

# CRIMMIGRATION COMMUNICATION

**LONG ISLAND**  
REGIONAL IMMIGRATION ASSISTANCE CENTER

## DWI/DUI OFFENSES

Criminal defenders must provide immigration advice to any non-citizen client, regardless of the charge. *Padilla v. Kentucky*, 559 US 356 (2010). Although convictions for Driving Under the Influence and Driving While Intoxicated (DWI/DUI) do not usually trigger adverse immigration consequences, the few exceptions are crucially important for those to whom they apply. DWI and DUI offenses by themselves are not among the categories of offenses that prevent qualifying for immigration benefits (inadmissibility) or cause deportation (deportability) under the immigration law, except for those who have been granted Temporary Protected Status (TPS) or Deferred Action for Childhood Arrivals (DACA).

For a DACA recipient, a DWI misdemeanor conviction will be classified as a “significant misdemeanor,” which ends DACA eligibility. Any felony conviction, including a felony DWI/DUI conviction will similarly end DACA eligibility.

<https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

For a TPS recipient, a misdemeanor DWI/DUI will count as a first misdemeanor. Any second misdemeanor conviction, or any felony conviction, including for a DWI/DUI, will terminate TPS eligibility. <https://www.uscis.gov/humanitarian/temporary-protected-status>.

For other non-citizens, whether in lawful status or undocumented, a conviction for a DWI/DUI offense generally does not trigger negative immigration legal consequences. The conviction will not be classified as an Aggravated Felony, (which leads to automatic deportation) even where the driver has caused injury to another person. *Leocal v. Ashcroft*, 543 U.S. 1 (2004)(DWI is not a Crime of Violence Aggravated Felony because lacks the intentional use of force required to qualify). Nevertheless, the Supreme Court has recently held that a person wrongfully removed because his DWI/DUI conviction was erroneously found to have been an Aggravated Felony before *Leocal*, is still

subject to prosecution for unlawful reentry, despite the unlawfulness of the prior removal. *US v. Palomar-Santiago* No. 20-437 (May 24, 2021).

Further, a DUI/DWI offense will not be classified as a Crime Involving Moral Turpitude, which can trigger inadmissibility or deportability, unless aggravating factors such as a culpable *mens rea*, are present. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Matter of Torres-Varela*, 23 I&N Dec. 78, 85 (BIA 2001) (explaining that the aggravating factor in *Lopez-Meza* was culpable mental state of knowing that license was suspended). The presence of a child in the car, (Leandra’s Law, NYVTL§ 1192.2-a(b), the use of illegal substances, NYVTL§ 1192.1(4), (4-a), or driving with a suspended license (NYVTL §§ 511.3, 511.2), may trigger negative immigration consequences on the CIMT ground, or other bases. *Matter of Vucetic*, 28 I&N Dec. 276 (BIA 2021); *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).

Also, *two or more convictions* for DWI/DUI offenses will trigger a presumption that defendant lacks good moral character (GMC) for purposes of citizenship or non-LPR cancellation of removal. See *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019). Clients should be warned of this risk when charged with a first DWI/DUI charge.

Finally, ICE has frequently detained and initiated removal proceedings against otherwise removable undocumented non-citizens with DWI/DUI charges or convictions. While the DWI/DUI conviction is not a basis for charges of removal, they can be the reason for ICE’s decision to detain an otherwise removable non-citizen. However, with the Supreme Court’s decision in *United States v. Texas* No 22-58 (June 23, 2023), reviving the Biden Administration’s enjoined Enforcement Priorities Memorandum, [www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf](http://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf), it is not yet clear this practice will continue. We nevertheless anticipate that ICE will continue to detain these non-citizens.