



Washington Defender Association's Immigration Project
www.defensenet.org/immigration-project

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Preserving Eligibility for Deferred Action for Childhood Arrivals (DACA)¹

On June 15, 2012, the Obama Administration announced a Deferred Action for Childhood Arrivals (DACA) program that would grant “deferred action status” for some undocumented people who entered the U.S. under age 16. With DACA, a client can legally avoid deportation and get a work permit for 3 years. However, many criminal convictions bar eligibility.

On November 20, 2014, the President expanded DACA. On February 16, 2015, a US District Court in Texas issued a preliminary injunction suspending the *expanded* version of DACA (only), while a lawsuit by Texas and 25 other states proceeds. Due to ongoing litigation, expanded DACA now seems as though it cannot go into effect until at least some time next year, it is critical that defenders continue to preserve their clients’ eligibility to apply. **New applications and renewals for the original DACA program announced on 6/15/ 2012 are not suspended and continue to be accepted.**

STEP ONE: IDENTIFY ELIGIBLE CLIENTS

Who is Eligible	Criminal Bars to Eligibility
<p><u>Currently eligible for DACA if:</u></p> <ul style="list-style-type: none"> • Undocumented, entered U.S. before 16th birthday, and was under 31 on 6/15/2007 (<i>born on or after 6/15/1981</i>); • Had 5 years residence in US as of 6/15/2012 (<i>entered US before 6/15/2007</i>) and present in US on that date; • Currently in school, graduated from HS, or obtained GED, or is honorably discharged from armed forces; and • Is not barred due to a conviction. <p><u>Will be eligible for <i>expanded</i> DACA if:</u></p> <ul style="list-style-type: none"> • Undocumented as of 11/20/2014 and entered U.S. before 16th birthday; • Been in the U.S. at least since January 1, 2010; • Currently in school, graduated from HS, or obtained GED, or is honorably discharged from armed forces; and • Is not barred due to a conviction. <p><i>Note: prior order of deportation does not bar eligibility.</i></p>	<p>Your client must avoid the following convictions in order to remain eligible:</p> <ul style="list-style-type: none"> • Any felony • Any 3 misdemeanors • Any single “significant misdemeanor”:<ul style="list-style-type: none"> ○ DUI & negligent driving ○ DV offenses ○ Firearms offenses ○ Sex offenses <p>These are <i>not</i> convictions for purposes of DACA:</p> <ul style="list-style-type: none"> • Infractions • compromise of a misdemeanor • Bail forfeiture • Vacated convictions² • “Minor traffic offenses” (e.g., NVOL) • Juvenile adjudications

¹ 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 on individual cases.

² See WDA advisory on vacating misdemeanor and felony convictions at www.defensenet.org/immigration-project.

STEP TWO: DEFENSE STRATEGIES FOR PRESERVING DACA ELIGIBILITY

Negotiate a Deferred Adjudication

- **For DACA and DAPA³ only:** a conviction that is dismissed as a result of a deferred adjudication will not trigger the conviction bars to eligibility. Negotiating a Stipulated Order of Continuance (SOC), deferred sentence, or other diversion is a great resolution for your DACA/DAPA eligible client.
- **HOWEVER,** in general, for statutory immigration purposes, a deferred adjudication must be “immigration safe” in order to not be a conviction in perpetuity under immigration law. So although a dismissed conviction may not bar DACA or DAPA, it may still be considered when your client applies to become a Lawful Permanent Resident (LPR) or a citizen. A diversion agreement is only “immigration safe” if the defendant does not admit guilt or admit or stipulate to facts sufficient to warrant a finding of guilt.⁴

Avoid a DUI

- **Plead to Reckless Driving (RD).** Since negligent driving is explicitly alcohol-related, it will bar DACA, so RD is a better resolution. The best way to plead to RD would be to dismiss the original DUI and re-file the Reckless, rather than amending the DUI; and in either case resist demands for a RD plea language admission of alcohol involvement, to the extent possible.
- **Note: A Deferred prosecution** will not count as a DUI conviction, but only once completed (usually 5 years). Until completion, your client remains ineligible for DACA/DAPA. Thus, a plea to reckless driving is a much better option for preserving eligibility for DACA/DAPA benefits.

Avoid DV Offenses

- **Get SOC.** See above. Even a non-“immigration-safe” SOC agreement may benefit a DACA-eligible client.
- **Plead to a non-DV alternative or get the DV designation dropped.** Easier said than done, but even 2 non-DV convictions are better than 1 DV conviction (as long as none of the other bars are implicated).

Avoid a 3rd Misdemeanor

- **Plead to a non-misdemeanor.** Where possible, negotiate to an infraction, compromise of a misdemeanor, or other non-misdemeanor conviction disposition.
- **Conviction vacation for DACA and DAPA only:** A vacated conviction will not trigger conviction bars to DACA/DAPA eligibility. If client is facing a 3rd misdemeanor conviction, and a deferred adjudication is not possible, inform them they can apply to have conviction vacated in 3 or 5 years, if they have no other convictions.⁵ Under RCW 9.94A.640 (felony vacation) and RCW 9.96.060 (misdemeanor vacation), a person who has pled guilty to certain felony or misdemeanor offenses can seek to have them vacated, if eligible.

Consider Taking the Case to Trial

- If DACA is or will be the only path to lawful status currently available to your client, and none of the above suggestions are possible, it is important to advise him that a plea will make him ineligible for DACA and assist him to consider whether to risk going to trial to preserve DACA eligibility.

STEP THREE: INFORM YOUR CLIENT ABOUT THIS NEW PATH TO STATUS

It is critical to inform your client about the DACA deferred action status program. ICE has been directed to not pursue deportation against individuals qualifying for original DACA. You should also encourage your client to contact Northwest Immigrant Rights Project (NWIRP) directly to access resources to help them pursue getting deferred action status: www.nwirp.org/resources/immigrationreform or 206-587-4009.

³ Deferred Action for Parents of Americans (DAPA). See WDAIP’s advisory at: www.defensenet.org/immigration-project.

⁴ See WDAIP’s advisory on negotiating immigration safe deferred adjudications at www.defensenet.org/immigration-project.

⁵ See WDA advisory on vacating misdemeanor and felony convictions at www.defensenet.org/immigration-project.