

Washington Defender Association's Immigration Project

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Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies - March 2008

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GETTING IMMIGRATION ASSISTANCE ON YOUR CASE:

- WDA's Immigration Project provides individual case consultations to assist defenders in understanding the immigration issues and consequences facing a client and where possible, alternatives to mitigate or avoid them. Consultations are free of charge.
- For assistance on your case, please contact Jonathan Moore. His email address (preferable) is: jonathan@defensenet.org His telephone: 206-623-4321, ext. 104

Introduction – Getting Help On Your Case

The confluence of criminal and immigration law is extremely complex and fluid. The immigration consequences that can result to a noncitizen from even the most minor criminal offense are often much more severe than the criminal punishment. Consequently, this information is not intended to substitute for individual case analysis of a particular noncitizens case.

ADDITIONAL RESOURCES : For additional detailed analysis (including caselaw and statutory citations) and offense-specific practice advisories (e.g. details on how to represent noncitizens in domestic violence, driving, or drug cases) consult the resources of the Washington Defender Association's Immigration Project, available at www.defensenet.org, including a chart of the immigration consequences of most RCW offenses.

1. Immigration Status & Criminal History – The Essential Information

- **Practice Point:** The first step to representing a noncitizen defendant is to identify her immigration status (and if she has lawful status, for how long) and a complete criminal history (including any dismissed charges, misdemeanor offenses, and sentences).
- A defendant's immigration status (in combination with the specific crime at issue and his criminal history) will be the starting point to determine which crime-related immigration law provisions his criminal conviction(s) might/will trigger (e.g. which grounds of deportation are at issue) and what strategies are available to mitigate or avoid such consequences.
- Any non-US citizen (regardless of lawful status, how long in US or other equities) is *always* subject to removal (a.k.a. deportation) for a violation of immigration laws.¹
- **Two major classifications of immigration status:**
 - **Lawful immigration status** – includes:
 - **Lawful Permanent Resident (LPR) Status (a.k.a greencard holders)** - can live and work in the US indefinitely and apply for citizenship after 5 years (3 years for persons married to US citizens); obtained generally through family ties, employment or refugee/asylum status;
 - **Refugee and Asylum Status** – can live and work in the US indefinitely and apply for LPR status after 1 year; obtained by proving past/future persecution;
 - **Non-immigrant Visa Status** – can remain lawfully in US for the duration of their temporary visa (e.g. tourist visa, student visa).

PRACTICE POINT: Persons with lawful status, particularly LPRs and refugees/asylees) generally will not face deportation UNLESS they are convicted of a crime that triggers it.

- **Undocumented immigrants** – includes:

¹ Crime-related violations of immigration law and being present in the US without immigration status (not a crime) account for the vast majority of deportations.

- Persons who entered the US illegally and have never had lawful immigration status; or
- Nonimmigrant visa holders who entered the US lawfully on a visa that has expired.

PRACTICE POINT: Undocumented persons are subject to removal/deportation due to their lack of lawful status. However, many undocumented people may be eligible to apply for lawful status. Criminal convictions will, generally, foreclose these options or present onerous obstacles to obtaining lawful status.

2. Immigration Consequences – What Are They?

- **PRACTICE POINT:** All arrests and convictions will have some negative immigration consequences. The challenge to defenders is to identify and create strategies to avoid or mitigate these consequences.²
- Since 1996 (when Congress passed several harsh, retroactive anti-immigrant laws in 1996) nearly a *million* noncitizens with criminal convictions have been deported from the U.S., many with nonviolent or minor misdemeanor violations from long ago, for which they served little or no time in jail.³
- The range of possible immigration consequences of a criminal conviction is wide. A conviction could trigger one (or all) of the following consequences:
 - Automatic and certain deportation (e.g. most drug trafficking offenses);
 - Automatic detention during the course of any removal proceedings;
 - Statutory ineligibility to ask an immigration judge for a discretionary “waiver” of deportation/removal;
 - Statutory ineligibility for immigration benefits (e.g. greencard or citizenship);
 - a negative discretionary factor in an application for immigration benefits (e.g. citizenship, greencard);⁴
 - Permanent bar to lawful reentry into the U.S. (essentially permanent banishment);
 - Significantly increase sentence enhancement for conviction of illegal reentry after deportation under 8 U.S.C. 1326.
- Three sections of immigration law contain most of the crime-related provisions that provide the basis for removal (a.k.a. deportation) of noncitizens with criminal convictions:
 - The grounds of deportation at 8 U.S.C. 1227(a)(2);
 - The grounds of inadmissibility at 8 U.S.C. 1182(a)(2); and
 - The aggravated felony definition at 8 U.S.C. 1101(a)(43).

