

PRACTICE ADVISORY¹

December 23, 2014

PREVENTING THE REMOVAL OF INDIVIDUALS ELIGIBLE FOR DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (DAPA) OR EXPANDED DEFERRED ACTION FOR CHILDHOOD ARRIVALS (EXPANDED DACA)

On November 20, 2014, President Obama [announced](#) a series of reforms modifying immigration policy (“Executive Action”). After the announcement, DHS Secretary Johnson issued agency-wide memoranda expanding deferred action and revising immigration enforcement priorities. This advisory offers strategies to prevent the removal of individuals who qualify for the expanded Deferred Action for Childhood Arrivals program (“Expanded DACA”) or the newly-created prosecutorial discretion program for certain parents of U.S. citizens and lawful permanent residents, Deferred Action for Parental Accountability (“DAPA”), or otherwise are not an enforcement priority.

Two DHS memoranda in particular impact individuals currently in immigration custody and/or removal proceedings.

- (1) [*Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents*](#) (“*Deferred Action Memo*”): This memo instructs Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to immediately begin identifying individuals in their custody, as well as newly encountered individuals, who may be eligible for DAPA or Expanded DACA. In addition, ICE must review pending removal cases, seek administrative closure or termination of cases of those who meet the eligibility criteria, and refer these cases to USCIS for case-by-case determinations.
- (2) [*Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*](#) (“*Enforcement Memo*”): This memo provides additional information about DHS’s arrest, detention, and removal policy and creates new categories of enforcement priorities which may impact the availability of DAPA.² This memo indicates that the criteria identified in

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² The *Enforcement Memo* rescinds the following prosecutorial discretion memoranda: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent*

the memo apply to individuals in removal proceedings.³ In addition to memoranda, [ICE](#) and [USCIS](#) have issued FAQs and additional guidance on their websites.

Several discrepancies exist between the *Enforcement Memo* and the *Deferred Action Memo*. Some of them will be discussed below, but continue to check our websites for future advisories that provide additional clarity.

Who qualifies for the Expanded Deferred Action for Childhood Arrivals (“Expanded DACA”)?

The *Deferred Action Memo* supplements and amends the June 15, 2012 memo that created the DACA program, [Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children](#). The *Deferred Action Memo* eliminates the “age cap,” so a person must no longer have been “under the age of 31 on June 15, 2012” to qualify. It also advances the start date for the continuous residence period from June 15, 2007 to January 1, 2010. In addition, the memo extends the DACA and accompanying work authorization period to three, instead of two, years.⁴ To initially qualify for the expanded DACA program,⁵ individuals must demonstrate that they:

- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since January 1, 2010 up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of requesting consideration of deferred action;
- Had no lawful status on June 15, 2012;

with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens, June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases*, November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations*, December 8, 2009.

³ See *Enforcement Memo*, at 2 (“In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.”).

⁴ For more information on the former DACA program’s eligibility criteria, see American Immigration Council Practice Advisory, [Deferred Action for Childhood Arrivals](#).

⁵ For more information about eligibility criteria under DACA and DAPA, please visit the Administrative Relief Resource Center. A joint practice advisory from the American Immigration Council, the National Immigration Project of the National Lawyers Guild (NIPNLG) and the American Immigration Lawyers Association is forthcoming.

- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, a significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Who qualifies for the Deferred Action for Parental Accountability (DAPA) program?

To qualify for DAPA, individuals must demonstrate that they:

- Have, as of November 20, 2014, a son or daughter of any age who is a U.S. citizen or lawful permanent resident;
- Have continuously resided in the United States since before January 1, 2010;
- Were physically present in the United States on November 20, 2014 *and* at the time they requested consideration of deferred action with USCIS;
- Have no lawful status on November 20, 2014;
- Are not enforcement priorities as defined in the *Enforcement Memo*. The *Enforcement Memo* creates three new priority enforcement categories.⁶
- Present no other factors that, in the exercise of discretion, make a grant of deferred action inappropriate.

USCIS has indicated that detailed explanations, instructions, regulations, and forms will become available in the coming months. Individuals may [request](#) e-mail updates from USCIS. USCIS will also post updates on its website, Facebook, and Twitter.

How will an individual with a final order of removal be treated under the Deferred Action memos?

