

## DEFENDING NONCITIZENS CHARGED WITH CRIMINAL TRESPASS (CT)<sup>i</sup>

**Criminal Trespass should not trigger any ground of inadmissibility or deportation, even with a DV designation. It is “immigration safe” except for DACA recipients (if DV).**

### 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>ii</sup>) jail communication, and risk ICE enforcement.</li> <li>Preserve paths to legal status (relief).<sup>iii</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>iv</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</b> (American Samoa): Not “aliens,” not deportable; need GMC for citizenship.</p>	

### STEP TWO: IMMIGRATION CONSEQUENCES AND DEFENSE STRATEGIES

Immigration Consequences of Criminal Trespass
<ul style="list-style-type: none"> <li>❖ CT is <b>not a crime involving moral turpitude</b> (CIMT),<sup>v</sup> nor a “<b>crime of violence</b>” <b>aggravated felony</b>. It will not trigger any other ground of deportation or inadmissibility, even with a DV label.</li> <li>❖ However, it will count as a misdemeanor for purposes of the bars to DACA and TPS (above).</li> <li>❖ A DV designation may also risk making it a “significant misdemeanor” for DACA purposes (as an “offense of domestic violence”).</li> <li>❖ A sentence on any conviction (even if suspended) will also count toward 5-year total inadmissibility.<sup>vi</sup></li> <li>❖ 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.</li> <li>❖ Although CT is a fairly safe offense in most scenarios, an immigration-safe diversion or continuance order would always be preferable.<sup>vii</sup></li> </ul>
<p><b>Warning!</b> Advise <i>all</i> noncitizen clients (undocumented and LPRs, etc.) not to leave the U.S. or apply for LPR status or citizenship without first consulting an immigration attorney.</p>

## Best Plea Practices for CT

- ❖ **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>viii</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>ix</sup>
  - **Best plea language:** “I entered or remained without permission in a building/ premises.”
- ❖ **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).
- ❖ **For DACA and TPS recipients:** Remove DV label.<sup>x</sup> If this would be a second (for TPS) or third (for DACA) misdemeanor, avoid any conviction and seek a deferred adjudication to preserve eligibility.

<sup>i</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. If in doubt, don’t concede!

<sup>ii</sup> See RCW 10.93.160

<sup>iii</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>iv</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>v</sup> *Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1018-19 (9th Cir. 2005) *abrogated on different basis by Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012); *Matter of M*, 2 I&N Dec. 721 (A.G. 1946); *Matter of M*, 1 I&N Dec. 469 (C.O. 1946); *Matter of Esfandiary*, 16 I&N Dec. 659, 661 (BIA 1979); *Matter of G-*, 1 I&N Dec. 403, 404–06 (BIA 1943).

<sup>vi</sup> 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.

<sup>vii</sup> See advisory on deferred adjudications and samples of safe deferred adjudications at immigration portion of the WDA website

<sup>viii</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). See also, RCW. 9.94A.450(1).

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

<sup>x</sup> Only crucial for DACA recipients, though this would be helpful on discretion for TPS holders as well.