These provisions incorporate hundreds of criminal offenses. Whether or not a specific state or federal conviction falls within them is determined on a case-by-case basis as outlined below.

² Note that while noncitizens facing deportation are entitled to legal representation, there is no entitlement to appointed counsel for indigent noncitizens. Eighty percent of noncitizens facing deportation are unrepresented. Thus, for many, criminal defense counsel will be the only legal representation they will get in addressing the immigration consequences of their criminal convictions.

³ See statistics available on the website of the Immigration and Customs Enforcement, a division of the Department of Homeland Security, at www.ice.gov.

⁴ Immigration authorities will not grant citizenship to anyone on probation.

3. **How To Structure Plea Agreements and Other “Record of Conviction” Documents To Assist Noncitizens To Avoid Deportation and Other Immigration Consequences.**

PRACTICE POINT: Structuring the language of the plea statement with an awareness of the immigration consequences is one of the most critical features in representing noncitizen defendants. Carefully crafted plea language can, in many instances, provide the best defense to avoid removal/deportation for the conviction. Do *not* agree to an *Alford/Newton* plea or include language in the plea statement without first consulting with WDA’s Immigration Project or other competent immigration counsel.

- In order to deport/removal someone for a criminal conviction, *the government* has the burden to prove both the existence of the conviction and that the elements of the criminal offense are sufficiently analogous to the elements of the charged crime-related ground of deportation/removal (e.g. the elements of fourth degree assault under RCW 9A.30.041 are sufficiently analogous to the elements of the immigration statute’s DV deportation ground).
- Whether the elements of the criminal offense are sufficiently analogous to the immigration removal ground is determined by reference to the criminal statute (and caselaw interpreting it) and the “record of conviction” (ROC), *not the defendant’s actual conduct*.
- The ROC for immigration purposes includes and is limited to: the judgment and sentence, the charging document related to the actual count(s) of conviction, the plea agreement and the plea colloquy, and sentencing transcript.
- The ROC *does not include* the police report, or the affidavit of probable cause *UNLESS such documents were included in the record of conviction (e.g. plea agreement) as a factual basis for the plea*. The general rule under Ninth Circuit caselaw is that any evidence that defendant admits to, or agrees to admit into evidence for purposes of establishing the factual basis, will become part of the immigration ROC.
- Where the language of the plea statement does not clearly and specifically indicate that the elements of this particular conviction are sufficiently analogous to the elements of the deportation ground, the conviction cannot be a basis for removal/deportation.
- Most of the crime-related immigration laws require a conviction in order to trigger deportation or denial of immigration benefits (e.g. citizenship, greencards)
 - Selected exceptions that do *not* require a conviction:
 - Reason to believe involvement in drug trafficking;
 - Judicial determination of violation of a protection/NC order.

4. **Criminal Convictions As A Basis For Denying Immigration Benefits (e.g. citizenship) or Re-Entry Into The U.S.**

PRACTICE POINT: Even where it does not result in removal, convictions (and arrests) can have other significant immigration consequences for noncitizens. Always be sure to advise your client to not leave the U.S. or apply for any immigration benefits without first consulting with competent immigration counsel.

- In addition to deportation, criminal convictions can also trigger statutory grounds for denial of re-entry into the U.S., as well as additional immigration benefits such as citizenship, lawful permanent resident status (greencard), asylum and any other immigration visa or benefit;
- Even if the conviction does not trigger statutory grounds for denying the immigration benefit criminal arrests and convictions will always be a negative discretionary factor in any application for immigration benefits.

5. State Misdemeanor and Felony Classifications Are Irrelevant Under Immigration Law – State Misdemeanors Can Be Aggravated Felonies Under Immigration Law.

Practice Point: Misdemeanor convictions are often more harmful to noncitizens than felonies and simply reducing a charge from felony to misdemeanor DOES NOT guarantee that the defendant will avoid deportation. In fact, sometimes the opposite is true.

