

Preserving Eligibility for Deferred Action for Childhood Arrivals (DACA)

This advisory is meant as a quick reference guide for defenders representing noncitizens. For case-specific analysis, defenders should [consult with the WDA's Immigration Project](#) or a qualified immigration attorney.

IMPORTANT: New DACA applications are not being processed due to an injunction that has been in place since 2021.¹ Those who already have DACA may continue to renew their status (renewals must be filed within one year of expiration of current status).

STEP ONE: IDENTIFY ELIGIBLE CLIENTS

Who Is Eligible

Defense counsel should try to maintain their client's eligibility for DACA despite the injunction.

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 single "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. **Note:** not all misdemeanors count toward the three-misdemeanor bar. Agency guidance states "a minor traffic offense, such as driving without a license" (which arguably includes DWLS convictions) will not be counted.²

¹ On September 13, 2023, the U.S. District Court in Texas found the Biden administration's DACA rule to be unlawful and continued the prior injunction. *Texas v. United States*, No. 1:18-CV-00068, 2023 WL 5951196 (S.D. Tex. Sept. 13, 2023).

² See DHS, *National Standard Operating Procedures, Deferred Action for Childhood Arrivals*, https://pennstatelaw.psu.edu/_file/2013-HQFO-00305_Document.pdf, at 76.

STEP TWO: DEFENSE STRATEGIES FOR PRESERVING DACA ELIGIBILITY

Negotiate a Deferred Adjudication / Stipulated Order of Continuance

For DACA only, a dismissed or expunged conviction 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 a discretionary application, and adjudicators may deny if they find the applicant a “public safety” concern. For that reason, you should try to keep unnecessary negative facts and admissions out of the record of conviction.

This will likely not work for current DACA holders who need to renew their status. A renewal will not be granted until the case is complete, but if the renewal is filed more than one year after the expiration of current status, the application will be treated as a “new” application and will not be processed. Clients in this situation may wish to timely file the renewal regardless, in order to preserve their eligibility in the event of litigation or a change in policy.

For all other immigration purposes, a deferred adjudication will *not* be immigration safe unless it is entered into pre-plea and without the admission of, or stipulation to, facts sufficient to establish guilt, and with immigration-safe language.³ Although a traditional deferred adjudication agreement may be safe for a DACA applicant, an agreement that is overall immigration safe is preferable.

Avoid a DUI

- **Plead to Reckless Driving rather than Negligent Driving.** Because Negligent Driving has an “under the influence” element, it is 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 a Reckless, rather than amend the DUI (making the charge 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 4).

Vacate or Expunge Conviction(s)

- **For DACA only**, a vacated or expunged conviction will not automatically trigger the criminal 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 another pre-trial motion. (For assistance, consult with WDA’s Misdemeanor Resource Attorney, Magda Baker, magda@defensenet.org.)

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