

## DEFENDING NONCITIZENS CHARGED WITH HARASSMENT RCW 9A.46.020<sup>1</sup>

### I. IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<b>Undocumented Person (UP):</b> <ul style="list-style-type: none"> <li>Entered without inspection; never had status.</li> <li>Entered lawfully with temporary visa (e.g., student, tourist, employment) that expired.</li> </ul>	<ul style="list-style-type: none"> <li>Avoid jail/risk of ICE encounter and enforcement.</li> <li>Preserve paths to obtain lawful status.</li> <li>Preserve eligibility for relief from removal.</li> <li>Avoid grounds of inadmissibility.<sup>2</sup></li> </ul>
<b>Currently admitted in lawful status:</b> <ul style="list-style-type: none"> <li>Lawful Permanent Residents (LPR)</li> <li>Asylees, Refugees</li> <li>Temporary Visa Holders (e.g., student, tourist, employment)</li> </ul>	<ul style="list-style-type: none"> <li>Maintain lawful status, ability to renew status.</li> <li>Preserve eligibility for relief from removal.</li> <li>Preserve eligibility to become LPR or USC.</li> <li>Avoid grounds of deportability and inadmissibility.</li> </ul>
<b>DACA</b>	Avoid eligibility bars: one felony, one “significant misdemeanor,” or three or more misdemeanors.
<b>Temporary Protected Status (TPS)</b>	Avoid eligibility bars: one felony, two or more misdemeanors.

### II. IMMIGRATION CONSEQUENCES AND DEFENSE STRATEGY

IMMIGRATION CONSEQUENCES
<p>Misdemeanor harassment (MH) should not be classified as a “crime involving moral turpitude” (CIMT) and so should not trigger removability on that basis.</p> <p><b>CAUTION:</b> We normally advise that MH is also not a crime of domestic violence. However, a recent (spring 2021) <i>unpublished</i> decision of the Board of Immigration Appeals (BIA) held that MH was categorically a “crime of violence.”<sup>3</sup> Under this holding, any MH involving a domestic relationship would be a deportable “crime of domestic violence.” Although we do not believe the BIA decision will be upheld, and it is not binding, we advise avoiding pleas to DV MH. See below for alternatives.</p>

<sup>1</sup> This advisory is meant to serve as a quick-reference guide for defenders with noncitizen clients. Defenders are advised to consult on individual cases with WDA’s Immigration Project by filling out an intake form [here](#).

<sup>2</sup> The grounds of *inadmissibility* apply to noncitizens seeking admission into the U.S. and anyone applying for immigration status. The grounds of *deportability* apply to anyone who entered the U.S. lawfully, even if currently UP (status expired).

<sup>3</sup> The BIA case involved an individual who had received a one-year sentence (before the maximum penalty for a WA gross misdemeanor was changed to 364 days), so the BIA found the conviction to be an “aggravated felony crime of violence.”

## DEFENSE STRATEGY

**Seek an alternative plea. The following are immigration-safe misdemeanors (even if labeled as DV):**

- Criminal Trespass
- Malicious Mischief
- Disorderly Conduct
- Obstructing
- Assault 4, Attempted A4

**Seek an immigration-safe SOC/deferred adjudication agreement:<sup>4</sup>**

- Must be a pre-plea agreement;
- Do not admit or stipulate to “facts sufficient to warrant a finding of guilt.”<sup>5</sup>

**If pleading to MH, ideally:**

- Plead to the minimum conduct under the statute, i.e. avoid pleading to (i) “bodily injury.” Plead to subsection (ii), or plead in general without specifying subsection.
- Do not incorporate or stipulate to police reports or probable cause statement.
- Remove DV label and do not include or incorporate any reference to domestic relationship in plea agreement (immigration judge can look to any record facts to determine domestic relationship).

**Seek minimum sentence (rather than automatic 364); keep sentence under 180 days:**

- An aggregate lifetime total of sentences (non-concurrent) of five years or more triggers inadmissibility and bars a finding of “good moral character.”<sup>6</sup>
- Actual incarceration for aggregate of 180 days or more bars finding of “good moral character.”

## FELONY HARASSMENT

**Felony Harassment – Threats to kill** (§ (b)) will trigger the CIMT grounds of inadmissibility and deportability. If designated as DV, it will trigger the “crime of domestic violence” deportation ground. And if the sentence imposed is one year or more, it will be an aggravated felony “crime of violence.”

**Alternatives:**

- **Assault 3** under a negligence prong ((d) or (f)) is usually a safe plea for a lawful permanent resident.<sup>7</sup>
- **Assault 2** is not a crime of violence and so is a good alternative if the client is facing a sentence of one year or more. *Assault 2 is likely to be deemed a CIMT*, however.<sup>8</sup>
- **Malicious Mischief** (any degree; physical damage to property prongs).
- Consider **Barr/Zhao plea** if necessary (see attached advisory).

**WARNING:** If there is a no-contact order in place, you should warn your client that **any** violation of a domestic violence protection order/injunction is a deportable offense.

<sup>4</sup> See WDAIP [Practice Advisory on deferred adjudications](#).

<sup>5</sup> The definition of “conviction” under immigration law includes an admission of guilt and any imposition of restraint on liberty by a court. 8 USC 1101(a)(48).

<sup>6</sup> “Good moral character” is a requirement for several types of immigration applications.

<sup>7</sup> See *Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 618–19 (B.I.A. 1992) (RCW § 9A.36.031(f) not a CIMT); *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004) (one cannot “use” force negligently).

<sup>8</sup> See *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017).