- In general, immigration consequences of criminal convictions are NOT dependent upon the state classification of the crime.
- Certain misdemeanor offenses – particularly assault and theft – can trigger removal as an *aggravated felony* where the sentence imposed (*regardless of time suspended*) is 365 days, e.g. fourth degree assault or third degree theft with 365 days sentence imposed.
- Aggravated felonies trigger the most severe immigration consequences (virtually certain deportation, ineligibility for any relief from deportation, sentence enhancements for prosecution under 8 USC 1326’s illegal reentry after deportation offense.)
- Where a defender cannot ensure a sentence imposed (regardless of time suspended) of 364 days or less, it may be safer for a noncitizen to plea to an alternative felony (e.g. third degree assault under RCW 9A.36.031(f) is “safer” than fourth degree assault under RCW 9A.36.041 with a 365 day sentence imposed).
- Where court refuses to consider imposing a sentence of 364 days or less, counsel should make a record, reserve appeal on sentencing, and consider filing a RALJ appeal on the sentence. Contact WDA’s Immigration Project for briefing, analysis, and appellate support.

6. Convictions And Deferred Adjudications As Defined Under Immigration Law

PRACTICE POINT: *Any formal admission of guilt, will be a conviction in perpetuity* under immigration law regardless of any subsequent dismissal or expungement. This includes deferred sentence adjudications, even if successfully completed and dismissed under state law or subsequently expunged. See drug section, infra, for first-time simple possession exception.

- Under immigration law, convictions are defined as a formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where—
 - A judge or jury has found the alien [noncitizen] guilty or the alien has entered a plea of guilty or nolo contendere *or has admitted sufficient facts to warrant a finding of guilt*, and
 - The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

- Pre-plea adjudications (e.g. SOCs and drug court agreements) that require stipulations to facts WILL constitute a conviction under immigration law in perpetuity, even if successfully completed and dismissed.
- Deferred Prosecutions under RCW 10.05 constitute convictions under immigration law (note, however, alcohol-related-DUI is not a removable offense).
- Juvenile Dispositions do not constitute convictions under immigration law. Juveniles convicted in adult court will have a conviction under immigration law.

7. Sentences Under Immigration Law

PRACTICE POINT: Always request a sentence of less than one year to ensure triggering certain aggravated felony provisions. Consider filing a RALJ appeal where judge refuses. Contact WDA's Immigration Project for model briefing and appellate support.

- Under the immigration law definition of what constitutes a sentence, it is the amount of time imposed by the court – REGARDLESS OF TIME SUSPENDED that counts for immigration purposes (e.g. a 365 day sentence with 364 days suspended = 365 day sentence under immigration law).
- Some removal/deportation grounds, such as the crime of violence and theft provisions under the aggravated felony ground under 8 U.S.C. 1101(a)(43)(F)&(G), are only triggered where a one year sentence is imposed (regardless of time suspended).

8. Drug Possession Offenses

- Any violation of a controlled substance law is a basis for deportation, denial of (re-)entry into the U.S., and immigration benefits. This includes includes RCW 69.50.4013 (possession and att'd possession) and 69.50.412(1) (paraphernalia).
- EXCEPTION #1: A conviction for first time simple possession of less than 30 grams of marijuana will not trigger deportation (but will trigger bars to admission or reentry).
- EXCEPTION #2: A conviction for solicitation to possess *any* C/S under 9A.28.030 will not trigger deportation/removal (but will trigger bars to admission or reentry).
- EXCEPTION #3: Under 9th Circuit caselaw, first-time simple possession of any C/S (or it's equivalent, including paraphernalia), including attempt or conspiracy to possess, will not constitute a removable/deportable conviction under immigration law IF: D is granted some type of rehabilitative treatment (e.g. deferred sentence, drug court, expungement). The noncitizen is not safe from deportation consequences until the "rehabilitative treatment" is successfully completed/obtained.

9. Drug Trafficking Offenses

- Drug Trafficking convictions (e.g. 69.50.401) will trigger deportation/removal, permanently bar admission/readmission to the U.S. and ineligibility for virtually all immigration benefits or discretionary relief from deportation/removal because it is both an aggravated felony and a crime of moral turpitude under immigration law.

