

DEFENDING NONCITIZENS CHARGED WITH PHYSICAL CONTROL (PC)¹

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 (illegal²) jail communication, and risk ICE enforcement. Preserve paths to legal status (relief).³ 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.⁴ 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) Temporary Protected Status (TPS) holders: Any second misdemeanor is a bar. 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 Physical Control
<p>❖ A plain alcohol-related PC with no other elements should not trigger any statutory, criminal conviction-based ground of inadmissibility or deportability under current laws.</p>

¹ 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!

² See RCW 10.93.160

³ 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/>

⁴ 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/>

Crime Relating to a Controlled Substance & PC:

- ❖ Conviction of a law “relating to a controlled substance” (CS) triggers removability for all non-citizens.
- ❖ Marijuana *is* a federally Controlled Substance. Thus, PC where a person is under the influence of marijuana risks triggering the CS deportation and inadmissibility grounds.⁵
- ❖ PC for being under the influence of a “drug” that is *not* a *scheduled CS* will *not* trigger the ground.⁶

Per se bar for people with certain status:

- ❖ A DUI conviction is a *per se* bar to DACA,⁷ so alcohol-related driving crimes like PC risk being treated as akin to DUI for DACA purposes. Any third misdemeanor is also a bar to DACA.
- ❖ Any second misdemeanor or any felony in the U.S. is a bar to TPS.⁸

Health Grounds Of Inadmissibility and “Prudential” Visa Revocation

- ❖ “Recent or multiple” alcohol-related driving offenses 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.⁹ Usually this means DUI; unknown how PC is treated.
- ❖ This can be a concern for non-immigrant visa holders who face “prudential” revocation¹⁰ of visas by the issuing consulate, or for a UP who is applying for LPR status through family at a consulate¹¹ or inside the U.S.¹² Medical re-exam can cause delays, and consular decisions are unreviewable.
- ❖ PC is usually preferable to a DUI, but since it is an alcohol-related driving crime, clients applying for a green card or visa should consult an immigration lawyer, *especially* if consular processing.

Best Alternatives to Avoid Immigration Consequences

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

For DACA recipient: Try for Negligent Driving 2 (ND2), NVOL, DWLS, or Reckless Driving (RD). Avoid ND1 and 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 PC, DUI, RD & ND.

⁵ Caveat for immigration counsel: There is a strong argument that this statute is overbroad and not divisible.

⁶ See RCW 46.61.540: “The word ‘drugs,’ as used in RCW 46.61.500 through 46.61.535, shall **include but not be limited to** those drugs and substances regulated by chapters 69.41 and 69.50 RCW and any chemical inhaled or ingested for its intoxicating or hallucinatory effects.”

⁷ DACA is the program which has granted temporary work authorization and temporary status to certain UPs who arrived under age 16. A DUI will be a *per se* “significant misdemeanor” See DACA Advisory at Immigration Project Resources link at the WDA website.

⁸ 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>.

⁹ See 8 USC 1182(a)(1)(A)(iii) (establishing health-related grounds of inadmissibility); Foreign Affairs Manual, 9 FAM 302.2-2 and 302.2-7; and 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>.

¹⁰ See 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.

¹¹ 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. See Foreign Affairs Manual, 9 FAM 302.2-2 and 302.2-7.

¹² 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> (“a record of criminal arrests and/or convictions for alcohol-related driving incidents may constitute prima facie evidence of health-related inadmissibility.”)

If ND2, NVOL and DWLS are unavailable, seek the following, in order of preference:

- ❖ RD: preferable to PC and DUI because it does not have alcohol as an element.¹³
- ❖ 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.)¹⁴

Note: all convictions are a negative discretionary factor in an application for immigration benefits. For that reason, an immigration-safe deferred adjudication¹⁵ will be a better outcome if successfully completed.

Best Plea Practices If Pleading to Physical Control

- ❖ **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.¹⁶ 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.**¹⁷
- ❖ **Alcohol-related:** This is safe *unless* your client is a DACA applicant or is a non-LPR seeking a visa.
- ❖ **Drug-related:** If possible, plead to alcohol ND. Otherwise, pleading to “exhibits effects” of an over-the-counter or *non-CS* prescribed drug is safest; or state “any drug.”
- ❖ Avoid pleading to marijuana or a CS, or “inhaled or ingested any chemical . . . for its intoxicating or hallucinatory effects.”

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.

¹³ See the WDAIP advisory on RD, available at the Immigration Project Resources link at the WDA website – www.defensenet.org.

¹⁴ We haven't heard of PC 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, PC) as a per se bar to any pathway to citizenship.

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

¹⁶ *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).

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