

Practice Advisory: Immigration consequences of a DUI in Oregon¹

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Glossary of Terms

Removable: Subject to removal because the noncitizen is deportable or inadmissible.

Deportable: Subject to removal after having been lawfully admitted in any status.

Inadmissible: Unable to enter or re-enter the United States, or obtain lawful status (visa, green card, etc.)

Noncitizen: anyone who is not a citizen or national of the United States.

Alien: Outdated legal term for a noncitizen.

Undocumented: A noncitizen present in the United States without authorization, including those who entered without inspection (EWI), and those who overstayed/violated a period of authorized presence, e.g. overstaying a visa.

Lawful Permanent Resident: A green card holder granted the right to permanently live in the United States but still subject to all grounds of removal.²

Nonimmigrant Visa Holder: a noncitizen allowed to temporarily reside in the United States for a specific purpose, e.g. visit, work, study.

Deferred Action for Childhood Arrivals (DACA): Temporary protection from deportation for certain noncitizens who entered the United States as children. Does not provide lawful status but does allow work authorization.³ Currently, DACA status may be renewed, but no new applications are accepted.⁴

Conviction: “A formal judgment of guilt of the alien entered by the court...where the alien has entered into a plea of guilt or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of ... restraint on the alien’s liberty...”⁵ This is broader than the Oregon definition.

² 8 U.S.C. § 1101(a)(20), INA § 101(a)(20). See also, 8 U.S.C. § 1101(a)(13)(C), INA 101(a)(13)(C).

³ Janet Napolitano, Sec. of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012).

⁴ *Consideration of Deferred Action for Childhood Arrivals*, U.S. Citizen and Immigration Services, 02/14/2018 <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines> (Archived).

⁵ 8 U.S.C. § 1101(a)(48)(A), INA § 101(a)(48)(A).

Update Summary

01.09.2020: Two or more convictions for DUI within a required “good moral character” period will create a presumptive bar to showing good moral character, barring several forms of relief and naturalization. [See IV\(C\)\(1\), below.](#) New proposed regulations would make most DUI offenses, and many related offenses, bars to asylum. A similar proposed rule would also bar work permits for asylum applicants. [See V, below.](#)

I. Introduction

Although a driving under the influence of intoxicants⁶ (DUI) conviction is not usually a removable offense on its own,⁷ it can have very serious consequences for noncitizen defendants. A DUI can cause revocation of nonimmigrant visas, bar Deferred Action for Childhood Arrivals (DACA), and prevent a noncitizen detained by Immigration and Customs Enforcement (ICE) from being released on bond. A DUI is also a negative factor in any discretionary decision, including the determination of good moral character required for citizenship. Entry into a DUI diversion program in Oregon is considered a “conviction” for immigration purposes and has many of the same consequences as a conviction.⁸

Both immigration counsel and criminal defense counsel should find this advisory a helpful overview of Oregon’s DUI law, DUI diversion, and the most common immigration consequences of a DUI and certain related offenses.

II. DUI in Oregon

A. DUI Convictions

A DUI conviction requires that the person “(a) has 0.08 percent or more blood alcohol content; (b) is under the influence of intoxicating liquor, cannabis, a controlled substance or an inhalant; or (c) is under the influence of any combination of intoxicating liquor, cannabis, a controlled substance or an inhalant.”⁹ A person is “under the influence” if “the person’s physical or mental faculties were adversely affected by the use of intoxicating liquor [or intoxicants] to a noticeable or perceptible degree.”¹⁰ This “includes not only the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition that results from consuming intoxicating liquor and that deprives the person of that clearness of intellect or control that the person would otherwise possess.”¹¹ “Driving” is synonymous with “operating a motor vehicle,” which is defined as “any operation, towing, pushing, movement or otherwise propelling.”¹²

A DUI may involve alcohol, a controlled substance, cannabis, or an inhalant.¹³ The fact that a person was under the influence of a controlled substance or an inhalant must be pleaded in the charging document, and either proved at trial or admitted in a guilty plea.¹⁴ However, Oregon District

⁶ Oregon Revised Statutes (ORS) § 813.010.

⁷ See *Leocal v. Ashcroft*, 541 U.S. 1, 3 (2004); ORS § 813.010.

⁸ *Matter of Roldan*, 22 I. & N. Dec. 512, 518 (BIA 1999).

⁹ ORS § 813.010.

¹⁰ Or. Uniform Crim. Jury Instr. 2701-02.

¹¹ *Id.*

¹² ORS § 801.370. See *State v. Cruz*, 121 Or. App. 241 (1993).

¹³ ORS § 813.010(1)(b).

¹⁴ ORS § 813.010(2).

Attorneys often do not specify the *exact* substance involved. If law enforcement is unsure, the defendant may be charged with being under the influence of a combination of both alcohol and controlled substances. The term “controlled substance” includes all substances classified in Schedules I-IV of the Federal Controlled Substances Act, excluding cannabis,¹⁵ but with additional substances as determined by the Oregon State Board of Pharmacy.¹⁶ “Inhalant” is defined by statute and includes certain paints, glues, solvents and laughing gas.¹⁷

A first DUI offense is usually subject to diversion and then dismissed upon successful completion. [See II\(B\) below](#). A second and third DUI offense (first and second criminal conviction) will result in a Class A misdemeanor conviction, with a maximum sentence of 364 days.¹⁸ Typically, a person will be required to spend a minimum of 48 hours in jail or complete 80-250 hours of community service for a first DUI conviction.¹⁹ A DUI is a Class C felony if the person has two or more prior DUI convictions in any jurisdiction in the past ten years. After the first felony DUI, each subsequent DUI is also a Class C felony.²⁰

No alternative pleas allowed: “A person charged with the offense of driving under the influence of intoxicants shall not be allowed to plead ‘guilty’ or ‘no contest’ to any other offense in exchange for a dismissal of the [DUI] offense charged.”²¹ Unlike most other criminal charges, there is no room to negotiate for an alternative plea that would be safer for immigration purposes. The only alternatives to a DUI conviction are to enter diversion, if eligible, or go to trial.

