmissibility.” See USCIS Policy Manual, Chapter 7 - Physical or Mental Disorder with Associated Harmful Behavior, at <https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-7>.

## Best Alternatives to Avoid Immigration Consequences

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

**For DACA recipient:** Negligent Driving 2 (ND2), NVOL, DWLS, or Reckless Driving (RD). Avoid ND1 or Physical Control (PC), which may not be better than a DUI for a DACA recipient.

**For other UPs and LPRS:** ND2, NVOL and DWLS are ideal as they do not trigger any removal grounds & are safer than DUI, RD & ND. If ND2, NVOL and DWLS are unavailable, seek the following, in order of preference:

- ❖ RD: preferable to DUI because it does not have alcohol as an element.<sup>13</sup>
- ❖ ND1: does not trigger any grounds of deportation or inadmissibility but does have “having consumed” alcohol as an element. We are unaware of a meaningful difference between ND and RD outside of the DACA context.<sup>14</sup>
- ❖ Physical Control: does not trigger any grounds of deportation or inadmissibility.

Note: all convictions are a negative discretionary factor in an application for immigration benefits. For that reason, an immigration-safe deferred adjudication<sup>15</sup> will be a better outcome if successfully completed.

## If you must plead to DUI

- ❖ **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>16</sup> 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.<sup>17</sup> This is especially important if the police report contains allegations of gang involvement or drug activity.
- ❖ Deferred Sentences and Deferred Prosecutions are permanent convictions for immigration purposes. Also, the cost of admitting to a substance use disorder or mental problem that led to the DUI (which may trigger mental health-related inadmissibility) should be weighed against any benefits of DP.
- ❖ Do not plead to “passenger under 16” under RCW 46.61.5055(6). Safe if judge uses it only as discretionary sentence factor under 46.61.5055(7).
- ❖ Do not plead to Marijuana or ‘any drug’; or, specify an over-the counter or *non-CS* prescribed drug.

**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>13</sup> See the WDAIP advisory on RD, available at the Immigration Project Resources link at the WDA website – [www.defensenet.org](http://www.defensenet.org).

<sup>14</sup> We haven't heard of Negligent Driving being treated like a DUI in any other immigration legal context. However, if Congress ever passes new immigration legislation, there is a risk that it would include DUIs (and by default, ND) as a *per se* bar to any pathway to citizenship.

<sup>15</sup> See our page on immigration-safe deferred adjudication agreements, at <https://defensenet.org/resource-category/deferred-adjudication-agreements>

<sup>16</sup> *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. Schaupt*, 111 Wash.2d 34 (1988). See also, RCW. 9.94A.450(1).

<sup>17</sup> If there is a compelling reason for such a plea in your case, please contact us.