- Solicitation to commit a trafficking offense (e.g. delivery) under 9A/28.030 will *not trigger deportation* as an aggravated felon for noncitizens with lawful status (but will bar reentry for such persons so they can *never* leave the U.S. unless they become citizens).
- Even though drug trafficking solicitation may constitute a crime of moral turpitude under immigration law, such classification (unlike the aggravated felony) will not automatically or necessarily bar the noncitizen from eligibility to ask an immigration judge for discretionary relief.

10. Crimes of Violence⁵

- Any conviction – including misdemeanor assault 4 – that constitutes a crime of violence under 18 USC 16 will trigger removal/deportation as an aggravated felony where the sentence imposed is 365 days or more, regardless of time suspended, or where the offense is designated as a domestic violence conviction.
- 18 USC 16 defines a COV as any offense that has as an element the use/attempted use of force OR any other felony that by its nature is likely to involve the substantial use of force;
- COV will trigger deportation/removal (and trigger denial of benefits) as crimes involving moral turpitude where the elements of the crime involves the intent to cause serious harm to persons or property.
- To be a COV, the offense must have an intentional mens rea; crimes of recklessness or negligence cannot be COVs.
- Assault 3rd under 9A.36.031(f) is not COV and will not trigger deportation.
- Assault 4 can be a COV unless the plea agreement is carefully worded to avoid acts showing the intentional use of force.

11. Domestic Violence Offenses and Crimes Against Children

- An DV offense will trigger deportation under immigration law IF there is: 1. a conviction, 2. that constitutes a COV under 18 USC 16 (same as COV *supra*), 3. , 4. committed against a person with whom D has requisite relationship (this requirement will be met if record indicates case is designated as DV case).
- Assault 3rd under 9A.031(f) is not a DV deportable offense.
- SOC's with "*immigration-safe language* do not constitute convictions and, as such will not trigger deportation under this provision.

⁵ For detailed analysis and instructions on crafting pleas in assault cases, see *Practice Advisory on Representing Noncitizens Accused of Misdemeanor Assault Offenses – Both DV and Non-DV Cases- Under RCW 9A.36.041* (2007), available at www.defensenet.org.

- Violations of no-contact orders - Under immigration law, *any* judicial determination of VNCO will trigger deportation (note: immigration law requires that the violation be to the portion of the NCO intended to protect against threats of harm, bodily injury or harassment). A conviction is NOT required.
- Convictions that have a child as an element will trigger deportation as a crime of child abuse, child abandonment, or child neglect. Convictions where the record of conviction establishes that the victim was a minor (regardless of whether it is an element of the offense) also risk deportation under these provisions.

12. Property Crimes

- **Theft and PSP** (including theft 3rd and PSP 2nd) are crimes involving moral turpitude (CIMT), and where a sentence of 365 days or more is imposed, will be aggravated felonies under immigration law (a basis for deportation/denial of benefits). As such, these convictions can/will trigger deportation and ineligibility for immigration benefits.
- **Burglary** will constitute a CIMT only if the underlying crime D intended to commit is a CIMT (e.g. burglary to commit theft = CIMT; burglary to commit assault 3rd not CIMT). Burglary will trigger deportation as an aggravated felony where the sentence imposed is one year or more regardless of time suspended).
- **Malicious Mischief**, in any degree (even felony MM1) will not trigger deportation (neither as a CIMT nor as an aggravated felony) as long a sentence imposed is less than 365 days (regardless of time suspended).
- **Fraud Crimes** will trigger deportation as CIMTs and, where the record of conviction shows “loss to the victim” is \$10,000 or more, will constitute an aggravated felony.

13. Driving Offenses

- Neither **DUI nor reckless driving** will trigger deportation or denial of (re-) entry.
- Both DUI and reckless driving will constitute a negative discretionary factor in applying for a greencard or citizenship.
- Immigration authorities will not grant citizenship to anyone on probation.

14. Sex Offenses

- Communicating with a Minor for Immoral Purposes will be an aggravated felony where the record of conviction shows that the communication constituted abuse (low threshold);
- Virtually all other sex offenses will trigger deportation as crimes of moral turpitude, crimes against children, DV offense or aggravated felonies;
- Sexual Motivation Allegations will be treated as an element of the offense of conviction for immigration purposes and can turn an otherwise non-deportable offense (e.g. non-DV assault 4 with sentence of less than 365 days) into a deportable offense.

