LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

national IMMIGRATION project of the National Lawyers Guild

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

PRACTICE ADVISORY[1]
August 13, 2012

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 15, 2012, Department of Homeland Security (DHS) Secretary Janet Napolitano issued a new memorandum to U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) explaining how prosecutorial discretion should be used with respect to individuals who came to the United States as children. Specifically, the memorandum directs that certain young people who do not present a risk to national security or public safety and meet specified criteria will be eligible to receive deferred action for two years, subject to renewal, and to apply for work authorization. Requests for relief are to be decided on a case-by-case basis, and applicants must pass a background check before they can receive deferred action. The memorandum, which was accompanied by an initial list of Frequently Asked Questions (FAQs), builds on prior DHS guidance regarding the exercise of prosecutorial discretion in low priority cases.[2]

On August 3, 2012, USCIS issued supplemental FAQs providing more details about the eligibility criteria and application process for deferred action for childhood arrivals (DACA). USCIS will receive and review DACA applications for all applicants except individuals in immigration detention, who instead are instructed to contact their deportation officer or the ICE Office of the Public Advocate. Individuals who meet the eligibility criteria may begin to apply for DACA on August 15, 2012, when USCIS expects to post the application form and instructions on its website. Applications submitted before this date will be rejected.

---

[1] Copyright (c) 2012 American Immigration Council. Click here for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The principal authors of this practice advisory were Melissa Crow, Beth Werlin, Paromita Shah, Laura L. Lichter, Mark R. Barr, and Alexsa Alonzo. The authors thank Dan Kesselbrenner, Mary Kenney, Betsy Lawrence and Shoba Sivaprasad Wadhia for their contributions.

[2] For information on prior prosecutorial discretion guidance, see the Legal Action Center's Practice Advisories, *DHS Review of Low Priority Cases for Prosecutorial Discretion* (updated February 13, 2012) and *Prosecutorial Discretion: How to Advocate for Your Client* (June 24, 2011).

The DACA policy does not supersede ICE's previously issued prosecutorial discretion guidance outlined in the June 17, 2011 Morton memo. For clients who do not meet the narrow eligibility criteria under DACA, attorneys should continue to assess the viability of deferred action requests or other requests for prosecutorial discretion based on the prior guidance. Such requests should be submitted to the local ICE Office of Chief Counsel or Field Office Director, as appropriate.

What is deferred action?

Deferred action is a discretionary DHS decision not to pursue enforcement against a person for a specific period. A grant of deferred action does not confer lawful immigration status, alter an individual's existing immigration status, or provide a path to citizenship.[3] While deferred action does not cure any prior or subsequent period of unlawful presence, time in deferred action status is considered a period of stay authorized by the Secretary of DHS. An individual does not accrue unlawful presence for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I) while in deferred action status[4] or while a DACA application is pending if the individual filed it before reaching age 18. However, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. DHS can renew or terminate a grant of deferred action at any time.

What are the eligibility criteria for DACA?

To establish eligibility for DACA, individuals must demonstrate that they:

- Were under the age of 31 on June 15, 2012;
- Arrived in the United States before reaching their 16th birthday;
- Continuously resided in the United States from June 15, 2007, to the present;
- Were physically present in the United States on June 15, 2012, as well as at the time of requesting deferred action from USCIS;
- Entered without inspection before June 15, 2012, or any lawful immigration status expired on or before June 15, 2012;[5]
- On the date of application, are in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED)

---

[3] *See* ICE Detention and Removal Operations Policy and Procedure Manual §§ 1.2, 20.8(a) (2006).

[4] *See* Donald Neufeld, Acting Assoc. Dir., USCIS, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009) at 7.

[5] Individuals without lawful status as of June 15, 2012, are eligible for DACA regardless of whether any applications for immigration benefits or relief from removal were pending on that date.

certificate, or are honorably discharged veterans of the U.S. Coast Guard or the U.S. Armed Forces;

- Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Determinations will be made on a case-by-case basis and are within the discretion of USCIS.

Is there a minimum age requirement for DACA applicants?

Individuals who have never been in removal proceedings or whose proceedings were terminated before they apply for DACA must be at least 15 years old at the time of filing their applications. Individuals who are under 15 but otherwise meet the eligibility criteria for DACA can apply once they turn 15.

Individuals in removal proceedings or subject to a final removal or voluntary departure order can apply for DACA even if they are under 15. Eligible individuals who are in immigration custody may not apply to USCIS for consideration, but instead are advised to identify themselves to their ICE detention officer or the Office of the ICE Public Advocate, via phone at 1-888-351-4024 (9 am to 5 pm, Monday-Friday) or via email at EROPublicAdvocate@ice.dhs.gov. In emergent circumstances, the individual should consider contacting the Law Enforcement Support Center hotline, at 1-855-448-6903 (24 hours/day, 7 days/week).

