

DEFENDING NONCITIZENS CHARGED WITH DRIVING UNDER THE INFLUENCE¹

This advisory is intended to serve as a quick-reference guide for defenders representing noncitizens and is not a substitute for individualized analysis. [Consult with the WDA Immigration Project](#) for case-specific assistance.

STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS²

STATUS	GOALS
WARNING: people who are undocumented, or lawfully present but deportable, should seek to avoid DOC custody . ³	
Undocumented Person (UP) <ul style="list-style-type: none"> Entered without inspection/never had status; Had visa (e.g., student, tourist), now expired; or Applied for status (e.g., asylum); application still pending. 	<ul style="list-style-type: none"> Avoid inadmissibility (to preserve LPR eligibility). Avoid deportability; avoid bars to “good moral character” (GMC) (for “10-year cancellation” eligibility). Asylum seekers must <i>also</i> avoid a “particularly serious crime” (for asylum eligibility).
Lawful Permanent Resident (LPR/green card holder)	<ul style="list-style-type: none"> Avoid deportability (especially for “aggravated felony”). Avoid inadmissibility (to allow travel outside U.S.). Avoid bars to GMC (for U.S. citizenship/naturalization).
Asylee or Refugee (status already granted)	<ul style="list-style-type: none"> Avoid a “particularly serious crime” (to maintain status). Avoid inadmissibility (to preserve LPR eligibility).
COFA (present under a Compact of Free Association from the Marshall Islands, Micronesia, or Palau)	<ul style="list-style-type: none"> Avoid deportability; avoid inadmissibility (to enable reentry to U.S., and to preserve LPR eligibility).
Current Visa Holder (e.g., business, student, temporary employment, tourist) or Visa Waiver Entrant	<ul style="list-style-type: none"> Avoid deportability; avoid inadmissibility (to preserve LPR eligibility); avoid DUIs (to maintain visa).
DACA: avoid bars to DACA (one felony, one “significant misdemeanor,” or any three misdemeanors); avoid inadmissibility (to preserve LPR eligibility). Temporary Protected Status (TPS): avoid bars to TPS (one felony or two misdemeanors); avoid inadmissibility (to preserve LPR eligibility). Noncitizen U.S. Nationals (e.g., American Samoans) not deportable; avoid bars to GMC (to preserve eligibility for U.S. citizenship).	

¹ Immigration consequences of crimes vary based on a person’s immigration status, time in that status, dates of entry, conviction and sentencing history, family ties, and other factors. This advisory cannot replace individualized advice. Defenders are urged to submit an intake to WDA’s Immigration Project at: <https://defensenet.org/case-support/wda-immigration-project/wdaip-case-assistance/>. Immigration practitioners may contact us for legal arguments to assist in their cases.

² For information and resources on the various forms of immigration status and relief from deportation available to noncitizens, please visit <https://defensenet.org/resource-category/common-paths-to-lawful-status-and-defenses-against-removal/>.

³ Keep Washington Working (RCW 10.93.160) prohibits law enforcement agencies, including jails, from sharing nonpublic information about noncitizens with immigration authorities (e.g., ICE). A carveout for those in the *physical* custody of the Department of Corrections (DOC) allows for information sharing, so noncitizens in DOC custody should expect that ICE will be alerted to their presence in DOC, and to other sensitive details (e.g., their date of release). Despite KWW, undocumented people should avoid jail time altogether, if possible, to avoid the risk of illegal communication between jail officials and ICE.

STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES

IMMIGRATION CONSEQUENCES OF DUI

Alcohol DUI

- Under *current* law⁴, an alcohol DUI with no other elements should not trigger any conviction-based ground of inadmissibility or deportability.
- Even a single DUI will be:
 - harmful to any discretionary decision (most forms of immigration relief involve discretion);
 - a significant negative factor in any immigration bond decision; and
 - grounds for “prudential revocation” of a nonimmigrant visa⁵ (e.g., student, business) and may also be the basis for denial of a visa application made through a U.S. consulate.

“Drug” DUI

- Conviction of an offense “**relating to a controlled substance**” (CS) will trigger grounds of removability (deportability and inadmissibility) for all noncitizens.⁶
- A drug DUI (including for marijuana, which is federally controlled) risks triggering the CS deportability and inadmissibility grounds.⁷
- A DUI for being under the influence of a “drug” that is *not* a scheduled CS cannot trigger the CS grounds.

Two or more DUIs create a presumption a person lacks “good moral character” (GMC).⁸

Passenger Under 16, RCW 46.61.5505(6)

- May be charged as a “**crime involving moral turpitude**” (CMT) or deportable “**crime of child abuse.**”
- Note: if this alleged fact is used by the judge *only* as a discretionary sentencing factor under subsection (7), and is not charged as an element under subsection (6), it should not trigger these removal grounds.