The *Deferred Action Memo* provides that individuals with final removal orders⁷ may qualify for Expanded DACA or DAPA. However, with respect to individuals with recent final removal

⁶ Each of the three categories of enforcement priorities contains “exception” language that permits DHS not to pursue enforcement with regard to a particular individual who otherwise is a priority. The *Enforcement Memo* lays out the factors that can be considered in determining whether DHS should apply the exception. For a preliminary analysis of the criminal bars to DAPA, see Immigrant Legal Resource Center and NIPNLG Practice Advisory, [Practice Advisory for Criminal Defenders: New “Deferred Action for Parental Accountability” \(DAPA\) Immigration Program Announced by President Obama](#). Note that this Practice Advisory only addresses the criminal and public safety bars to DAPA, not bars related to violations of immigration law.

⁷ The *Enforcement Memo* cross-references the 8 CFR § 1241.1 definition of the term “final order.” That regulation provides that “[a]n order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
- (b) Upon waiver of appeal by the respondent;

orders—i.e., those with final removal orders entered on or after January 1, 2014—it remains to be seen whether DHS will grant deferred action under the DAPA program. That is because the *Deferred Action Memo* provides that a person is ineligible for DAPA if he or she is an enforcement priority, and the *Enforcement Memo* identifies as an enforcement priority “those who have been issued a final order of removal on or after January 1, 2014.” This practice advisory will be updated as soon as DHS provides clarification regarding this apparent tension between the *Deferred Action Memo* and the *Enforcement Memo*. In the meantime, counsel with clients who potentially qualify for DAPA may wish to appeal removal orders issued by immigration judges, seek remand of cases now before a court of appeals, move to reopen removal orders rendered final in 2014, and take other steps that may prevent clients from having a final order of removal dated on or after January 1, 2014.

My client is in removal proceedings and meets the criteria for Expanded DACA or DAPA. What steps can I take to facilitate administrative closure or termination of proceedings?

If your client is eligible for Expanded DACA or DAPA under the *Deferred Action Memo* and his or her removal proceedings are pending before an immigration judge or the Board of Immigration Appeals, ICE may identify your client’s case without any action on your part.⁸ The *Deferred Action Memo* “instruct[s]” ICE to review pending removal cases “and seek administrative closure or termination” of cases where the individual is eligible for Expanded DACA or DAPA. However, the ICE Executive Action website does not mention any affirmative duty by ICE, stating that the individual in proceedings should submit his or her administrative closure request to ICE. Given this inconsistency and our experience with the DACA program to date, it may be unwise to wait for ICE to initiate the process of administratively closing or terminating removal proceedings. As ICE recommends on its [website](#), you may submit written requests for prosecutorial discretion to the ICE Office of the Principal Legal Advisor (OPLA) at the mailbox of the [OPLA field office](#) that is handling the case. In the request, include your client’s full name, alien registration number, and the case status, and describe in detail the reasons why your client does not fall within the DHS enforcement priorities, and how he or she

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- (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;
 - (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;
 - (e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or
 - (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

⁸ ICE has not provided guidance regarding steps individuals should take when their cases are pending before a court of appeals. If your client’s case is pending before a court of appeals, please contact the American Immigration Council at clearinghouse@immcouncil.org.

meets the eligibility criteria for Expanded DACA or DAPA.⁹ We also recommend that you submit any available corroborating evidence. The ICE Executive Action website provides that OPLA should consider such requests promptly and respond.

If the ICE trial attorney refuses to grant prosecutorial discretion and will not join a motion to administratively close or terminate your client's case, consider filing a motion with the immigration court requesting termination or administrative closure, citing *Matter of Avetisyan*.¹⁰ If the immigration judge denies your motion based on a finding that the individual is not eligible for Expanded DACA or DAPA or for another reason, you still may file a motion to continue removal proceedings while the respondent pursues a deferred action request directly with USCIS. Practitioners also should consider other types of prosecutorial discretion requests, if applicable, such as asking ICE not to issue or to cancel a Notice to Appear that has been issued but not filed with the Immigration Court.¹¹

My non-detained client has a removal order, is scheduled for removal, and meets the criteria for Expanded DACA or DAPA. What should I do?

Promptly contact the Enforcement and Removal Operations (ERO) officer responsible for your case. You may also call the ICE ERO Detention Reporting and Information Line, toll-free, at 1-888-351-4024. ICE further recommends contacting the local OPLA office or calling the USCIS National Customer Service Center toll-free at 1-800-375-5283. At this point, however, it is unclear what steps USCIS may be able to take in this situation.

