



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

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Preserving Eligibility for Deferred Action for Parents of Americans (DAPA)¹

On November 20, 2014, the Obama Administration announced a program called Deferred Action for Parents of Americans (DAPA). It would grant “deferred action” status to undocumented parents of U.S. citizen or LPR children. An undocumented client granted DAPA will be able to avoid deportation and get a work permit for three years. However, criminal convictions bar eligibility.

On February 16, 2015 a US district court in Texas issued a preliminary injunction, suspending implementation of DAPA (and an *expanded* version of Deferred Action for Childhood Arrivals (DACA)) while a lawsuit by Texas and 25 other states proceeds. Due to ongoing litigation, the DAPA program 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 for such paths to even temporary lawful status.

STEP ONE: IDENTIFY ELIGIBLE CLIENTS

Who will be Eligible	Criminal Bars to Eligibility
<p>Your client will be eligible for DAPA if all of the following apply:</p> <ul style="list-style-type: none"> • Undocumented; • Has a U.S citizen (or LPR) son or daughter (any age); • Has been in the U.S. at least since January 1, 2010; and • Is not barred due to a conviction. <p>Note: prior order of deportation does not bar eligibility.</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 “<u>significant misdemeanor</u>” <ul style="list-style-type: none"> ○ DUI & negligent driving ○ DV offenses ○ Firearms offenses ○ Sex offenses <p>The following are <i>not</i> convictions for purposes of DAPA:</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 DAPA ELIGIBILITY

Negotiate a Deferred Adjudication

- **For DAPA and DACA³ only:** a conviction that is dismissed as a result of a deferred adjudication will not trigger the conviction bars to eligibility. Therefore, negotiating a Stipulated Order of Continuance (SOC), deferred sentence, or other deferred adjudications or diversions can be a great resolution for your DAPA/DACA 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 DAPA applications, so Reckless Driving 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

- **Negotiate a SOC.** See above. Even a non “immigration-safe” SOC agreement will benefit your DAPA-eligible clients if they obtain the dismissal.
- **Plead to a non-DV alternative or get DV designation dropped.** Easier said than done, but even 2 non-DV misdemeanor 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 offense.
- **Conviction vacation for DAPA and DACA only:** A vacated conviction will not trigger the conviction bars to DAPA/DACA eligibility. If your client is facing their 3rd misdemeanor conviction, and a deferred adjudication is not possible, inform them that they can apply to have the conviction vacated in 3 or 5 years, if they don’t have any other criminal 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 DAPA will be the only path to lawful status potentially available to your client, and none of the above suggestions are possible (e.g. *only* offer is PGAC to DUI), it is important to advise him that a plea will make him ineligible for future DAPA and to help consider whether to risk going a trial to preserve DAPA eligibility.

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

It is critical to inform your client about the new deferred action DAPA program, even though applications cannot yet be filed. You should also encourage your client to contact Northwest Immigrant Rights Project (NWIRP) directly to access resources to help them prepare to pursue getting deferred action status:

www.nwirp.org/resources/immigrationreform or 206-587-4009.

³ Deferred Action for Childhood Arrivals (DACA). 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.