

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

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.

ALERT: As of March 30, 2023, a conviction under RCW 69.50.401 is once again a drug trafficking aggravated felony under the Immigration Act. *See, Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023).

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.¹ 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 |
|---|
| Aggravated Felony: A conviction under RCW 69.50.401 ("PWI") is a drug trafficking aggravated felony. ² <ul style="list-style-type: none"> LPRs/others lawfully admitted: An aggravated felony results in virtually automatic deportation, bars eligibility for discretionary forms of relief, bars return to the U.S., and permanently bars naturalization. UP: With an aggravated felony, an undocumented person may be summarily removed without a hearing. Bars eligibility for all discretionary forms of relief, permanently bars return to U.S., permanently bars naturalization. |
| Particularly Serious Crime (PSC): As an aggravated felony, PWI is a per se bar to asylum, and with a sentence of five years or more, it will also bar withholding of removal. |

¹ 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).

² *Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023)(overruling *Valdivia-Flores v. Garland*, 873 F.3d 1201 (9th Cir. 2017)).

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

DACA and TPS: PWI 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 or a C/S crime, *but only in the 9th Circuit*.³ If possible, plead to “deliver” (not “manufacture”) and to marijuana.⁴ Solicitation to PWI is still a CIMT.
- Short of a safe, non-drug-related offense, solicitation to (simple) possession is best.

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:

- 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 the deciding 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 still likely trigger this ground. Try to sanitize the record of any evidence of trafficking and 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.

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

⁴ This preserves an argument 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.