What should I do if my client appears eligible for DACA but is currently within the voluntary departure period?

ICE has confirmed in stakeholder meetings that its attorneys are to join or submit motions to reopen and then agree to administratively close cases of individuals who appear eligible for DACA, have been granted voluntary departure, and are currently within the voluntary departure period. Attorneys who have clients in this situation should immediately contact the ICE Public Advocate hotline at 1-888-351-4024 (9 am to 5 pm, Monday-Friday).

If an individual overstays a period of voluntary departure without having his or her case reopened, the grant of voluntary departure will automatically convert to a final order of removal and subject him or her to severe consequences.[6]

To date, DHS has issued no guidance on whether a grant of deferred action would be construed as a justifiable basis for not abiding by the terms of a voluntary departure grant. Attorneys should consider advising their clients to file a motion to reopen to withdraw a request for voluntary departure *prior* to their designated departure dates.[7] If the motion cannot be filed

---

[6] A person who overstays the voluntary departure period may be subject to a fine of up to $5,000 and is barred for ten years from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. INA § 240B(d).
[7] For more information about the consequences of overstaying voluntary departure and how a grant of voluntary departure can be terminated, see the Legal Action Center's Practice Advisory,

before the voluntary departure period expires, counsel should consider explaining the reason for the delay and file the motion based on the immigration judge's *sua sponte* authority or seek DHS's consent to file a joint motion. Any motion also may seek administrative closure or termination of proceedings.

What documentation can be used to establish physical presence and continuous residence in the United States?

Applicants for deferred action must document three aspects of their physical presence and residence in the United States, namely, that they:

(1) entered the United States before they reached age 16;

(2) have continuously resided in the country since June 15, 2007 (i.e., for the five year period prior to June 15, 2012); and

(3) were physically present in the U.S. on June 15, 2012.

The USCIS guidance does not require *uninterrupted* physical presence for five years—only *continuous residence*. Brief, casual, and innocent absences from the United States will not interrupt continuous residence.[8]

An absence will be considered "brief, casual, and innocent" if it occurred prior to August 15, 2012, and it:

(i) was short and reasonably calculated to accomplish its purpose;

(ii) was not the result of an order of exclusion, deportation, or removal;

(iii) was not because of an order of voluntary departure or an administrative grant of voluntary departure prior to the initiation of exclusion, deportation, or removal proceedings; and

(iv) the purpose of the absence and the applicant's actions while outside the United States did not violate the law.

According to the supplemental FAQs, documentation of physical presence and residence may include, but is not limited to: financial records, medical records, school records, employment records, and military records. It is unclear what level of documentation will be required. On August 15, 2012, USCIS is expected to provide further guidance regarding acceptable documentation on its website at www.uscis.gov/childhoodarrivals.

Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart (July 6, 2009).

[8] This provision is similar to, but not entirely limited by what is referred to as the *Fleuti* doctrine, under which a trip abroad does not break the continuity of residence if it was "innocent, casual, and brief." *See Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963).

Similar programs, where an element of eligibility for relief includes proof of physical presence and/or residence,[9] may provide insight into the kinds of documentation that could prove DACA eligibility. Attorneys may want to review the lists of documents in those programs for examples that may be suitable under the DACA initiative. *See, e.g.,* 8 C.F.R. §§ 244.9(a)(2); 245.13(e), (f); 245.15(i), (j); and 245.22. These documents include immigration court records, applications for immigration benefits, correspondence with immigration agencies, I-94 cards, driver's licenses, birth certificates of children born in the United States, marriage certificates, hospital records, school records, utility bills, tax returns, rental receipts, other dated receipts, bank statements, personal checks bearing a dated bank cancellation stamp, employment records, and credit card statements, among other documents. In cases where primary evidence was unavailable, in these related types of applications, individuals have been able to rely on testimony or affidavits attesting to physical presence, and letters from employers or attestations from churches, unions or other organizations to show continuous residence. As discussed further below, however, USCIS has stated that affidavits will generally not be sufficient on their own to establish eligibility for DACA.

Attorneys also may find it useful to review any prior applications that their clients have filed to ensure that all the information included in a request for deferred action is consistent. Such applications may be obtained through a Freedom of Information Act request, if necessary. Some of these applications may have been supported by additional evidence of residence or entry, such as letters, affidavits or declarations from third parties.

What documentation can be used to establish that an individual has fulfilled the educational or military service requirements?