B. DUI Diversion

A DUI diversion is considered a “conviction” for immigration purposes, even if completed successfully.²² This is because Oregon’s diversion program requires entry of a plea of guilt or no contest.²³ However, successful diversion does not automatically disqualify a noncitizen from DACA. [See IV\(A\)\(4\), below](#).

DUI diversion is generally offered after a first DUI arrest. Successful completion will result in dismissal of the DUI charge.²⁴ DUI diversion is an option if the defendant:

- has never been convicted of a felony DUI in any jurisdiction;
- has no other pending offenses related to driving while under the influence in any jurisdiction;
- has not been convicted for a DUI offense or entered DUI diversion in the last 15 years in any jurisdiction;
- the current DUI offense did not involve death or physical injury; and

¹⁵ ORS § 475.005(6)(b).

¹⁶ See ORS § 475.035; <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=3987>.

¹⁷ ORS § 801.317.

¹⁸ ORS § 161.615. The maximum punishment for a class A misdemeanor was amended from 365 days to 364 days, effective August 15, 2017. 2017 Oregon Laws Ch. 706 (H.B. 2355).

¹⁹ ORS §§ 813.020, 137.129(4).

²⁰ ORS § 813.011.

²¹ ORS § 813.170.

²² See *Matter of Roldan*, 22 I. & N. Dec. 512, 518 (BIA 1999); *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998).

²³ ORS § 813.230(1)(a).

²⁴ ORS § 813.250.

- the person did not have commercial driving privileges or was not operating a commercial motor vehicle at the time of the offense.²⁵

The court also examines other factors to determine eligibility, e.g., blood alcohol content (BAC) levels, whether diversion would benefit the community, whether the defendant will cooperate with the diversion agreement, and whether a minor was in the car.²⁶

In a typical diversion program, the defendant will be required to:

- Install an interlock device;
- Attend a victim panel;²⁷
- Undergo a drug and alcohol evaluation that will examine the police report, person's medical history, and drinking habits to determine the appropriate number of alcohol and drug classes;
- Attend weekly alcohol and drug classes (dependent on the drug and alcohol evaluation); and
- Remain sober for 90 days with weekly urine analyses (UAs).

The defendant must also appear in court on the date scheduled for the first appearance, file the diversion petition within 30 days of the first appearance date, and plead guilty or no contest to the DUI.²⁸ Upon successful completion, a motion must be filed to dismiss the DUI charge.²⁹ The DUI arrest cannot be expunged after successful diversion.³⁰

If the DUI agreement is violated the court can terminate diversion, enter a plea, and sentence the defendant without a trial.³¹ Diversion can be terminated at any time, for reasons including:

- Failure to appear at hearings;³²
- Driving during the suspension period;
- Failing a urine analysis (UA);
- Not completing listed requirements and failing to file for an extension;
- A subsequent arrest for DUI during the diversion program.

If diversion cannot be completed within a year, a person may file for an extension at the end of the year at a "show-cause" hearing. An extension to complete the program will only be given if there is a realistic probability that the program can be completed within 180 days.³³

²⁵ DUI Diversion, Oregon Judicial Branch, <https://www.courts.oregon.gov/courts/clatsop/programs-services/Pages/DUI-diversion.aspx>; DUI Diversion Form 3 Defendant's Declaration of Eligibility April 2017, https://www.courts.oregon.gov/forms/Documents/DUI_Diversion_Form_3_Declaration_of_Eligibility.pdf; See ORS §§ 813.200, 813.215.

²⁶ *Id.* (a minor must be more than three years younger than the defendant).

²⁷ ORS § 813.235.

²⁸ DUI Diversion, Oregon Judicial Branch, <https://www.courts.oregon.gov/courts/clatsop/programs-services/Pages/DUI-diversion.aspx>

²⁹ ORS § 813.250.

³⁰ ORS § 137.225(8)(b).

³¹ *Id.*; see ORS § 813.255.

³² Counsel should be aware that failure to appear in the first degree, in violation of ORS § 162.205 may be considered an "aggravated felony," triggering virtually mandatory and permanent removal. *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016).

³³ ORS § 813.225(5).

III. Immigration Consequences NOT found with DUI Convictions

Unlike many other criminal offenses, a DUI conviction involving alcohol does not trigger removal under current law. Oregon case law and the structure of the Oregon statutes should also prevent a DUI involving a controlled substance from triggering any of the controlled substances grounds of removal. Specifically, an Oregon DUI conviction does not trigger the following related grounds of removal:

A. Aggravated Felony Crime of Violence

The term “aggravated felony” refers to a list of offenses Congress has determined should trigger virtually mandatory and permanent removal from the United States.³⁴ This list includes conviction of a “crime of violence” as defined by 18 U.S.C. § 16, with a sentence imposed of 365 days or more.³⁵

An Oregon DUI cannot trigger deportation as an aggravated felony crime of violence.³⁶ The Supreme Court found that the *mens rea* involved in a simple DUI offense is negligence. The Court then held that because force cannot be “used” negligently,³⁷ the government could not establish that a DUI involved the “use” of force, as is required for an offense to be considered a “crime of violence” under 18 U.S.C. § 16. Oregon’s DUI statute does not contain a *mens rea* element.³⁸

B. Crime Involving Moral Turpitude (CIMT)

Conviction (or admitting commission of) a “crime involving moral turpitude” can have various immigration consequences, including triggering deportation or inadmissibility. A simple DUI offense, however, is not a crime involving moral turpitude.³⁹ Multiple DUI convictions do not aggregate into a CIMT.⁴⁰

Counsel should be aware that violation of Oregon’s driving while suspended (DWS) statute should also not be considered a CIMT—unlike a uniquely worded Arizona statute. The Board of Immigration Appeals (BIA), an administrative appellate court between the immigration judge level and the federal circuit courts, held that an Arizona conviction for “aggravated driving under the influence” is a CIMT because it requires proof that the driver knows he or she is prohibited from driving.⁴¹ The Ninth Circuit has deferred to this decision.⁴² Oregon does not have an equivalent statute. The Immigrant Rights Project is not aware of any case in which the government has found a simple Oregon DWS, even where the license was suspended for a DUI, to be a CIMT.⁴³ To date we

³⁴ 8 U.S.C. § 1101(a)(43), INA § 101(a)(43).

