

## Defending Noncitizens Charged with Assault in the First or Second Degree

June 2021<sup>1</sup>

### **STEP ONE: IDENTIFY IMMIGRATION STATUS AND 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 visa (e.g., student, tourist, employment) that has expired</li> </ul>	<ul style="list-style-type: none"> <li>Avoid jail/risk of ICE encounter and enforcement<sup>2</sup></li> <li>Preserve paths to obtain lawful status</li> <li>Preserve eligibility for relief from removal</li> <li>Avoid grounds of inadmissibility<sup>3</sup></li> </ul>
<b>Currently admitted in lawful status:</b> <ul style="list-style-type: none"> <li><b>Lawful Permanent Residents (LPRs)</b></li> <li><b>Asylees, Refugees</b></li> <li><b>COFA residents</b> (from a Pacific Island Compact nation)</li> </ul>	<ul style="list-style-type: none"> <li>Avoid triggering deportation grounds</li> <li>Avoid triggering inadmissibility grounds</li> <li>Preserve paths to LPR and relief from deportation</li> <li>Preserve eligibility for naturalization (LPRs cannot get citizenship if on probation; some crimes bar the required “good moral character”)</li> </ul>
<b>Visa Holders</b> (e.g., business, student, temporary employment, or tourist visas)	<ul style="list-style-type: none"> <li>If visa is current, goals = those for LPRs &amp; refugees</li> <li>If visa is expired, goals = those for UPs</li> </ul>
<b>DACA</b>	<ul style="list-style-type: none"> <li>Avoid bars to eligibility (one felony, one “significant misdemeanor,” or three or more misdemeanors)</li> </ul>
<b>Temporary Protected Status (TPS)</b>	<ul style="list-style-type: none"> <li>Avoid bars to eligibility (one felony, two or more misdemeanors)</li> </ul>

### **STEP TWO: DEFENSE STRATEGIES FOR ASSAULT 1 AND 2 CHARGES<sup>4</sup>**

#### **A. First-Degree Assault (RCW § 9A.36.011)**

Since the standard range for an A1 begins at over 12 months and includes the element of intent to inflict great bodily harm, an A1 conviction will be deemed a “crime of violence” (COV) “aggravated felony” (AF), and a “crime involving moral turpitude” (CIMT). AFs have the harshest immigration consequences: AFs bar eligibility for all forms of discretionary relief, including asylum and cancellation of removal, and result in virtually automatic deportation, even for LPRs. A1 cannot be made safe for a noncitizen.

#### **B. Second-Degree Assault (RCW § 9A.36.021)**

<sup>1</sup> 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 answer all questions.

<sup>2</sup> See RCW § 10.93.160, for Washington State law *bar* on jail compliance with voluntary ICE detainer requests.

<sup>3</sup> *Inadmissibility* grounds apply to noncitizens seeking admission to the U.S. and to those applying for immigration status. *Deportability* grounds apply to anyone who entered the U.S. lawfully, even if now undocumented (e.g., status expired).

<sup>4</sup> See WDAIP advisory on Assault 3 (usually a preferable alternative).

## Immigration Consequences of Assault 2

### Crime involving moral turpitude (CIMT):

DHS charges A2 as a CIMT, though there are strong arguments it should not be, since the minimum conduct under § (e) does not require harm, intent to harm, or use of force.

A2 is not a “crime of violence” (COV) in the 9th Circuit,<sup>5</sup> so it is:

- ***not an aggravated felony COV***: Under current case law, A2 with a sentence of 12 months or more is not an AF COV because it is a single crime with alternate means, and § 9A.36.021(e) does not require the actual, attempted, or threatened use of violent force.<sup>6</sup>
- ***not a deportable crime of domestic violence (CODV)*** regardless of sentence, and even with DV designation.

**Assault 2 risks being deemed a “particularly serious crime” (PSC)** which is a bar to asylum and “withholding of removal”<sup>7</sup>; or a “**violent or dangerous crime,**” an ill-defined discretionary standard. These determinations are made case by case and are fact- and-circumstance- based.

## If You MUST Plead to Assault 2

### To mitigate risk of a CIMT charge:

- Plead to §(e) (“With intent to commit a felony, assaults another”)
- Do not specify the intended felony. If you must, identify a felony that is not a CIMT (e.g., Malicious Mischief 2)
- Plead explicitly to a common-law assault by “offensive touching”

### To avoid an (erroneous) AF charge (or one under another circuit’s case law<sup>8</sup>):

- Avoid a sentence of one year or more. Consider multiple counts with consecutive sentences of less than one year each vs. concurrent sentences.
- **Remove the DV designation:** Although Assault 2-DV is not a removable DV offense, the DV label is worse for discretionary purposes.

**BEST PLEA LANGUAGE:** “On [date] I offensively touched [alleged victim] with the intent to commit [a felony] or [felonious Malicious Mischief].”

**DAMAGE CONTROL:** Given the seriousness of A2, especially to a non-LPR or to one seeking status, **avoid stipulating to a factual basis derived from documents such as police reports or the CDPC.**

- Seek a plea statement *and any agreed factual basis*, as close as possible to the statutory language, elements, and minimum conduct required for conviction of the pleaded offense.
- For same reason, avoid stipulating to “real facts” for sentencing.<sup>9</sup>
- This won’t *eliminate* the possibility that an immigration adjudicator will review the entire record, for *discretionary* purposes, but helps unlink the offense of conviction from an original charge, and prevent triggering any additional grounds of inadmissibility or removal.

**The safest felony assault is Assault 3 under the (d) or (f) negligence prongs; Malicious Mischief 2 is best alternative felony property crime.**

<sup>5</sup> See *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017); *United States v. Door*, 917 F.3d 1146, 1149 (9th Cir. 2019); *United States v. Vederoff*, 914 F.3d 1238, 1244-46 (9th Cir. 2019). The U.S. sentencing COV definition in these cases, and of “force,” virtually mirrors 18 U.S.C. § 16(a), the immigration definition. See, e.g., *Matter of Osman*, 2018 WL 1872000, n.1 (“DHS concedes that [A2-DV] is not a removable offense.”).

<sup>6</sup> *State v. Smith*, 154 P.3d 873, 876 (2007) (*en banc*) (the A2 statute “articulates a single criminal offense and then provides six separate subsections by which the offense may be committed.”).

<sup>7</sup> An aggravated felony (AF) is a *per se* “particularly serious crime” for asylum, but a non-AF can be a PSC as well. “Withholding of removal” is a backup provision to asylum that is both harder to prove and does not lead to LPR status.

<sup>8</sup> As of June 2021, we are not aware of any contrary circuit court or Board of Immigration Appeals decisions.

<sup>9</sup> See WDAIP advisory “[Real Facts](https://defensenet.org/wp-content/uploads/2017/11/Real-Facts-Advisory-WDAIP-FINAL-4-29-13.pdf)” for Sentencing and Immigration Consequences at <https://defensenet.org/wp-content/uploads/2017/11/Real-Facts-Advisory-WDAIP-FINAL-4-29-13.pdf>