The supplemental FAQs also provide non-exclusive lists of documents that can be used to prove compliance with the educational or military service requirements, but note that circumstantial evidence will not be accepted for this purpose.[10] Individuals may demonstrate that they are enrolled in school on the date they apply for DACA,[11] have graduated from high school, or have obtained a GED certificate by presenting diplomas, GED certificates, report cards, and school

---

[9] Examples include: the Nicaraguan Adjustment and Central American Relief Act (NACARA), the Haitian Refugee Immigration Fairness Act (HRIFA), and Temporary Protected Status (TPS). Attorneys may also wish to review guidance found in the instructions to other applications for immigration benefits that require a showing of continuous residence or physical presence, such as EOIR-40 (Suspension of Deportation), EOIR-42A (Cancellation for Lawful Permanent Residents), EOIR-42B (Cancellation for Non-Lawful Permanent Residents), I-687 (Application for Temporary Residence under 245A), and I-881 (Special Rule Cancellation).

[10] The prohibition against circumstantial evidence also applies to establishing age on June 15, 2012.

[11] On a stakeholders' call on August 3, 2012, USCIS stated publicly that "in school" includes enrollment in a GED program. However, it is unclear whether there will be any limitations on which programs will be considered or whether this category also includes vocational school, continuing education programs, classes at a community college, or other types of adult educational opportunities.

transcripts. The government may entertain exceptions to the education requirement for individuals who are not currently enrolled in school because of emergent circumstances, but who do intend to return to school or who are prevented from meeting this requirement due to disability. Individuals may demonstrate that they have been honorably discharged from the U.S. Coast Guard or U.S. Armed Forces by presenting report of separation forms, military personnel records, and military health records. On August 15, 2012, USCIS is expected to post further guidance regarding acceptable documentation on its website at www.uscis.gov/childhoodarrivals.

Initial consideration of the military service provisions suggests that they will benefit a very small number of people, as noncitizens who entered the United States without inspection or who are not in a lawful immigration status generally may not enlist in the U.S. Armed Forces or Coast Guard. Under the military service provisions, 10 U.S.C. § 504(b)(1), only U.S. citizens and nationals, lawful permanent residents, certain persons from Palau, Micronesia, and the Republic of the Marshall Islands, and certain other persons whose enlistment has been determined by a Service Secretary to be “vital to the national interest” may enlist. Among the limited number of individuals who are “honorably discharged veterans” under age 31, and otherwise eligible for deferred action, most also would be eligible for naturalization under INA § 329, and therefore not in need of deferred action.

Importantly, the June 15, 2012 memorandum did not alter the enlistment rules for individuals who receive deferred action. To date, no Service Secretary has authorized the enlistment of undocumented noncitizens or of individuals who have been granted deferred action. *See* 10 U.S.C. § 504(b)(2) (providing that the Secretary may authorize the enlistment of individuals not typically permitted to enlist). Attorneys should ensure that their clients are aware that the new policy does not expand the categories of noncitizens eligible for enlistment, and that their clients will not be eligible to enlist, even if they are successful in seeking deferred action.

Will USCIS accept affidavits to fulfill the eligibility criteria for DACA?

Affidavits cannot be used to prove the educational or military service requirements, physical presence on June 15, 2012, arrival in the U.S. prior to age 16, the under-31 age requirement, or criminal history. Failure to submit required primary evidence to establish these eligibility criteria will result in the issuance of a request for evidence (RFE).

Affidavits may be used to fill a gap in other documentation demonstrating that an applicant meets the five-year continuous residence requirement and/or that any departures during the five years were “brief, casual, and innocent.” To fulfill these criteria, applicants must submit two or more affidavits from other individuals who have direct personal knowledge of relevant events and circumstances.

Will USCIS consider circumstantial evidence to establish eligibility for DACA?

In the absence of other documentation, circumstantial evidence may be used to prove physical presence on June 15, 2012, arrival in the U.S. prior to age 16, to fill gaps in direct evidence of

the required five-year continuous residence period, and/or to show that any departures during the period of continuous residence were "brief, casual, and innocent."

This suggests that DHS will likely apply a presumption of presence for individuals who can show presence on days near June 15, 2012, but not necessarily on that day. This is similar to the approach employed for adjustment applications under INA § 245(i), in which an applicant must demonstrate presence on December 21, 2000. In those cases, the agency typically considers evidence of presence both before and after the qualifying date to be sufficient to meet the applicant's burden.

Circumstantial evidence may not be used to prove an individual's age on June 15, 2012, or to fulfill the educational or military service requirements.

How can I determine whether my client has been convicted of any disqualifying crimes?