15. Guidelines for Crafting Noncitizen Pleas

- Do not incorporate the police report or affidavit of probable cause into the plea statement as the factual basis for the plea. Do not do Alford/Newton Plea w/o consulting w/immigration counsel.
- Washington case law does not require the defendant to stipulate to police reports or affidavits of probable cause as the underlying factual basis and, when representing *noncitizens*, it is *critical to avoid doing so*. See *State v. Zhao*, 157 Wn.2d 188; 137 P.3d 835 (2006).
- Whenever possible, do not stipulate to “real facts” for sentencing purposes. If necessary, make sure that ROC documents clearly reflect that documents admitted under such a stipulation are only for purposes of determining the sentence.
- Defendant’s statement regarding the offense should (unless advised otherwise by competent immigration counsel) as vague/generic as possible and simply recite the language of the statute, not specifics of defendant’s conduct (e.g. R.C.W. 9A.36.041: “On Jan. 1, 2008, I assaulted the victim in a manner that did not constitute assault 1, 2, or 3.”)
- Where possible, defendant’s guilty plea statement should reflect a plea to only the portions of a statute that do not trigger immigration consequences (e.g. R.C.W. 9A.36.041 ““On December 8, 2007, I, John Lennon, [intentionally] placed the victim in reasonable fear of unwarranted [or offensive] touching.”
- If not possible to plead only to “safe” portions of the statute, disjunctively (using “or”) include both the problematic offense (e.g. giving false information to an officer) with innocuous portions of conduct listed in the statute (e.g. refusal to stop).
- Where defendant is pleading to an amended charge, make as clear a record as possible to reflect that the plea is to the amended charge, not the original or other charges.
- Negotiate wherever possible to omit any reference to the age or relationship to defendant of any alleged victims in the defendant’s guilty plea statement, the charging document and any other documents in the record of conviction.
- Where possible always obtain a sanitized and amended charging document.
- Negotiate wherever possible to omit any reference to the age or relationship to defendant of any alleged victims in the defendant’s guilty plea statement, the charging document and any other documents in the record of conviction.
- Where possible always obtain a new amended charging document.
- Omit/avoid any reference to the use/threatened use of force in defendant’s plea statement.
- In domestic violence cases, only include victim’s name where the judge requires it. Case law does not require it. *State v. Johnston*, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000).

- Deferred adjudication agreements (e.g. SOCs) must use “immigration safe” language to avoid being a conviction in perpetuity under immigration law.

16. Intake Questions/Information for Noncitizen Defendants

1. Client’s country of origin.
2. Client’s current immigration status (LPR/greencard? Refugee/Asylee;? Undocumented?)
3. If client has lawful status, how and when did s/he get it?
4. Client’s current criminal charge and any offers.
5. Client’s criminal history, including *all* convictions, sentences and juvenile history.
6. Client’s spouse, parent, children who are US citizens or have lawful status.

17. Immigration Attorney Referrals

These attorneys are private immigration practitioners. They all represent noncitizens and their families throughout the state of Washington. All of these attorneys have considerable expertise in the confluence between immigration law and criminal law. All are members of the Washington State Chapter of the American Immigration Lawyers Association. All speak numerous languages, including Spanish, or have staff who do.

Law Offices of Vicki Dobrin and Hilary Han, Seattle, WA

Telephone: 206-448-3440

Website for contacts and information: <http://www.dobrin-han.com>

Law Offices of Gibbs, Houston & Pauw, Seattle, WA

Telephone: 206-682-1080

Website for contacts and information: <http://www.ghp-law.net>

Law Offices of Carol Edward , Seattle and Mt. Vernon, WA

Telephone: 206-956-9556

Website for contacts and information www.seattle-immigration.com

Law Offices of Karl Hack, Olympia, WA

Telephone: 360-357-4344

Website for contacts and information: <http://www.attorneykarlhack.home.comcast.net>

The Northwest Immigrant Rights Project (NWIRP) - Website: <http://www.nwirp.org>

NWIRP is a nonprofit organization that provides direct representation to low-income noncitizens and their families on immigration-related matters. NWIRP has three offices in Washington State.

Western Washington Office – Seattle, WA Telephone 206-587-4009 or 800-445-5771

Eastern Washington Office – Granger, WA Telephone 509-854-2100 or 888-756-3641

Tacoma Office – Serving the Northwest Detention Center – Telephone 253-383-0519

(Note: Please contact this office only to reach NWIRP staff serving those detained there).