

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

CAUTION: On July 16, 2021, federal district court judge issued a nationwide injunction prohibiting the processing of new DACA applications. The Biden administration is appealing. For now, first-time DACA applications will *not* be processed. Renewal applications for those previously granted DACA will continue to be processed.

Deferred Action is an exercise of prosecutorial discretion that grants individuals a temporary reprieve from immigration enforcement. It does not lead to permanent status. Individuals granted DACA receive work permits that they must renew regularly.

STEP ONE: IDENTIFY ELIGIBLE CLIENTS

Who Is Eligible

To qualify for DACA, a person:

- Must have been under age 31 (i.e., born on or after June 15, 1981) on June 15, 2012;
- Must have been physically present in the U.S. and without legal status on June 15, 2012;
- Must have entered the U.S. before turning 16 years old;
- Must have lived in the U.S. continuously since June 15, 2007;
- Must be in school, have graduated from high school, have obtained a GED, or have been honorably discharged from the U.S. armed forces;
- Must not be subject to any of the criminal bars.

Criminal Bars to DACA

- Any felony
- A “significant misdemeanor,” defined as offenses of:
 - Domestic violence
 - Sexual abuse or exploitation
 - Drug sales (distribution or trafficking)
 - Burglary
 - DUI of alcohol or drugs
 - Any other misdemeanor for which a person received a jail sentence of more than 90 days (suspended sentences do not count towards the 90 days)
- Three or more nonsignificant misdemeanors that did not occur on the same date and did not arise out of the same act, omission, or scheme of misconduct

¹ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible, defenders are advised to consult with the WDA’s Immigration Project on individual cases.

STEP TWO: DEFENSE STRATEGIES FOR PRESERVING DACA ELIGIBILITY

Negotiate a Deferred Adjudication / Stipulated Order of Continuance

For DACA only: Once a conviction has been dismissed (or expunged), it will not trigger any of the *conviction-based* bars to DACA. Thus, a Stipulated Order of Continuance, deferred sentence, or other diversion agreement is generally a good resolution for a DACA-eligible client. However, DACA is discretionary and there is a general “public safety” basis for denial, so try to keep unnecessary negative facts and admissions out of the record of conviction. (DACA renewal applications will likely not be granted until any agreement is completed and the charge dismissed.)²

(NOTE: For all other immigration purposes deferred adjudications will *not* be immigration safe unless they are entered into pre-plea, without the admission of, or stipulation to, facts sufficient to establish guilt, and with immigration-safe language.³ Thus, although a traditional deferred adjudication agreement may be safe for DACA, an agreement that is overall immigration safe is preferable.)

Avoid a DUI

- **Plead to Reckless Driving rather than Negligent Driving.** Because Negligent Driving is explicitly alcohol related, it has been treated as equivalent to a DUI and is therefore not safe for DACA applicants. Reckless Driving is better. Ask the prosecutor to dismiss the original DUI and file the Reckless, rather than amending the DUI (making it a “dry” reckless). Avoid admission of alcohol involvement.

Avoid DV Offenses

- Eliminate the DV designation. Even two non-DV offenses would be preferable to a single DV offense (assuming no other convictions).
- If you can’t eliminate the DV designation, get a deferred adjudication (see above and note 2).

Vacate or Expunge Conviction(s)

- **For DACA only,** a vacated or expunged conviction will not automatically trigger the conviction bars.

Consider Taking the Case to Trial

- If maintaining eligibility for DACA is a priority for your client and no other options are available, you should discuss with your client the possibility of taking the case to trial or filing a motion to suppress or other pre-trial motions. (For assistance, consult with WDA’s Misdemeanor Resource Attorney, Magda Baker, magda@defensenet.org.)

² Although new DACA applications are not being processed, you should still try and maintain your client’s eligibility, as the litigation is ongoing.

³ See WDAIP’s advisory on [negotiating immigration-safe deferred adjudications](#).