

DEFENDING NONCITIZENS CHARGED WITH PWI MANUFACTURE/DELIVER CONTROLLED SUBSTANCE (RCW 69.50.401)¹

STEP ONE: IDENTIFY IMMIGRATION STATUS & 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 grounds of inadmissibility.² Avoid jail/risk of ICE encounter. Preserve paths to obtain lawful status. Preserve eligibility for relief from removal.
Lawfully admitted and in valid 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"> Avoid grounds of deportability and inadmissibility. Maintain lawful status, ability to renew status. Preserve eligibility for relief from removal. Preserve eligibility to become LPR or USC.
Deferred Action for Childhood Arrivals (DACA)	Avoid eligibility bars: one felony; one “significant misdemeanor;” 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 PWI
<p>Aggravated Felony (AF): A controlled substance “trafficking” offense (as defined in federal statutes) is an AF. However, in the 9th Circuit ONLY, PWI is <i>not</i> a drug trafficking AF, because the state statute has a lower <i>mens rea</i> than the federal statute.³ <i>If client is apprehended/put into removal proceedings outside of the 9th Circuit, the offense will be a drug trafficking AF:</i></p> <ul style="list-style-type: none"> LPRs/others lawfully admitted: AF results in virtually automatic deportation, bars eligibility for discretionary forms of relief, permanently bars to return to U.S., and bars naturalization. UP: With AF, may be summarily removed without hearing. Bars eligibility for discretionary forms of relief, permanently bars return to U.S.
<p>Crime involving moral turpitude (CIMT): PWI is a CIMT.</p> <ul style="list-style-type: none"> LPRs/others lawfully admitted: One felony CIMT will trigger deportability only if <i>committed within five years of admission</i>. A single felony CIMT does trigger inadmissibility, resulting in obstacles to obtaining LPR status, and to re-entering the U.S. after travel, even for LPRs. UPs: Felony CIMT triggers inadmissibility and will bar paths to lawful status.
<p>Controlled Substance Offense (C/S): PWI is an offense “relating to a controlled substance.” In the 9th Circuit, where PWI is not an AF, PWI will be charged as C/S.</p> <ul style="list-style-type: none"> LPRs/others lawfully admitted: PWI triggers deportability. C/S ground alone does not bar LPR eligibility for defense to removal called “LPR Cancellation of Removal.”⁴ UPs: PWI triggers inadmissibility, no waiver available. Bars “10-year Cancellation of Removal.” Does not bar asylum, but is negative discretionary factor.
<p>Particularly Serious Crime (PSC): PWI likely to be considered a PSC (a fact-specific determination), which bars asylum and withholding of removal.</p>

Violent or Dangerous Crime (VOD): PWI could be deemed a VOD, triggering heightened standard for discretionary or hardship-based applications.

DACA and TPS: PWI (because it's a felony) bars eligibility for obtaining/renewing DACA or TPS.

STEP THREE: DEFENSE STRATEGIES FOR PWI CHARGES

Best Alternatives to Avoid/Mitigate Immigration Consequences

In the 9th Circuit only:

- **Solicitation to PWI** (RCW 9A.28.030) is not a drug-trafficking crime *and* is not a C/S crime,⁵ *but only in the 9th Circuit.*⁶ If possible, plead to “deliver” (not “manufacture”) and to marijuana.⁷ Solicitation to PWI is still a CIMT.
- Short of a safe, non-drug-related offense, solicitation to (simple) possession is best (avoids CIMT).

Generally:

- **Barr/Zhao plea** to non-drug crime, e.g., unlawful storage of ammonia; malicious mischief.
- **Rendering criminal assistance 2nd or 3rd** is not a C/S offense. Should not be CIMT in 9th (but no case exactly on point), but may be CIMT elsewhere.
- **Plea to legend drug** will avoid AF and C/S (legend drugs includes drugs not classified as federal controlled substances). Delivery of LD may be a CIMT; misdemeanor simple possession of LD is not.
- **Plea to simple possession** avoids AF but is still C/S. For LPRs, will not bar eligibility for LPR cancellation of removal (assuming otherwise eligible).

If You MUST Plead to PWI

To preserve arguments for relief outside of the Ninth Circuit:

- Plead to deliver, rather than manufacture, *and* specify drug as marijuana, or do not specify at all.
- If possible, have factual basis include “not for remuneration,” or omit reference to any remuneration.

WARNING: “Reason to Believe” Person Has Engaged in Drug Trafficking

Any noncitizen whom officer “knows or has reason to believe” has engaged or assisted in drug trafficking will be permanently inadmissible. This ground does not require a conviction: any credible evidence can be considered, so most of the alternatives above will likely trigger this ground. Try to sanitize the record of any evidence of trafficking; limit factual basis for plea.

Advise all noncitizen clients not to travel outside the U.S. and not to apply for LPR status, citizenship, or any other immigration benefit without first consulting an immigration attorney.

¹ This advisory 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 be sure to 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 *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017).

⁴ “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](#).

⁵ *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997); *Leyva-Licea v. I.N.S.*, 187 F.3d 1147 (9th Cir. 1999).

⁶ See WDAIP [Solicitation Warning](#).

⁷ This preserves an argument that can be made outside of the 9th Circuit that, under *Moncrieffe v. Holder*, 569 U.S. 184 (2013), a state statute that criminalizes the sharing of a small amount of marijuana without remuneration is not a drug trafficking aggravated felony.