³⁵ 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F).

³⁶ *Leocal v. Ashcroft*, 543 U.S. 1, 3 (2004); see *Delgado v. Holder*, 648 F.3d 1095, 1105 (9th Cir. 2011).

³⁷ *Leocal*, 541 U.S. at 3.

³⁸ ORS § 813.010. *State v. Miller*, 309 Or. 362, 788 P.2d 974 (1990).

³⁹ *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 85 (BIA 2001) (holding that an AZ aggravated DUI with driving while suspended was a crime involving moral turpitude because a culpable mental state existed).

⁴⁰ *Id.* at 86. (“We find that multiple convictions for the same DUI offense, which individually is not a crime involving moral turpitude, do not, by themselves, aggregate into a conviction for a crime involving moral turpitude”).

⁴¹ *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1194 (BIA 1999).

⁴² *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc) (Arizona conviction of driving under the influence while knowing that that one had a suspended license, in violation of Arizona Revised Statutes 28-1383(A)(1), constitutes a crime of moral turpitude for immigration purposes), deferring to *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999).

⁴³ Driving while suspended is also a strict liability offense. *State v. Click*, 305 Or. 611, 614 (1988); *State v. Maguire*, 78 Or. App. 459 (1986).

are also not aware of the government finding that a class B felony DWS, upon a prior felony DUI conviction,⁴⁴ is a CIMT.

C. Controlled Substances Offense (CSO)

A DUI conviction that *factually* involves a controlled substance should not trigger any of the *conviction-based* controlled substances grounds of removal. However, conviction of a controlled substance DUI can have other negative consequences. [See IV\(A\), below.](#)

Conviction of a controlled substance offense can trigger deportability or inadmissibility.⁴⁵ However, the offense must involve a federally listed controlled substance, established as an element of the offense.⁴⁶ When a state statute requires the specific identity of the controlled substance be proven as an element of the offense, immigration authorities may look to the “record of conviction” (generally the charging document, plea and judgment) to determine whether the substance is included on the federal list.⁴⁷ If the state does not require proof of the specific substance, and the state includes substances not on the federal list, then the statute is categorically overbroad and cannot trigger removal.⁴⁸

The Oregon controlled substance schedules include substances not on the federal schedules.⁴⁹ Moreover, Oregon law is clear that the specific identity of a controlled substance is not an element that must be proven to convict in the case of a DUI.⁵⁰ Thus, the Oregon DUI statute is both overbroad and indivisible in terms of the substance and cannot trigger removal under any of the conviction-based grounds of removal.

IV. Current Immigration Consequences of a DUI

A DUI offense may have serious immigration consequences, even absent a DUI ground of removal. Below is a brief description of possible consequences, organized by common immigration statuses, followed by additional consequences that affect all noncitizens equally.

⁴⁴ ORS § 811.182(3).

⁴⁵ 8 U.S.C. § 1182(a)(2)(A)(i)(II), INA § 212(a)(2)(A)(i)(II); 8 U.S.C. § 1227(a)(2)(B), INA § 237(a)(2)(B).

⁴⁶ *United States v. Valdavinos-Torres*, 704 F.3d 679 (9th Cir. 2012). *See Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965).

⁴⁷ *Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014); *Padilla-Martinez v. Holder*, 770 F.3d 825, 831, n.3 (9th Cir. 2014).

⁴⁸ *Mellouli v. Lynch*, ___ U.S. ___, 135 S.Ct. 1980 (2015) (Kansas misdemeanor conviction of possession of drug paraphernalia “to . . . store [or] conceal . . . a controlled substance,” under Kan. Stat. Ann. §21-5709(b)(2), did not categorically constitute a controlled substances offense under 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i), since at the time of conviction, the Kansas controlled substances schedules were not confined to federally controlled substances, and the State did not charge, or seek to prove, that the defendant’s offense involved a substance on the federal schedules); *Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015) (Nevada drug paraphernalia conviction, under NRSA 453.566, constitutes a controlled substance conviction, for purposes of inadmissibility, only if the conviction involved a substance criminalized by federal drug laws); following *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), and holding *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) and its progeny are no longer good law.

⁴⁹ Compare Oregon Schedule of Controlled Substances, Board of Pharmacy Chapter 855 Division 80, 855-080-0023, <https://secure.sos.state.or.us/oard/displayChapterRules.action> (lists pseudoephedrine, ephedrine, phenylpropanolamine, carisoprodol) with 21 C.F.R. 1308.11-15 (does not include pseudoephedrine, ephedrine, and phenylpropanolamine).

⁵⁰ *State v. King*, 316 Or. 437, 446 (1993) (abrogated on other grounds by *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or. 686 (2011)) (the only elements of Oregon DUI are “that the accused (1) drove a motor vehicle (2) while under the influence of intoxicants.”); *State v. Leachman*, 285 Or. App. 756 (2017) (the requirement, under ORS § 813.010(2) that the fact that defendant was under the influence of a controlled substance or intoxicant be proven is a record-keeping matter, rather than an element). See also, *State v. Hansz*, 167 Or. App. 147, 155 (2000) (“if a defendant must only *knowingly or intentionally* possess a Schedule II controlled substance, not a particular Schedule II controlled substance, then neither must he *possess* a particular Schedule II controlled substance in order to violate the statute.” [emphasis in original]).