Attorneys should question their clients in detail about their criminal histories and take steps to obtain copies of all police reports and records of disposition of any criminal charges, including any juvenile adjudications, no matter how minor or how long ago they occurred. A relatively simple way to obtain an individual's adult arrest record is through an FBI criminal background check, which requires the submission of an application form, fingerprints, and an $18 fee.[12] In addition, many states have web-based systems that enable individuals and their attorneys to access criminal records.[13]

Some states require that the individual provide fingerprints in person in order to obtain records. Because individuals with pending warrants could be arrested if they go to a law enforcement office to provide fingerprints, attorneys should explore alternative ways of obtaining criminal histories, such as private fingerprinting services or web-based records requests.

State laws govern access to juvenile records. Most states consider those records to be public, but restrict access after the person attains the age of majority. Attorneys should seek records relating to juvenile delinquency, including diversion or referrals to restorative justice programs, for all clients interested in applying for DACA.

Because USCIS will conduct independent background checks following collection of biometrics, applicants are not required to submit evidence of good moral character. However, if your client has a criminal record or other adverse factors, such evidence may be helpful.

What crimes render an applicant ineligible for deferred action?

---

[12] More information about FBI criminal background checks is available at http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi.

[13] Information about state-based criminal history systems can be found at: http://www.publicrecordsinfo.com/criminal_records.htm.

Individuals are not eligible for deferred action if they have been convicted of a felony, a significant misdemeanor,[14] or three or more non-significant misdemeanors (not including minor traffic offenses) unless DHS determines that there are exceptional circumstances. DHS has not provided any guidance as to what could constitute an exceptional circumstance. The supplemental FAQs specifically exclude immigration-related offenses classified as felonies and misdemeanors under state laws (such as Arizona's SB 1070). Presumably, criminal violations of federal immigration law will be considered.

The federal criminal classification scheme governs whether an offense is considered a felony or misdemeanor for purposes of DACA. A "felony" is an offense punishable by a potential sentence of more than one year. A misdemeanor is an offense punishable by more than five days, but less than a year. The label a state attaches to a particular offense is not relevant. Thus, some offenses that a state labels as a misdemeanor, but which include a potential sentence of more than one year, will be a felony. A violation which carries a sentence of five days or less, such as a municipal violation, may not be counted as a misdemeanor, but may nonetheless be taken into consideration under the totality of the circumstances. Attorneys should also be cautious of federal tickets, which under the Assimilated Crimes Act, could be counted as a misdemeanor.

A "significant misdemeanor" includes any misdemeanor, regardless of the sentence imposed, involving burglary, domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm; driving under the influence; and drug distribution or trafficking. A "significant misdemeanor" may also include any other misdemeanor for which an applicant was sentenced to more than 90 days imprisonment, not including suspended sentences, pretrial detention or time held pursuant to an immigration detainer. The policy specifically notes that a conviction for driving under the influence of drugs or alcohol is a significant misdemeanor, regardless of the sentence imposed.

The supplemental FAQs separately define a "non-significant misdemeanor." The term includes any misdemeanor punishable by imprisonment of more than five days and less than a year that is not identified as a per se "significant misdemeanor" (an offense of burglary, domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, driving under the influence, or drug distribution or trafficking), for which a person receives a sentence of 90 days or less, again, not including suspended sentences, pretrial detention or time held pursuant to an immigration detainer.

Individuals with three or more non-significant misdemeanors not occurring on the same date and not arising out of the same act, omission or scheme of misconduct, which resulted in a sentence of more than five days, are ineligible for deferred action. Minor traffic offenses, including driving without a license, will not count towards the three or more non-significant misdemeanor bar. However, DHS has stated that a person's entire history of offenses can be considered, along with other facts, to determine whether deferred action is warranted under the totality of the circumstances.

---

[14] This term does not appear in the Immigration and Nationality Act or elsewhere in the U.S. Code.

An applicant for DACA who does not meet the eligibility requirements risks being placed in removal proceedings or being detained. In addition, for cases that involve a "criminal offense, fraud, or a threat to national security or public safety," confidentiality protections, which are discussed below, will likely not apply unless DHS determines there are exceptional circumstances. USCIS will apply its existing Notice to Appear guidance governing referral of cases to ICE and issuance of notices to appear, which is also discussed below.

How will DHS treat juvenile delinquency adjudications?

DHS uses the term "juvenile conviction" to refer to a juvenile delinquency adjudication. DHS states that a juvenile delinquency adjudication will not automatically disqualify an applicant from DACA relief. A minor with a delinquency adjudication will get a case-by-case review to see if the "particular circumstances" of his or her case warrant a positive exercise of prosecutorial discretion. Attorneys should explore the circumstances and facts surrounding any juvenile delinquency adjudication to anticipate how DHS might characterize the underlying conduct that gave rise to the delinquency adjudication, as well as seek out evidence of mitigation or rehabilitation, as appropriate. For example, a noncitizen who receives a delinquency adjudication because of a drug distribution offense which otherwise would have been considered a significant misdemeanor for an adult, may be found ineligible. A noncitizen convicted as an adult offender has an adult conviction, and does not receive case-by-case treatment based on age.

