

DEFENDING NONCITIZENS CHARGED WITH DRUG POSSESSION¹

STEP ONE: IDENTIFY IMMIGRATION STATUS AND DEFENSE GOALS

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

STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES

Immigration Consequences of Drug Possession
<ul style="list-style-type: none"> A conviction “relating to a controlled substance,” including attempt and conspiracy, will: <ul style="list-style-type: none"> Trigger deportability grounds for LPRs and anyone else lawfully admitted. Trigger inadmissibility grounds for anyone seeking entry into the U.S. or applying for legal status. Make UPs ineligible for “cancellation of removal.”³ See Step Three for limited marijuana exceptions. Use of drug paraphernalia convictions trigger the same consequences. Misdemeanors trigger the same consequences as felonies. Caution: Marijuana (MJ) is still a federally controlled substance. Admitting to possessing legal MJ in WA, having worked in a legal MJ business, or having ever used MJ, can lead to negative immigration consequences.⁴

¹ This advisory reflects changes to drug possession effected by *State v. Blake*, 481 P.3d 521 (Wash. 2021), and Senate Bill 5476 (effective 5/13/21). It is intended to serve as a quick-reference guide for criminal defense attorneys representing noncitizens. Defenders are encouraged to consult with WDA’s Immigration Project in every case involving a noncitizen client. Please complete our [online intake form](#) and answer all questions.

² 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).

³ “Cancellation of removal” is a form of relief from removal available to noncitizens in immigration court proceedings. For UPs, a grant of cancellation results in LPR status. For LPRs, a grant allows them to keep their LPR status. A simple possession conviction renders UPs ineligible for cancellation; for LPRs, it is not a bar to cancellation. The WDAIP advisory for UP cancellation is [here](#), and for LPR cancellation, [here](#).

⁴ A legally sufficient “admission” can lead to a finding of inadmissibility, denial of entry into the U.S., denial of an application for status or naturalization, and, depending on the circumstances, could make an LPR deportable.

STEP THREE: DEFENSE STRATEGIES FOR POSSESSION CHARGES

If you cannot negotiate an alternative to avoid immigration consequences, it may be better to risk trial. You must identify your client's immigration status and goals to know how to best help your client.

Alternatives to Avoid/Mitigate Immigration Consequences

- Immigration-safe diversion agreement. Pre-arrest diversions per SB 5476 will not constitute drug convictions. Where charges filed, agreement must be pre-plea, with specific immigration-safe language.⁵
- Rendering criminal assistance 2nd or 3rd degree, RCW §§ 9A.76.080, 090, is not a controlled substance offense; and should not be “crime involving moral turpitude” in the 9th Circuit (but may be elsewhere).
- Diversions involving Substance Use Disorder (including drug court): Admissions to drug abuse/addiction can trigger separate immigration consequences and interfere with ability for UPs to obtain lawful status. Even so, a pre-plea diversion with immigration-safe language is usually far better than a conviction.
- **In the 9th Circuit ONLY:** Solicitation to possess (RCW § 9A.28.030) is not a controlled substance offense. This continues to be a safe plea alternative, even for simple misdemeanor possession. Advise your client that it is critical to consult with an immigration attorney before moving outside the 9th Circuit or leaving the U.S.
- A *Barr/Zhao* plea to possession of a legend drug (with no mention of any federally controlled substance). The list of WA legend drugs includes drugs that are not also on the federal controlled substances list, and thus the conviction will not “relate to a controlled substance.”⁶

Limited Marijuana Exceptions

- A *single* conviction for possession of **30 grams or less** of marijuana (MJ) **for personal use** will not trigger deportation for LPRs or those in some other type of lawful status.
 - The plea *must specify* that the amount is $\leq 30g$ and the MJ is for personal use. The exception may not apply where facts indicate PWI or more than personal use.
- Although MJ possession triggers inadmissibility, a limited waiver is available if the offense involves $\leq 30g$ and UP has LPR or USC immediate family members.⁷

Warning: “Reason to Believe” Person Is a Drug Trafficker

- Any person the government “knows or has reason to believe” has been an illicit drug trafficker or knowing aider and abettor of drug trafficking is permanently inadmissible. A conviction is not required; the government can use as a basis for this finding any “substantial, probative evidence.”
- If you are pleading down from PWI, or other evidence of dealing/trafficking is in the record, try to sanitize the record as much as possible. Do not stipulate to the CDPC, police reports, “real facts,” etc. Explicitly limit the factual basis for the plea to possession only. It may not work, but it is the best you can do.

Warning! Advise *all* noncitizen clients not to leave the U.S. or apply for LPR status, citizenship, or any immigration benefit without first consulting an immigration attorney.

⁵ See WDAIP [advisory on diversions](#).

⁶ For advice on using *Barr* pleas for noncitizens, see [WDAIP's advisory](#).

⁷ See, 8 U.S.C. 1182(h).