A. Consequences by Immigration Status:

1. Undocumented/Overstay: A noncitizen who is undocumented or has overstayed a visa is subject to removal, regardless of criminal history. Any criminal charge or conviction, including a DUI or DUI diversion, will make the noncitizen a high enforcement priority. [See IV\(B\), below.](#) A DUI offense is also considered an extremely serious negative discretionary factor. [See IV\(C\)\(3\), below.](#) Additionally:

a. Multiple Offenses: A noncitizen becomes inadmissible if convicted of any two or more offenses that result in an aggregate sentence of five years or more, including suspended sentences.⁵¹ Jail time for a DUI may be counted toward this total.

b. Drug Abuser or Addict: A noncitizen is inadmissible or deportable if found to be a “drug abuser or addict.”⁵² This is a factual issue, meaning that no conviction is necessary. The government can look at police reports, etc. of a DUI involving controlled substances. The substance must be listed in the federal schedules.⁵³ This ground is most likely to arise when the noncitizen applies for lawful status, especially if the application requires a medical examination. The Centers for Disease Control and Prevention (CDC) sets the guidelines to determine whether a noncitizen is a drug abuser or addict.⁵⁴ A civil surgeon may determine whether a noncitizen is a drug abuser or addict, or is in sustained remission, according to the Diagnostic and Statistical Manual of Mental Disorders (DSM).⁵⁵ The DSM defines sustained remission to include at least 12 months without use. However, that is not the only factor.⁵⁶ Taking prescription drugs in accordance with a doctor’s instruction is not considered a substance use disorder. However, abuse of prescription drugs can trigger removal.⁵⁷

c. Physical or Mental Disorder: One or more DUI convictions involving alcohol may signal that a person suffers from alcoholism. Alcoholism, in turn, may trigger inadmissibility as a physical or mental disorder that poses a current threat to property, safety, or the welfare of the person or others.⁵⁸ Current and previous physical and mental disorders that are likely to recur in the future are defined by regulation by the Secretary of Health and Human Services. The diagnosis of a mental disorder must be conducted by a panel physician or civil surgeon. Noncitizens with a history of alcohol-related arrests, including DUI, may be found inadmissible under this ground. The Technical Instructions suggest that a noncitizen with a single DUI arrest within the last five years, or two or more arrests in the last ten years,

⁵¹ 8 U.S.C. § 1182(a)(2)(B), INA § 212(a)(2)(B).

⁵² 8 U.S.C. § 1182(a)(1)(A)(iv), INA § 212(a)(1)(A)(iv).

⁵³ USCIS Policy Manual, Volume 8 – Admissibility, Part B – Health Related Grounds of Inadmissibility, Chapter 8 – Drug Abuse or Drug Addiction (July 26, 2018), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartB-Chapter8.html>, *Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-related Disorders for Panel Physicians*, Centers for Disease Control and Prevention, November 2017, <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/panel/mental-panel-technical-instructions.html>

⁵⁴ 8 U.S.C. § 1182(a)(1)(A)(iv), INA § 212(a)(1)(A)(iv); 42 C.F.R. § 34.2(h).

⁵⁵ USCIS Policy Manual, Volume 8 – Admissibility, Part B – Health Related Grounds of Inadmissibility, Chapter 8 – Drug Abuse or Drug Addiction.

⁵⁶ Hasin, Deborah S. et al., *DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale*, *The American Journal of Psychiatry* 170.8, 834–851 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3767415/>

⁵⁷ *Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-related Disorders for Panel Physicians*, Centers for Disease Control and Prevention, November 2017, <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/panel/mental-panel-technical-instructions.html>

⁵⁸ 8 U.S.C. § 1182(a)(1)(A)(iii)(I-II), INA § 212(a)(1)(A)(iii)(I-II).

should be evaluated.⁵⁹ Again, this issue is most likely to arise when the noncitizen is making an application for lawful status that requires a medical examination.

d. Immigration Bond: A DUI is a negative discretionary factor and may lead to a denial of bond and release from ICE detention.⁶⁰ [See IV\(C\)\(3\), below](#). This is likely to arise soon after the criminal case has completed.

2. Lawful Permanent Residents: A lawful permanent resident is at risk of deportation if convicted of a deportable crime after admission to the United States. A lawful permanent resident may also risk becoming inadmissible if she commits a crime, leaves the country, and attempts to reenter.

a. Multiple Offenses: An LPR is inadmissible if she has been sentenced to five years or more in the aggregate, including suspended sentences, for any two or more crimes, including DUI.⁶¹

b. Drug Abuser or Addict: An LPR who is, or at any time after admission has been, a drug abuser or addict can be deportable or inadmissible.⁶² A DUI arrest alone can provide the basis to alert immigration authorities to investigate addiction or abuse. [See IV\(A\)\(1\)\(b\) above](#). Deportation on these grounds is rare, but the ability to travel may be affected.

c. Physical or Mental Disorder: One or more DUI convictions can suggest that an LPR suffers from alcoholism, considered a physical or mental disorder, and could trigger inadmissibility. [See IV\(A\)\(1\)\(c\) above](#).