Will expunged convictions be considered under the new policy?

The same policy relating to juvenile "convictions" applies to expunged convictions. This is a departure from immigration law precedent, which treats expunged convictions as convictions for immigration purposes.

What other conduct-based activities are bars to deferred action?

Even absent a criminal conviction, individuals are ineligible for deferred action if their background checks or other information reveal that they pose a threat to public safety or national security. Relevant factors include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.[15]

Under the totality of circumstances test, DHS may consider allegations of participation in criminal activities based on the facts surrounding dismissed charges, as well as participation in drug/alcohol programs, or anger management classes. Attorneys should review the circumstances of any dismissed charges to see if the applicant could nonetheless be found ineligible for deferred action or even at risk of enforcement action. Police reports or complaints suggesting drug use or drug trafficking, assaults against family members or partners, and sex crimes should

[15] Gang membership may prove to be an area of concern for potential applicants, given the reported difficulties former gang members face obtaining other immigration benefits or forms of prosecutorial discretion.

be explored in detail to see if the conduct could be construed as "participation in criminal activities."

Suspected gang members also face a bar to DACA. Unfortunately, many people will not know if they are suspected of being gang members until USCIS conducts a background check. USCIS may rely on reports from local police departments to determine gang membership, and has not indicated whether individuals will be advised if this is the reason for a failed application, much less whether an applicant will be notified of the issue and provided an opportunity to rebut allegations of gang membership. Attorneys should carefully review criminal history information for any gang references. In addition, the attorney can submit a FOIA request to ICE or a public records act request to the local police department to see if a client is believed to be a current or former gang member. Attorneys are advised to review distinctions between gang members and nonmembers. For example, a gang membership determination could be incorrect if a USCIS officer misreads tattoos and incorrectly concludes that the person in question belongs to a specific gang. Alternatively, an individual may have been a gang member in his teenage years, but subsequently left the gang. An applicant with mitigating factors and other significant equities might still have an application favorably considered. However, as discussed above, such an individual risks potential removal if he or she is considered an enforcement priority. Practitioners are advised to follow trends in this area closely. This same analysis would apply when reviewing whether someone could be construed to be a national security threat.

What constitutes an exceptional circumstance to overcome a bar to DACA?

DHS has not provided any guidance as to what could constitute an exceptional circumstance, but practitioners should assume that DHS will apply this exception sparingly. A possible example of a case that might qualify would be a domestic violence conviction where the person convicted was "not the primary perpetrator of violence in the relationship."[16] It is unclear whether evidence of rehabilitation or significant time since the activity at issue will overcome the bar. Because individuals who would face these bars are necessarily likely to be considered enforcement priorities, attorneys should proceed with caution, if at all, in affirmative filings, and should consider providing clients with clear written warnings of the risks associated with making a request.

Are individuals who are currently in removal proceedings or subject to a final removal order or a voluntary departure order eligible for DACA?

Yes. According to the supplemental FAQs, individuals who fall into these categories, meet the eligibility guidelines, and are not currently in immigration detention should submit their applications to USCIS — not ICE as stated in the initial FAQs released on June 15, 2012. The request should include a copy of the removal order or the decision of the immigration court or the Board of Immigration Appeals, if available. Such individuals may be under 15 at the time of the request, but cannot have been 31 or older as of June 15, 2012, to be considered for DACA. If an individual does not meet the age requirements for DACA, he or she may ask ICE to consider a request for prosecutorial discretion under the June 17, 2011 Morton memo.

---

[16] INA §237(a)(7).

If a client in immigration detention meets the eligibility criteria for DACA, you should notify his or her detention officer or contact the ICE Office of the Public Advocate at 1-888-351-4024 (9 a.m. to 5 p.m., Monday to Friday) or by email at EROPublicAdvocate@ice.dhs.gov. Once ICE is made aware of the case, it is unclear whether the application will be adjudicated by ICE or USCIS, or what the process will be. If your client is in danger of imminent removal, you should immediately contact the Law Enforcement Support Center hotline at 1-855-448-6903 (24 hours/day, 7 days/week).

