

# Washington Defender Association's Immigration Project

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110 Prefontaine Place South, Suite 610 Seattle, WA 98104  
Ann Benson: Tel: 360-385-2538 Email: [abenson@defense.net](mailto:abenson@defense.net)  
Jonathan Moore: Tel: 206-623-4321 Email: [jonathan@defense.net](mailto:jonathan@defense.net)

## The "Quick & Dirty" Advisory for Representing Noncitizens Defendants Charged with Harassment Violations - 2009<sup>1</sup>

### IDENTIFY IMMIGRATION STATUS & CRIMINAL HISTORY

- **Undocumented Persons (UP):** Note many UP (except those w/prior deportations) have avenues for obtaining lawful status, particularly if they have U.S. citizen spouse or parents and have never left the U.S. Two types of UP: 1). Entered illegally and have never had status; 2). Came lawfully with a temporary visa (e.g. student or tourist) that has since expired.
- **Lawful Permanent Residents (LPR or greencard holders) & Refugees<sup>2</sup>:** Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status.
- **Temporary (non-immigrant) Visa Holders (e.g. student & tourist visas):** Identify if person's status is current or expired. If current, goals = LPRs & refugees. If expired, goals = UPs.
- **Mandatory Immigration Detention.** Hrsmt convictions can trigger mandatory detention once person is in deportation proceedings, which can last for months/years if D fights deportation.
- **Deportation is Permanent.** Virtually impossible to obtain/regain lawful status if deported. Illegal re-entry after deportation most-prosecuted federal felony; sentence enhancements if prior convictions.
- **Obtain Complete Criminal History.** Prior history impacts immigration analysis of current charges.

### DEFENSE GOALS FOR UNDOCUMENTED PERSONS (UPs):

1. **Avoid ICE apprehension by getting/staying out of jail.** A UP who goes to jail for even one day is likely to encounter ICE, get a detainer imposed and end up in ICE custody & removal proceedings. If defendant does not yet have ICE detainer, getting out of jail may be the highest priority (see #2).
2. **Preserve avenues to obtain lawful status.** Congress currently debating immigration law changes that will provide UP with avenue to get permanent resident status. Many UPs already have avenues to obtain lawful status, especially if LPR/USC spouse. Hrsmt convictions could render them ineligible to do this. Preserving avenue(s) to obtain LPR status may be a higher priority.

### DEFENSE GOALS FOR LAWFUL PERMANENT RESIDENTS & REFUGEES

1. **Avoid a conviction that triggers deportation.** Even where you do, advise clients not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.
2. **If #1 is not possible, preserve avenues for relief from deportation.** LPRs and refugees will get a hearing before an immigration judge who has the power to grant *discretionary* "relief from removal (deportation)" through one of several legal avenues to qualifying noncitizens. Generally speaking, that means LPRs with 7 years of residency and refugees/asylees who've not yet become LPRs.

### KEY CONCEPTS STRATEGIES TO AVOID/MITIGATE IMMIGRATION CONSEQUENCES

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<sup>1</sup>This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible defenders are advised to consult specifically with WDA's Immigration Project for individual case assistance and our extensive resources, including a practice advisory on DV cases available at the **Immigration Resources Section of the WDA website: [www.defense.net](http://www.defense.net)**

<sup>2</sup> People who come to the US in refugee status must apply for LPR status after one year, although many take longer to do so. People granted asylum in the U.S. can also apply to be LPRs.

If avoiding immigration consequences are an imperative defense goal, and you cannot negotiate the necessary immigration-safe requirements in a plea, it may be more important for defendant to go to trial since the immigration consequences of conviction at trial are no greater.

- **Harassment under RCW 9A.46.020** contains four separate offenses, each of which might well trigger deportation under 3 separate provisions of immigration law: As an aggravated felony (AF), a crime of domestic violence (CODV) or a crime involving moral turpitude (CIMT).
- **Classification as an Aggravated Felony (AF).** To avoid classification as an aggravated felony under immigration law, the sentence imposed (regardless of time suspended) must be < 365 days. AF's trigger harshest immigration consequences & higher sentences in illegal reentry prosecution.<sup>3</sup>
- **CIMT deportation exception:** *One* CIMT conviction *will not* trigger removal for persons lawfully admitted (LPRs, refugees & asylees) IF the offense was not *committed* w/in five years of their admission. But any two separate CIMT convictions "after admission" will trigger removal.
- **CIMT inadmissibility exception:** The CIMT inadmissibility ground triggers removal for most UPs. It is also a basis to deny (re)admission into the U.S., as well as LPR status and citizenship. This ground will not be triggered where there is *only one* CIMT conviction with a maximum possible sentence of not more than one year and where the actual sentence imposed (regardless suspended time) was not more than 180 days. The exception does not apply if there are 2 CIMTs.
- **Crime of DV (CODV):** If classified as DV offense and record shows use/attempted use of force will likely trigger CODV ground of deportation. (Only applies to persons lawfully admitted.)
- **Permanent Deportation & Mandatory Immigration Detention.** Deportation is permanent (only a tiny fraction of those deported ever lawfully return). Hrsmt can trigger mandatory detention once in immigration custody, lasting for months/years if person fights their deportation case.
- **Deferred Sentences & Deferred Adjudications (E.g. SOC's):** Immigration law has its own definition of what constitutes a conviction, which includes a finding of guilt, admission of guilt, or *admission to facts sufficient* to warrant a finding of guilt. Deferred sentence agreements require plea of guilty and = conviction *in perpetuity* regardless of dismissal. You *must* use "immigration-safe" deferral language in any deferred adjudication agreement (e.g. SOC).<sup>4</sup>
- **Defendant's Plea Statement Is Critical.** Under the analytical framework used to determine whether a conviction falls under a ground of removal, the wording of defendant's statement in the plea agreement will often determine whether the offense triggers removal. It is imperative that D's statement not include use of force or, if a minor, victim's age.<sup>5</sup>
- **ALTERNATIVE CHARGES OR DISPOSITIONS:** Trespass and disorderly conduct and bail forfeiture are immigration-safe alternatives. Malicious mischief 3<sup>rd</sup> or non-DV assault 4<sup>th</sup> w/364 day sentence. Assault 3<sup>rd</sup> (felony ok) or attempted assault 3<sup>rd</sup> under either §§ 9A.36.031(d) or (f) negligence prongs.
- **IF D MUST PLEAD TO HRSMT:** § 9A.46.020 (1)(a)(ii), to commit property damage is probably the "least bad" (there are arguments that it is not a CODV nor a CIMT). If under § 9A.46.020 (1)(a)(iii) is unavoidable, try to plea to restraint only by deception. In any m/d hrsmt plea avoid admissions to a course or pattern of repeated conduct, or of the use/ threat of the use of violent force.

<sup>3</sup> For detailed arguments in support of requests for 364 day sentences (or less) see the advisory and briefing available at the Immigration Resources section of WDA's website – [www.defensenet.org](http://www.defensenet.org)

<sup>4</sup> See the practice advisory *Negotiating Deferred Adjudication Agreements* for specific alternative immigration-safe language to include in your client's agreement. At the Immigration Resources section of WDA's website – [www.defensenet.org](http://www.defensenet.org)

<sup>5</sup> WA law does not require identification of victim's name or age. *State v. Johnston*, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000), citing *State v. Plano*, 67 Wn. App. 674, 679-680 (Wash. Ct. App. 1992). Cf. *State v. Clowes* 104 Wn. App. 935, 942 (2001).