3. Visa Holders and Applicants: A noncitizen must be admissible (or receive a waiver of inadmissibility) to qualify for a visa. A DUI arrest or conviction can cause revocation of a nonimmigrant visa.

a. Ineligible to Receive a Visa: A noncitizen with a DUI may be found ineligible to receive a visa, or an existing visa may be revoked if the person is inadmissible under any of the following grounds:

i. Multiple Offenses: [See IV\(A\)\(1\)\(a\) above](#).

ii. Drug Abuser or Addict: [See IV\(A\)\(1\)\(b\) above](#).

iii. Physical or Mental Disorder: [See IV\(A\)\(1\)\(c\) above](#).

b. Revocation of a Visa: A nonimmigrant visa can be revoked by a U.S. consulate officer⁶³ or the Department of State, based on a DUI arrest or conviction within the preceding five years.⁶⁴ The Department of State can always prudentially revoke a visa if ineligibility or lack of entitlement is suspected, or for virtually any other reason.⁶⁵

4. DACA Recipients: A DACA recipient concerned about maintaining DACA status must avoid conviction of: (1) a felony; (2) three or more misdemeanors; or (3) a “significant misdemeanor.”⁶⁶ A DACA recipient must also not “otherwise pose a threat to national security or public safety.”⁶⁷

⁵⁹ *Technical Instructions for Panel Physicians and Civil Surgeons*, Center for Disease Control and Prevention, November 1, 2017, <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/panel/mental-panel-technical-instructions.html>; see 8 C.F.R. § 1182(a)(1)(A)(iii)(I-II); INA § 212(a)(1)(A)(iii)(I-II).

⁶⁰ *Matter of Siniauskas*, 27 I. & N. Dec. 207 (BIA 2018) (a DUI is a significant adverse consideration in determining whether an alien is a danger to the community in bond proceedings).

⁶¹ 8 U.S.C. § 1182(a)(2)(B), INA § 212(a)(2)(B).

⁶² 8 U.S.C. §§ 1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii); INA §§ 212(a)(1)(A)(iv), 237(a)(2)(B)(ii).

⁶³ A consular officer abroad is not allowed to revoke the visa of a noncitizen in the U.S. or actively travelling to the U.S. for any reason *except* in the case of a DUI. 9 FAM 403.11-3(B).

⁶⁴ 9 FAM 403.11-3(A)(5), 403.11-5(B)(c).

⁶⁵ 9 FAM 403.11-5(B)(a).

⁶⁶ Janet Napolitano, Sec. of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012).

⁶⁷ DACA FAQ, at: <https://www.uscis.gov/archive/frequently-asked-questions> (last visited 10/05/2018).

a. DUI Diversion: While a successfully diverted DUI is still considered a “conviction” for immigration purposes, a successful diversion is not considered a “significant misdemeanor” for DACA purposes. While the DUI arrest is still considered a negative discretionary factor, a noncitizen who has successfully completed diversion may still apply to renew their DACA application. It will become necessary to show strong rehabilitation and equities when making the request to renew.

b. Significant Misdemeanor: A misdemeanor DUI conviction, regardless of the sentence imposed, is considered a “significant misdemeanor” that will make a person ineligible for and/or terminate DACA.⁶⁸

c. Still Subject to Other Grounds: A DACA recipient must also be concerned about the criminal grounds of removal and inadmissibility.

5. Other: There are several other forms of status a noncitizen might hold while in the United States, including as an asylee or refugee, a “U.S. national” (if born in American Samoa), a “habitual resident” (if born in Palau, Micronesia, the Marshall Islands, or having been adopted from certain countries), or being present in the United States under “temporary protected status.”⁶⁹ The immigration consequences of a DUI may differ significantly if the noncitizen has one of these more unusual forms of immigration status.

B. An Enhanced Enforcement Priority for Removal

If a noncitizen is subject to removal on any other basis, a pending DUI charge or a completed conviction will make the noncitizen a priority for removal.⁷⁰ While the Department of Homeland Security (DHS) previously exempted certain categories of people from potential immigration enforcement, any undocumented person is now considered a priority.

For example, in March of 2017, ICE officers arrested 84 undocumented immigrants with criminal records in Oregon; of the 84 targeted, 19 were arrested for previous DUI offenses. The leading counties with arrests were Washington, Multnomah, and Lane.⁷¹ That same month, ICE agents waited outside of a Portland courtroom to arrest an undocumented immigrant who was appearing to address a DUI charge.⁷²

Unlike years past, ICE is not necessarily waiting for the criminal courts to complete prosecution of a case before taking a defendant into immigration custody. This causes additional problems. The noncitizen may face consequences for failing to appear in criminal court due to their detention, and it is difficult to have a noncitizen detained by ICE in Tacoma, WA brought back to Oregon for a criminal hearing.⁷³

⁶⁸ *Id.*

⁶⁹ A list of current TPS countries can be found at <https://www.justice.gov/eoir/temporary-protected-status>. A noncitizen is disqualified from TPS if convicted of a felony, two or more misdemeanors, or a particularly serious crime. 8 C.F.R. § 244.4.

⁷⁰ John Kelly, Sec. of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest*, (February 20, 2017).

⁷¹ Lauren Hernandez, *ICE arrests 84 undocumented immigrants in Pacific Northwest*, March 2017, <https://www.statesmanjournal.com/story/news/2017/03/30/ice-arrests-undocumented-immigrants-oregon-washington-alaska-northwest/99849858/>

⁷² Carma Hassan, *Judge scrutinized after undocumented immigrant escapes courtroom*, CNN March 3, 2017, <https://www.cnn.com/2017/03/02/us/undocumented-immigrant-escapes-courtroom-trnd/index.html>

⁷³ Under current local policy, ICE at the Northwest Detention Center generally requires a judicial order specifying that the noncitizen must be returned to ICE custody and that the sheriff of the local jurisdiction is responsible for transportation. ICE may be willing to release a noncitizen for criminal prosecution if the agency determines that the government interest in prosecution is greater than ICE’s interest in immediate removal (i.e. the charges are serious or will support ICE’s efforts

During the Obama administration, many noncitizens in removal proceedings were able to have their removal cases “administratively closed” (i.e. put on indefinite hold) if they were a low priority or had immigration options available to them outside of immigration court. This included persons with DUI convictions. Due to recent actions taken by former Attorney General Sessions,⁷⁴ these cases are now subject to being reopened. Any criminal arrest, including a DUI, is likely to prompt DHS to move that an administratively closed removal case be re-calendared before the immigration court.

C. Eligibility for Relief and Other Benefits

While a DUI does not trigger any grounds of removal, it may affect a noncitizen’s ability to qualify for relief from removal and other immigration benefits.