Individuals who recently received a final order of removal and are still within the statutory time period for seeking reopening (within 90 days of the entry of a final order of removal under INA § 240(c)(7)(C)), may want to consider filing a motion to reopen based on the new DHS guidance. Alternatively, an individual beyond the reopening period may seek DHS's consent to file a joint motion to reopen or even present a motion to the immigration court or BIA for *sua sponte* consideration. Even though such individuals are eligible for DACA, it is to their advantage in most cases to reopen the case in order to obtain administrative closure or termination. This will put them in a better position in the event DACA is rescinded, a renewal application is denied, or the individual becomes eligible for another form of relief from removal.

Can individuals apply for DACA if they were previously offered, but did not accept an offer of administrative closure, or if a request for prosecutorial discretion was declined?

Yes. Any individuals who can demonstrate that they meet the guidelines are eligible for DACA, even if their cases were considered in the course of DHS's case-by-case review process and regardless of the results. Since Secretary Napolitano's June 15th announcement, ICE has granted deferred action to certain individuals who met the DACA guidelines whose cases were already identified for administrative closure.

Will deferred action applicants accrue unlawful presence while their applications are pending?

Applicants who are 18 years old or older will continue to accrue unlawful presence while their applications for DACA are pending. Individuals under 18 years old do not accrue unlawful presence. *See* INA § 212(a)(9)(B)(iii)(1). Based on the supplemental FAQs, applicants who request deferred action while under age 18 will not accrue unlawful presence even if they turn 18 while their requests are pending.

An individual granted deferred action will not accrue unlawful presence during the period of deferred action, but previous or subsequent periods of unlawful presence are not erased by a grant. Thus, individuals who have accrued at least 180 days or one year of unlawful presence before receiving deferred action may already be subject to the three and ten-year bars, respectively, and should avoid leaving the country under any circumstances.

The supplemental FAQs state that a person granted deferred action is eligible to apply for advance parole, and may be able to depart and reenter the country as a parolee. Note, however, that under the recent BIA decision in *Matter of Arrabally & Yerrabelly*, 25 I&N 771 (BIA 2012), an individual who otherwise would trigger the three- or ten-year bar simply because he or she

departed under advance parole, is not considered to have departed the United States. Presumably, individuals who already have a path to residency, but who are not currently eligible to adjust, may find themselves adjustable after travel on advance parole.

What will happen to individuals who meet the eligibility criteria but are stopped or arrested by ICE or CBP?

On June 15, 2012, Secretary Napolitano instructed ICE and CBP to immediately exercise their discretion, on a case-by-case basis, to prevent individuals who meet the eligibility criteria from being apprehended, held under ICE detainers, placed into removal proceedings, or removed from the United States. On a June 18 national stakeholder call, CBP announced that individuals who encounter CBP will be briefly detained for screening purposes. Following an interview and a background check, CBP will release individuals who are found to be prima facie eligible for deferred action. CBP will instruct eligible individuals to apply to USCIS for deferred action after the affirmative application procedure has been established.

If you believe that ICE or CBP has pursued enforcement action against your client in violation of this policy, you should contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (24 hours/day, 7 days/week) or the ICE Office of the Public Advocate at 1-888-351-4024 (9 am to 5 pm, Monday-Friday) or by e-mail at EROPublicAdvocate@ice.dhs.gov. Also, please complete this survey to assist AILA and the Legal Action Center in monitoring implementation of the new policy.

Can individuals in removal proceedings who are granted deferred action influence whether their cases should be terminated, administratively closed or pursued?

Once an NTA has been filed with the immigration court, only the immigration judge can decide whether to terminate or administratively close proceedings. Joint motions for such relief are invariably granted. In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), however, the Board held that an immigration judge could grant such a motion filed by either party over the objection of the other party. Thus, a respondent can seek this relief even if ICE counsel does not agree. Conversely, because a party's opposition to administrative closure is a factor that an immigration judge must consider under *Matter of Avetisyan*, a respondent also can object to an ICE motion for administrative closure.

Attorneys should bear in mind that there may be strategic advantages to termination or administrative closure, or even continuing on to the merits, depending on a particular respondent's situation. Attorneys should thoroughly weigh options before choosing a particular course of action. Notably, there is no legal authority requiring that a case be administratively closed or terminated before DHS grants deferred action.

More problematic is the question whether DHS will require respondents to join a motion to terminate or administratively close the removal case as a condition of a DHS grant of deferred action. DHS has not addressed this question. Assuming an individual can decline an ICE offer to join a motion for termination or administrative closure without losing eligibility for DACA, it remains to be seen whether the offer then expires or can be accepted at a later time (e.g., after an

adverse determination on the merits by an immigration judge). During ICE's review of pending cases for prosecutorial discretion, individuals in removal proceedings have frequently faced a "take it or leave it" dilemma, with administrative closure offers not offered a second time if initially declined. However, if DHS determines that an individual meets the eligibility criteria for deferred action, this determination should not be affected if the individual opts to pursue other forms of relief first. Further, given that deferred action is available to those with final orders of removal, it is reasonable to expect that offers would be "renewed" at the end of removal proceedings if a more favorable outcome were not achieved.