Health Ground of Inadmissibility

- “Recent or multiple” DUI arrests and/or convictions may be interpreted as indicating a mental disorder (i.e., alcohol or substance-use disorder) with associated harmful behavior (i.e., driving impaired), which can trigger health-related inadmissibility as a Class A medical condition.⁹
- A finding of inadmissibility may delay or prevent a noncitizen from being granted LPR status, and could result in an undocumented applicant being placed in removal proceedings. For a noncitizen applying for LPR status at a U.S. consulate, a finding of inadmissibility could delay (based on the need for medical re-examination) or entirely prevent their reentry to the U.S., and consular decisions are unreviewable.¹⁰

DACA: a DUI conviction is a *per se* bar to DACA, as a “significant misdemeanor.”¹¹

Temporary Protected Status (TPS): any felony and/or two misdemeanors bar TPS.¹²

⁴ A proposed new federal law would turn a single DUI into a ground of deportability and inadmissibility. [H.R. 875](#) passed the U.S. House of Representatives on June 26, 2025, and is currently pending in the Senate. If the bill becomes law, the issue of retroactivity will need to be litigated.

⁵ See 9 FAM 403.11 (a visa may be revoked based on information of “an arrest or conviction of driving under the influence, driving while intoxicated, or similar arrests/convictions (DUI) that occurred within the previous five years.”). A noncitizen who receives an email or letter cancelling their visa should contact immigration counsel, as it may be possible to get a new visa.

⁶ 8 USC § 1227(a)(2)(B)(i) (CS deportability ground); 8 USC § 1182(a)(2)(A)(i)(II) (CS inadmissibility ground).

⁷ Caveat for immigration counsel: there is a strong argument that this statute is overbroad and not divisible.

⁸ See p. 1 of this advisory for more on the circumstances under which one must demonstrate GMC. Note: The two-DUI presumption of lack of GMC is nearly impossible to overcome. See *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019).

⁹ See 8 USC § 1182(a)(1)(A)(iii) (health-related grounds of inadmissibility); 9 FAM 302.2-2, 302.2-7.

¹⁰ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (regarding consular nonreviewability).

¹¹ 8 CFR § 236.22(b)(6)(i).

¹² 8 CFR § 244.4(a).

STEP THREE: IDENTIFY DEFENSE STRATEGIES

BEST ALTERNATIVES TO AVOID OR MITIGATE IMMIGRATION CONSEQUENCES

In order of preference:

- **Negligent Driving 2, No Valid Operator's License, Drive While License Suspended.**
- **Reckless Driving.** Preferable to DUI and Neg 1 because it avoids any element of impaired driving.
- **Negligent Driving 1.** Doesn't currently trigger inadmissibility or deportability, but Neg 1 *does* bar DACA (as analogous to DUI); may trigger inadmissibility and deportability if new DUI law passes. (See FN 4.)
- **Physical Control.** Same as notes for Neg 1 (except unclear whether it will bar DACA).¹³

Note: all convictions are negative discretionary factors in an application for immigration benefits. For that reason, an immigration-safe deferred adjudication will be a better outcome if successfully completed.

IF YOU *MUST* PLEAD TO DUI

Plead to the minimum conduct of the statute only.

- A plea statement setting forth the elements of the statute provides a sufficient factual basis to make the plea knowing, voluntary, and intelligent under Washington law.¹⁴ Elaborating additional facts is not required and should be avoided.
- Avoid incorporating the charging documents, police report, or CDPC as the basis for the plea. This is especially important if those documents contain allegations of gang involvement or drug activity. In the same vein, you should generally avoid *Alford* pleas.¹⁵

Plead to driving under the influence of (in descending order of preference):

- "Intoxicating liquor" (only);
- "Intoxicating liquor or any drug" (in the disjunctive);
- A drug as defined in RCW 46.61.540¹⁶ (either specifying a *non*-CS drug [an over-the-counter drug or a *non*-CS prescribed drug] or not specifying a drug at all); or
- "Intoxicating liquor, marijuana, or any drug" (in the disjunctive).

Passenger under 16.

- Do not plead to "passenger under 16" under RCW 46.61.5055(6).
- Instead, seek to have judge use this only as a discretionary sentencing factor under 46.61.5055(7).

Warning! Advise *all* noncitizen clients with a DUI conviction not to leave the U.S. or apply for LPR status/green card renewal/citizenship, etc., without first consulting an immigration attorney.¹⁷

DEFERRAL AGREEMENTS

- A deferral agreement (deferred prosecution, adjudication, sentence, etc.) that requires the defendant to plead guilty (or admit "sufficient facts to warrant a finding of guilt") will be a **permanent conviction** for immigration purposes, even if the charge is later dismissed.¹⁸
- The benefits of deferral should be weighed against the risk of admitting that a substance-use or mental disorder led to the DUI (i.e., potentially triggering a health-related ground of inadmissibility).

¹³ See WDAIP, *Physical Control*, <https://defensenet.org/resources/physical-control-practice-advisory/>.

¹⁴ See WDAIP, *Just Say No! To "Real Facts,"* <https://defensenet.org/resources/just-say-no-to-real-facts/>.

¹⁵ If there is a compelling reason for such a plea in your case, please contact us.

¹⁶ This should be safe because the definition of "drug" under this section explicitly includes legend drugs, found at RCW 69.41.

¹⁷ See immigration attorney referral list, <https://defensenet.org/case-support/immigration-attorney-referrals/>.

¹⁸ See 8 USC § 1101(a)(48)(A) (defining "conviction" for immigration purposes); see also WDAIP SOC practice advisory, <https://defensenet.org/resources/negotiating-immigration-safe-deferred-adjudication-agreements-e-g-socs/>.