1. Good Moral Character

Good moral character (GMC) must be established to qualify for naturalization,⁷⁵ and various forms of relief.⁷⁶ A *single* DUI (including a diversion) is not a statutory bar to showing GMC. However, on October 25, 2019, the U.S. Attorney General issued an administrative decision⁷⁷ that creates a presumptive bar to finding GMC for anyone who has been convicted of two or more DUIs during the required GMC period.⁷⁸ At this point, one should assume that the “presumption” will be nearly impossible to overcome. This change may also be applied retroactively to pre-2019 convictions. The groups most affected by this new decision will likely be those seeking Non-LPR Cancellation of Removal (who must show 10 years’ GMC), and those seeking to naturalize (who must show five or three years’ GMC).

A DUI—on its own—is not a statutory bar to showing good moral character. However, factors commonly associated with a DUI conviction can be potential bars to establishing good moral character:

- a. Habitual Drunkard: Multiple DUI convictions with alcohol could lead to a finding that one is a habitual drunkard, which is a statutory bar to establishing good moral character.⁷⁹ The Ninth Circuit defines habitual drunkard as someone who regularly drinks alcoholic beverages to excess.⁸⁰ Someone is not a habitual drunkard for their status as an alcoholic, but rather for the conduct related to drinking in excess during the relevant period.⁸¹
- b. Multiple Offenses.⁸² In addition to triggering inadmissibility, two or more convictions for any offenses with an aggregate sentence to five years or more will also bar GMC.

to remove the noncitizen). Requests for release or transportation should be made to the noncitizen’s assigned deportation officer or a supervisor.

⁷⁴ See *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

⁷⁵ 8 U.S.C. § 1427(a), INA § 316(a).

⁷⁶ INA § 240A(b)(1)(B) (establishing good moral character is necessary to apply for Cancellation of Removal and Adjustment of Status for certain nonpermanent residents).

⁷⁷ *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) (two or more convictions for a DUI during a required good moral character period establishes a strong presumption that a noncitizen lacks good moral character under 8 U.S.C. § 1101(f)). See also, USCIS Policy Alert, PA-2019-10 (Dec. 12, 2019), implementing this decision as of October 25, 2019. <https://www.uscis.gov/sites/default/files/policymanual/updates/20191210-AGOnDUIAndSentencing.pdf>.

⁷⁸ ICE has reportedly attempted to argue that a person with multiple DUI convictions is barred from showing good moral character if even one of those convictions falls within the required GMC period.

⁷⁹ 8 U.S.C. § 1101(f), INA § 101(f)(1); *Ledezma-Cosino v. Lynch*, 857 F.3d 1042 (9th Cir. 2017).

⁸⁰ *Ledezma-Cosino*, 857 F.3d 1042, 1046 (quoting Black’s Law Dictionary 587 (4th ed. 1951)).

⁸¹ *Id.*

⁸² 8 U.S.C. § 1107(f)(3), INA § 101(f)(3); 8 U.S.C. § 1182(a)(2)(B), INA § 212(a)(2)(B).

c. Imprisonment for 180 Days or More: A noncitizen cannot establish GMC if imprisoned for an aggregate period of 180 days or more within the GMC period.⁸³ The reason for imprisonment does not matter (e.g. imprisonment for a probation violation).⁸⁴ For GMC purposes, imprisonment means actual custody, not a suspended sentence or probation.⁸⁵

d. Naturalization Specific Bars: The naturalization regulations include an expanded list of bars to good moral character, which include (for DUI purposes):

- i. Admitting commission of a controlled substances offense, even if not arrested.
- ii. Commission of unlawful acts that adversely reflect upon the applicant's moral character.
- iii. Naturalization will not be granted while a noncitizen is on probation, parole or within the period of a suspended sentence. Any time during the required good moral character period that a noncitizen was on probation, parole, or a suspended sentence may also be considered in determining good moral character.⁸⁶ The best course of action may be to wait until the entire period of probation is outside the period of good moral character before applying for citizenship.

2. Asylum and Withholding of Removal

A conviction of a “particularly serious crime” (PSC) can bar a person afraid of returning to their home country from seeking asylum⁸⁷ or withholding of removal.⁸⁸ The Board of Immigration Appeals has held, in at least one unpublished decision, that a DUI conviction can be considered a particularly serious crime—at least where the facts underlying the DUI were serious, e.g. resulted in physical injury. The Ninth Circuit has thus far refused to overturn these decisions.⁸⁹ One former Ninth Circuit judge believed that a DUI should never be considered a particularly serious crime.⁹⁰

3. Immigration Bond

Upon arrest, the DHS is the first to determine whether a noncitizen may be released on bond and to set a bond amount. If a noncitizen has been convicted of an offense that triggers certain grounds of removal, the immigration court may be stripped of jurisdiction to reconsider the decision of the DHS.⁹¹ While conviction of a DUI does not bar an immigration judge from reviewing a DHS bond determination, the noncitizen may have been convicted of an additional offense that does bar redetermination by the immigration court.

A DUI offense is considered a strongly negative discretionary factor and may lead to a denial of bond and release from ICE detention.⁹² An immigration judge considers the nature and circumstances of a person's criminal history (arrests and convictions) to determine whether the

⁸³ 8 U.S.C. § 1107(f)(7), INA § 101(f)(7).

⁸⁴ *Conditional Bars for Acts in Statutory Period*, U.S. Citizenship and Immigration Services, Policy Manual Volume 12, Part F, Chapter 5, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter5.html#S-D>.

⁸⁵ *Id.*

⁸⁶ 8 C.F.R. § 316.10.

⁸⁷ 8 U.S.C. § 1158(b)(2)(A)(ii), INA § 208(b)(2)(A)(ii).

⁸⁸ 8 U.S.C. § 1231(b)(3)(B)(ii), INA § 241(b)(3)(B)(ii).