Will individuals who receive deferred action be eligible to work?

Yes. Under 8 C.F.R. § 274(a).12(c)(14), individuals who receive deferred action may apply for and obtain employment authorization for the period of deferred action if they can establish "an economic necessity for employment."[17] An application for employment authorization should be filed concurrently with an application for DACA. USCIS expects to post both application forms on its website on August 15, 2012. An individual who applies for and receives a renewal of deferred action separately must request a renewal of his or her employment authorization. At this point, there is little guidance on what evidence is necessary to establish economic necessity, but it is important to distinguish between economic necessity and economic hardship. In practice, any individual demonstrating a need to lawfully be able to accept employment should be eligible for work authorization.

What is the application process for DACA?

On or after August 15, 2012, applicants – other than those in detention – should send a completed application form and supporting documentation, along with Form I-765 (Application for Employment Authorization) and the requisite fees totaling $465,[18] to the USCIS lockbox. All applicants must submit to biometric and biographic background checks prior to receiving deferred action. USCIS will notify applicants in writing if more information or evidence is needed, or if an in-person appearance will be required. Applicants will be able to track the status of their applications online, and will receive a final written decision from USCIS.

Are fee waivers available under DACA?

There are no fee waivers associated with DACA, but — in accordance with 8 C.F.R. § 103.7(d) — limited fee exemptions are available. To request a fee exemption, attorneys should send USCIS a letter and supporting documentation establishing that their clients:

(i) are under 18, homeless, in foster care or lacking parental or familial support for other reasons, and have an income under 150% of the U.S. poverty level;

[17] Economic necessity, which also governs requests for employment authorization by U visa holders, does not require a showing of economic hardship.
[18] This includes $380 for employment authorization and $85 for biometrics.

(ii) cannot care for themselves because they suffer from a serious, chronic disability and have an income under 15% of the U.S. poverty level; or

(iii) at the time of the request, have accumulated $25,000 or more in debt in the past 12 months as a result of unreimbursed medical expenses for themselves or an immediate family member, and their income is less than 150% of the poverty level.

Requests for such exemptions must be filed and granted ***before*** an individual files a DACA application without the requisite fee.

Acceptable evidence will include:

- Affidavits from community-based or religious organizations to establish homelessness or lack of parental or familial support;

- Copies of tax returns, bank statements, pay stubs, or other reliable evidence of income;

- Affidavits from the applicant or responsible third parties attesting that the applicant does not file tax returns, has no bank accounts, and/or has no income;

- Copies of medical records, insurance records, bank statements, or other reliable evidence of unreimbursed medical expenses.

USCIS will issue requests for evidence (RFEs) if more information is needed. Beginning August 15, 2012, USCIS will post additional information on procedures for requesting a fee exemption on its website at www.uscis.gov/childhoodarrivals.

Will individuals who apply for DACA be permitted to travel outside the United States?

Individuals who travel outside the United States ***after*** August 15, 2012 — either before they apply for DACA or while their applications are pending — will be deemed not to have fulfilled the continuous residence requirement. Any departure after that date, but before a grant of deferred action (regardless of being brief, innocent and casual) will disqualify an applicant for DACA. Thus, all clients should be warned of the consequences of travel prior to a grant of deferred action.

Individuals who have been granted deferred action may be permitted to travel abroad, but only pursuant to a grant of advance parole from USCIS. After receiving deferred action, individuals seeking to travel outside the United States must apply for advance parole by filing Form I-131, Application for Travel Document and paying the requisite fee of $360. USCIS will generally grant advance parole to a DACA recipient only if the purpose of the intended travel is humanitarian, educational or employment-related. The advance parole must have been granted prior to any departure.

Even if travel abroad is permitted via advance parole, it may not be in your client's best interest. Although unlawful presence will not accrue during any deferred action period, individuals who

have reached the age of eighteen may be subject to the inadmissibility bars if they have previously been unlawfully present in the United States for more than 180 days. The Board's recent decision in *Matter of Arrabally & Yerrabelly*, 25 I&N 771 (BIA 2012), however, hints at a possible advantage to travel on advance parole. *Arrabally* held that a departure under advance parole after more than 180 days of unlawful presence does not trigger the three- and ten-year bars.

