

# 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@defensenet.org](mailto:abenson@defensenet.org)  
Jonathan Moore: Tel: 206-623-4321 Email: [jonathan@defensenet.org](mailto:jonathan@defensenet.org)

## The "Quick & Dirty" Advisory for Representing Noncitizens Defendants Charged with NCO/PO 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.** VNCO convictions can trigger 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. VNCO 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.

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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.defensenet.org](http://www.defensenet.org)

<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.

## IMMIGRATION CONSEQUENCES OF VNCO OFFENSES

- **No conviction required to trigger Immigration VNCO deportation ground:** 8 USC § 1227(a)(2)(E)(ii) only requires a “determination” by the court that D has “engaged in conduct” that violates a protection order (VPO) – which includes “no contact” orders.
- **Triggering Conduct.** The 9th Circuit has ruled<sup>3</sup> that conduct not “inherently violent, threatening, or harassing in nature” such as making a phone call or coming within a specified distance, triggers deportability if the protection order as a whole “involves protection against” domestic violence. Thus it is likely that a person who violated an order under RCW 26.50 or 10.99 will trigger this ground, even if through non-threatening contact or at the invitation of the protected person. An anti-harassment protection order under RCW 10.14, by contrast ought not to *automatically* evoke this ground.<sup>4</sup> If the record of conviction reveals or specifies a ‘domestic’ relationship or if the court determines that the violation was against a family member, then a violation of a non-DV order could still trigger the ground. (If the violation is for an anti-harassment order under RCW 10.14 that was never specified as a DV order the person should theoretically not be deportable under the VPO ground.)
- **To Whom Does the VPO ground Apply?** The VPO ground is a ground of deportation (used to remove persons lawfully admitted) and does not have a corresponding ground of inadmissibility (used to deny admission & lawful status, and to remove UPs who entered illegally). In short, the VPO ground will trigger removal for LPRs, refugees, asylees and anyone else who was lawfully admitted. It does not apply directly, as a removal ground to UPs who entered the U.S. illegally and have never had lawful status.
- **Because of the expansive nature of the 9<sup>th</sup> Circuit’s ruling in *Alanis-Alvarado*, in most cases the only way to avoid deportability for lawfully admitted persons (LPRs, Refugees, etc.) will be a plea to a different charge.** See alternatives outlined *infra*.
- **NCO/PO Violations as Crimes Involving Moral Turpitude (CIMT).** VNCO/PO convictions run a high risk of being deemed CIMTs and, as such can trigger both deportation & inadmissibility.
- **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 2 CIMTs.
- **NCO/PO Violations as Crimes of Violence.** In order to avoid a VNCO/PO conviction from triggering removal as an Aggravated Felony or a “crime of domestic violence (CODV)”, you must ensure that the elements of conviction and plea statement do not reflect use/threat to use violent force.

**WHEN PLEADING TO VNCO IS UNAVOIDABLE:** Plead to a strict liability (non-threat and non-violent) violation, to keep the offense from also becoming a CIMT or a “crime of violence.” Negotiate for a sentence of < 365 days. Avoid any admissions to past acts of abuse or to repeated harassment or a course of conduct that in any way resembles stalking.

**ALTERNATIVE “IMMIGRATION SAFE” OFFENSES:** Criminal trespass; disorderly conduct; malicious mischief (2<sup>nd</sup> or 3<sup>rd</sup>) w/sentence <365 days. Assault 4 can be safe *if*: not DV, under 365, victim over 18, plea statement specifies committed by “offensive touching” only. Felony Assault 3 per (f) negligence prong. An “immigration-safe” order of continuance will not equal a conviction for immigration purposes (but be sure to avoid any determination by the court of violative conduct); a bail forfeiture is a safe non-conviction. (So is compromise of a misdemeanor, if assault can be non-DV.)

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<sup>3</sup> *Alanis-Alvarado v. Holder*, 558 F.3d 833, (9th Cir. 2009) 2009 WL 514198.

<sup>4</sup> See RCW 10.140.010, legislative intent is to prevent harassment of “a person” but is not specified as limited to, or applying specifically to, domestic violence or harassment.