⁸⁹ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1078 (9th Cir. 2015).

⁹⁰ *Delgado v. Holder*, 648 F.3d 1095, 1111 (9th Cir. 2011) (“It is difficult to understand how the BIA could hold that a DUI conviction is a particularly serious crime, sufficient to send an alien home to face persecution and possible death, when it is not even a serious enough offense to render him removable in the first place—when it is neither an aggravated felony, nor a crime involving moral turpitude, nor any other kind of offense for which an alien may be deported.”) (Reinhardt, concurring in part).

⁹¹ 8 U.S.C. § 1226(c), INA § 236(c).

⁹² *Matter of Siniauskas*, 27 I. & N. Dec. 207 (BIA 2018) (a DUI is a significant adverse consideration in determining whether an alien is a danger to the community in bond proceedings).

person is a danger to the community.⁹³ In making their decision much emphasis is placed on the recency of the offense, the blood alcohol content (BAC), and the forms of immigration relief available. Noncitizens with multiple DUIs (unless very old) are very unlikely to be released on bond.

The BIA suggested that a single DUI, many years removed, might not rise to the level of dangerousness that would sustain denial of an immigration bond.⁹⁴ However, the BIA found it proper to deny bond to a noncitizen who had last been arrested for a DUI ten years prior but had been recently arrested again on the first anniversary of his mother's death. The BIA refused to consider strong family, church, and community ties as evidence that he would not be a danger if released from immigration custody.⁹⁵

In practice, whether a noncitizen with a DUI will be released on bond will depend upon the judge hearing the bond request, the recency of the offenses, and evidence of rehabilitation. Even if bond is allowed, the amount of the bond could range from \$7,500-\$25,000.

4. Visa Eligibility

[See IV\(A\)\(3\), above.](#)

V. Future Legislation

Several bills have been introduced in Congress that would increase the immigration consequences of a DUI conviction. Congress has proposed making a DUI a deportable offense on its own⁹⁶ and making a third DUI conviction with a sentence of 365 days or more an aggravated felony.⁹⁷ It is unknown whether any such law will ultimately be passed or whether it would have retroactive effect. Congress has often applied new grounds of removal retroactively.

On December 19, 2019, the government published a proposed rule that would bar asylum for any person convicted of a second DUI (likely including a first DUI following a diversion) or a single DUI that factually caused injury. The proposed rule also would bar asylum for any person convicted of any felony, any controlled substances offense, and any offense related to possession or use of a fake ID.⁹⁸ A similar rule, published November 14, 2019, would bar employment authorization for any asylum applicant convicted of a single DUI, any felony, or any controlled substance offense, among other bars.⁹⁹

VI. Related Offenses

There are several offenses that often accompany a DUI charge. Even where a defendant accepts a diversion on a DUI charge, the defendant may still be required to enter a guilty plea to one or more of these offenses.

⁹³ *Id.*

⁹⁴ *See id.* at 210 ("This is not a case involving a single conviction for driving under the influence from 10 years ago. The respondent has multiple convictions ... which undermines his claim that he has been rehabilitated").

⁹⁵ *Id.* at 210.

⁹⁶ Scott Gardner Act, H.R. 3808, 112th Cong. (2012).

⁹⁷ Taking Action Against Drunk Drivers Act, S.51, 115th Cong. (2017).

⁹⁸ Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (2019) (to be codified at 8 C.F.R. pt. 208, 1208) (proposed Dec. 19, 2019).

⁹⁹ Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (2019) (to be codified at 8 C.F.R. pt. 208, 274a) (proposed Nov. 14, 2019).

A. Driving While Suspended (DWS)

Driving with a suspended or revoked license can be punished as a violation¹⁰⁰ or a misdemeanor.¹⁰¹ A violation should not trigger removal under any ground. A Class A misdemeanor DWS should not trigger removal.¹⁰²

A conviction for DWS after conviction of certain other offenses, including felony DUI, is punishable as a Class B felony.¹⁰³ While this offense may cause a noncitizen to become inadmissible if the noncitizen has been sentenced to an aggregate term of five years or more, a Class B felony DWS should not be considered a crime involving moral turpitude. The statute does not require proof of knowledge, intent, or proof of the nature of the prior offense. A Class B felony DWS is still merely regulatory or *malum prohibitum* for CIMT purposes.¹⁰⁴ Oregon does not have a statute that specifically punishes DUI with knowledge that the driver's license has been suspended.¹⁰⁵

B. Failure to Perform Duties of a Driver ("Hit & Run")

Oregon has two statutes that cover traditional hit & run offenses: (1) failure to perform duties of a driver when property is damaged¹⁰⁶ and (2) failure to perform duties of a driver to injured persons.¹⁰⁷ While failure to perform duties involving property damage should not be considered a CIMT,¹⁰⁸ conviction of hit and run causing injury has been held to be a CIMT where the actor failed to render aid.¹⁰⁹ While most subsections of ORS § 811.705 should not be problematic, a conviction under ORS § 811.705(e) (failure to render aid) should be avoided. A single CIMT conviction may be sufficient to trigger removal or bar relief, depending on the noncitizen's immigration history.

C. Reckless/Careless Driving

A reckless driving¹¹⁰ conviction should not trigger removal. The Oregon statute punishes recklessly driving in a manner that endangers the safety of persons or property. Unlike more serious offenses that have been found to trigger removal as a CIMT, this statute does not require any actual harm or significant risk of harm,¹¹¹ and it does not specify a significant level of harm, such as serious bodily

¹⁰⁰ ORS § 811.175.

¹⁰¹ ORS § 811.182.

¹⁰² See *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1119 (9th Cir. 2003) (an offense does not become an "inherently base, vile and deportable 'crime of moral turpitude' simply because the offender's driver's license has been suspended").

¹⁰³ ORS § 811.182(3).