If a person has already triggered inadmissibility under 212(a)(9)(B) or (C), travel under advance parole will not cure the previously incurred bar. Under *Arrabally*, an argument could be made that individuals who already have a path to residency, but who are not currently eligible to adjust (such as an EWI immediate relative of a U.S. citizen, entering as a parolee), may find they are not only eligible to apply to adjust after travel on advance parole (because they now are in parole rather than EWI status), but also need not apply for a waiver of the three- or ten-year bar. Given the short time *Arrabally* has been in play and the lack of guidance on how USCIS may treat such departures, attorneys should monitor developments in this area before advising clients on the impact of travel.

Under no circumstances should an individual granted deferred action travel abroad without a grant of advance parole. Such an individual will be subject to any applicable grounds of inadmissibility upon returning to the United States.

Will family members of individuals who receive deferred action under this policy also be granted deferred action?

Only individuals who meet all the eligibility criteria will be granted deferred action under the new memorandum. Family members, including dependents who do not independently qualify, will not receive deferred action pursuant to this process. Although such family members may still be eligible for prosecutorial discretion pursuant to prior guidance issued by USCIS or ICE or the ongoing review of pending removal cases announced in August 2011, there is no affirmative application process for such relief. Thus, if family members are not currently in removal proceedings, not likely to be placed into proceedings, and not under an imminent threat of deportation, they will not be able to apply for prosecutorial discretion under the prior guidance.

There is no indication that family members of individuals who receive deferred action will have a heightened risk of immigration enforcement. To the contrary, confidentiality provisions outlined in the supplemental FAQs indicate that these individuals are not only not at any increased risk, but the fact that a family member has been granted deferred action may be a positive discretionary factor in evaluating enforcement priorities.

Can a grant of deferred action be extended beyond two years?

Yes. Unless a grant of deferred action is terminated prematurely, a recipient may request a renewal of both deferred action and employment authorization. Like the original applications, these requests will be considered on a case-by-case basis.

How can I prepare my clients to apply for deferred action under the new memorandum?

Individuals who qualify for relief should begin gathering the documents necessary to establish their eligibility. In addition to the documents discussed above, applicants should obtain certified copies of their birth certificates or passports to establish their identity and age.

Can individuals appeal a denial of deferred action under the new memorandum?

No. However, applicants or their attorneys can contact the National Customer Service Center at 1-800-375-5383 to request review if (i) USCIS denied the DACA application based on abandonment in a case where the applicant responded to a Request for Evidence within the prescribed time; or (ii) USCIS mailed the Request for Evidence to the wrong address despite the applicant's prior submission of a Form AR-11 (Change of Address) or online change of address. If you believe that your client's DACA application was improperly denied, please be sure to complete AILA's survey in order to help AILA and the LAC monitor implementation and advocate for improved policies and procedures. There is no prejudice to filing a new application.

What will happen to individuals whose requests for deferred action are denied?

Attorneys are advised to warn their clients in writing that even for prima facie eligible cases, deferred action is not guaranteed. The warning should further explain that applicants will be revealing and, in most cases, documenting their removability to a government agency that can initiate removal proceedings.[19] If USCIS denies deferred action to an applicant subject to a final order of removal, that individual may still request prosecutorial discretion pursuant to the prior guidance issued by ICE on June 17, 2011, or the ongoing review of pending removal cases announced in August 2011. Such requests may be submitted to the local ICE Office of Chief Counsel or Field Office Director, as appropriate.

In cases where USCIS denies an individual's request for deferred action and the individual is not subject to a final order of removal, USCIS will apply its existing Notice to Appear guidance governing referral of cases to ICE and issuance of notices to appear. This guidance prioritizes the prosecution of cases involving criminal convictions, fraud, and threats to national security or public safety.[20] In addition, DHS said in the supplemental FAQs that individuals who knowingly make a misrepresentation or knowingly fail to disclose facts in the deferred action application process "will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States." Other cases

---

[19] Confidentiality provisions outlined in the most recent FAQs indicate that such information is protected from disclosure for the purpose of immigration enforcement unless the requestor meets the criteria for the issuance of a notice to appear.

[20] In accordance with its existing guidance, USCIS also will continue to issue notices to appear as required by statute or regulation, including in cases involving denials of Form I-751 (Petition to Remove the Conditions of Residence), denials of Form I-829 (Petition by Entrepreneur to Remove Conditions), terminations of refugee status, denials of NACARA 202 and HRIFA adjustments, asylum referrals, termination of asylum or withholding of removal, positive credible fear findings, and certain NACARA 203 cases.

will be referred to ICE for removal proceedings only where DHS determines that there are "exceptional circumstances," a term which is not defined.

USCIS may share information regarding applicants, as well as their family members and guardians, with national security and law enforcement agencies, including ICE and CBP, for purposes unrelated to immigration enforcement, including for assistance in consideration of DACA applications, to identify or prevent fraudulent claims, for national security purposes, or to investigate or prosecute a criminal offense.