My client is facing imminent removal. What should I do?

In addition to contacting the ERO Detention Reporting and Information Line and emailing OPLA to request prosecutorial discretion, it is advisable to file a request for a judicial or administrative stay of removal.¹² It also may be prudent to file a copy of the USCIS request with

⁹ See American Immigration Council Practice Advisory, [Prosecutorial Discretion: How to Advocate for your Client](#), for information about how an attorney can influence an immigration officer to exercise favorable prosecutorial discretion. An update to this practice advisory is forthcoming.

¹⁰ 25 I&N Dec. 688 (BIA 2012) (providing that immigration judges and the BIA may administratively close removal proceedings, even if a party opposes the closure, after weighing certain relevant factors).

¹¹ For more information, see American Immigration Council Practice Advisory, [Notices to Appear](#).

¹² Pursuant to 8 C.F.R. § 241.6, ICE may issue an administrative stay of removal. In addition, a court of appeals may issue a stay of removal if there is pending petition for review of the removal order. An individual may request a judicial stay by filing a motion concurrently with a petition for review or after a petition for review has been filed. See American Immigration Council, NIPNLG and New York University School of Law Immigrant Rights Clinic Practice Advisory, [Seeking a Judicial Stay of Removal in the Court of Appeals](#).

ICE. Some practitioners have reported that elected officials and community organizers were helpful in supporting requests to stay the execution of a removal order.

My client is in immigration custody, but is eligible for DAPA or Expanded DACA. What steps should I take to get my client out of detention?

You should immediately notify ICE that your client meets the criteria for one of these programs and explain why he or she is not an enforcement priority. The ICE Executive Action website instructs detainees to identify themselves to ICE officers according to the detainee-staff communication procedures in the detention facility’s orientation handbook, which should have been provided at the time of booking. Legal representatives may call the ICE ERO Detention Reporting and Information Line at 1-888-351-4024 to request prosecutorial discretion. The *Enforcement Memo* provides additional criteria that DHS can take into account when considering a request for release from detention.¹³ For example, unless a person falls under one of the enforcement priorities or is subject to mandatory detention, he or she should only be detained under extraordinary circumstances. Officers and special agents will have to obtain approval from the ICE Field Office Director to detain someone who is known to be suffering from serious physical or mental illness; who is disabled, elderly, pregnant, or nursing; who demonstrates that he or she is the primary caretaker of children or an infirm person, or whose detention is otherwise not in the public interest.

My client is not eligible for Expanded DACA or DAPA, but does not appear to be an enforcement priority. What should I do if he or she is in removal proceedings or scheduled to be deported?

The *Enforcement Memo* takes effect on January 5, 2015.¹⁴ Nevertheless, you may wish to seek a favorable exercise of prosecutorial discretion from ICE or CBP at this time. The ICE Executive Action website repeatedly indicates that individuals who believe they are eligible for prosecutorial discretion should contact ICE. Under the *Enforcement Memo*, resources should be devoted, “to the greatest degree possible,” to those identified as enforcement priorities. If a person does not fit within one of the enforcement priority categories, ICE may pursue his or her removal only if, in the judgment of an ICE Field Office Director, removing the person would “serve an important federal interest.”¹⁵

Can I ask ICE to reconsider decisions made in responses to requests for prosecutorial discretion, including requests to be released from detention?

ICE’s Executive Action website states that “there is no formal reconsideration process.” However, an attorney may contact the supervisor of the DHS employee who made a particular decision to request a further explanation. The website also instructs that you may contact OPLA to request review of the decision in a client’s case.

¹³ *Enforcement Memo*, at 5.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 5.

Where can I find more information about these programs?

Advocates can find information about these new programs and other executive actions at:

- USCIS Webpage, [*Executive Actions on Immigration*](#)
- ICE Webpage, [*Immigration Action*](#)
- DHS Webpage, [*Fixing Our Broken Immigration System Through Executive Action – Key Facts*](#)
- American Immigration Council, [*A Guide to the Immigration Accountability Executive Action*](#)

Please complete [this survey](#) to help us monitor ICE and CBP’s implementation of these new policies. Please contact clearinghouse@immcouncil.org if you have additional questions.