¹⁰⁴ See also *State v. Early*, 180 Or. App. 342, 43 P.3d 439 (2002) (fact of prior offense is element of driving while suspended, but nature of prior need not be charged) (overruled on other grounds by *State v. Caldwell*, 187 Or. App. 720, 69 P.3d 830 (2003)).

¹⁰⁵ Compare *Marmolejo-Campos v. Holder*, 558 F.3d 903, 914-17 (9th Cir. 2009) (en banc) (Arizona DUI with knowledge license is suspended is a crime of moral turpitude); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003) (Arizona conviction under former ARS 28-697A is not categorically a crime of moral turpitude because the offense can be committed by either driving on a suspended license while under the influence of alcohol [a CIMT], or by merely being in actual physical control of a vehicle [not a CIMT]).

¹⁰⁶ ORS § 811.700.

¹⁰⁷ ORS § 811.705.

¹⁰⁸ See *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008) (explaining that part of a CA hit and run statute was not a crime involving moral turpitude because it was not "base, vile and depraved; nor ... evince any willfulness or evil intent, a requisite element of crimes of moral turpitude"); *Latu v. Mukasey*, 547 F.3d 1070 (9th Cir. 2008).

¹⁰⁹ *Conejo-Bravo v. Sessions*, 875 F.3d 890, 893 (9th Cir. 2017).

¹¹⁰ ORS § 811.140.

¹¹¹ *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1212 (9th Cir. 2013) (non-fraud CIMT generally involves physical injury).

injury or death.¹¹² A lesser included offense, careless driving,¹¹³ also should not be considered a CIMT.

However, a conviction for reckless driving along with a DUI may be taken as a negative discretionary factor and may become an issue when seeking release on an immigration bond. A conviction for reckless driving may also trigger a determination of whether a noncitizen should be denied admission as a danger to others. [See IV\(A\)\(1\)\(c\), above.](#)

D. Recklessly Endangering Another Person

Defense counsel should assume that a conviction for reckless endangerment¹¹⁴ will be considered a crime of moral turpitude since the statute requires that the defendant act in a way that creates a substantial risk of serious physical injury to another person.¹¹⁵ This could be significant because it may trigger removal (even though the DUI does not), disqualify the noncitizen from relief from deportation or bar an immigration judge from considering to release the noncitizen on bond. On the other hand, Oregon has applied this statute in the case of a simple DUI with two minor passengers, without proof that the defendant had driven erratically at all.¹¹⁶ Therefore, there may be some room for argument in immigration court.

E. Refusing a Breathalyzer Test

Refusing to take a breathalyzer test does not trigger removal. Refusal is a punishable violation that can result in a \$680 fine and a one-year license suspension.¹¹⁷ Refusal to take the test now cannot be presented as evidence of guilt at trial.¹¹⁸ Oregon police do not conduct breathalyzer tests in the field but will conduct the test at the police station following arrest.

F. Assault, Manslaughter, etc.

Oregon law includes several statutes that prohibit a person from causing death or injury, including many involving “deadly or dangerous weapons.”¹¹⁹ Depending on the statute, driving a motor vehicle may be an element of the offense,¹²⁰ or a motor vehicle may be considered a “dangerous weapon.”¹²¹ Examining each of these statutes is beyond the scope of this advisory, but a noncitizen charged under one of these statutes will need to be concerned about avoiding an “aggravated felony” or a crime of moral turpitude.

¹¹² *Matter of Leal*, 26 I. & N. 20 (BIA 2012) (Arizona conviction of endangerment, which requires proof of “recklessly endangering another person with a substantial risk of imminent death” is a crime of moral turpitude).

¹¹³ ORS § 811.135.

¹¹⁴ ORS § 163.195.

¹¹⁵ See *Matter of O.A. Hernandez*, 26 I. & N. Dec. 464 (BIA 2015) (Texas conviction for recklessly engaging in conduct that places another in imminent danger of serious bodily injury is a crime of moral turpitude).

¹¹⁶ *State v. Mojarro-Sandoval*, 208 Or. App. 178, 180 (2006).

¹¹⁷ ORS § 813.420(1). See ORS §§ 813.100(3), 813.130(2)(c).

¹¹⁸ *State v. Banks*, 364 Or 332 (2019) (provision of ORS § 813.310, which states that refusal to consent to a breathalyzer test may be used as evidence of guilt is unconstitutional, as it violates defendants right against self-incrimination).

¹¹⁹ A motor vehicle will generally be considered a “dangerous,” not “deadly” weapon. *State v. Kuznetsov*, 345 Or. 479, 481, 199 P.3d 311, 312 (2008).

¹²⁰ See, e.g., ORS § 163.149 (“aggravated vehicular homicide”).

¹²¹ ORS § 161.015(1) (“dangerous weapon”). See, e.g., ORS § 163.165(a) (Assault III – recklessly causes serious bodily injury by means of a deadly or dangerous weapon”).

Immigrant Rights Project

The Oregon Justice Resource Center's Immigrant Rights Project was created in recognition of the need for public defense providers in Oregon to offer the most complete and useful advice possible to their noncitizen clients of the immigration consequences of criminal pleas and convictions. At no cost, we help public defense providers meet their constitutional duty by providing as much clarity as possible regarding the immigration consequences of crimes. As a result, clients can make informed decisions about their cases. The Immigrant Rights Project is supported by the Office of Public Defense Services.

We serve public defense providers and private counsel with clients who have been found indigent by the court, in the following Oregon state circuit and appellate court proceedings:

- Criminal;
- Juvenile delinquency;
- Contempt; and
- Dependency.

To access our services, complete a short Immigration Referral Form on the OPDS website at <https://www.oregon.gov/opds/appellate/Pages/forms.aspx>. After we receive the referral, we will email you a ticket number and a link to our full intake and instructions. Questions should be directed to Erin McKee and J.J. Rollin at 503-944-2270 or irp@ojrc.info.