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PRACTICE ADVISORY¹

August 27, 2014

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 15, 2012, then Department of Homeland Security (DHS) Secretary Janet Napolitano issued a [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 applied 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 are to be decided on a case-by-case basis, and requestors must pass a background check before they can receive deferred action. The memorandum builds on prior DHS guidance regarding the exercise of prosecutorial discretion in low priority cases.²

Since June of 2012, USCIS has issued [FAQs](#) providing more details about the eligibility criteria and request process for Deferred Action for Childhood Arrivals (DACA), as well as a form and instructions. USCIS will receive and review DACA requests for all individuals except those in immigration detention, who instead should contact their deportation officer, the relevant “Jail Liaison,” the ICE Field Office Director or the ICE Detention Reporting and Information Line at 1-888-351-4024 or submit an email to ERO.INFO@ice.dhs.gov.³ Individuals who meet the eligibility criteria for Initial DACA or a different set of criteria for DACA Renewal may request Initial DACA or DACA Renewal by submitting [Form I-821D](#) (Consideration of Deferred Action for Childhood Arrivals), accompanied by [Form I-765](#) (Application for Employment

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² For information on prior prosecutorial discretion guidance, see the American Immigration Council’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).

³ ICE Deferred Action for Childhood Arrivals Home Page, <http://www.ice.gov/daca/> (last visited June 14, 2014).

Authorization), [Form I-765WS](#) (Worksheet), and the requisite fees totaling \$465, unless exempt. Individuals are required to submit these three forms regardless of whether they are requesting Initial DACA or DACA Renewal. Note that the I-821D will not be considered if not concurrently filed with Form I-765, Form I-765WS, and the required fees.

The DACA policy does not supersede ICE's previously issued prosecutorial discretion guidance outlined in the [June 17, 2011 Morton memo](#). For clients in removal proceedings who do not meet the narrow eligibility criteria under DACA, attorneys should 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.

This edition of this practice advisory includes information about the DACA Renewal process, as well as general information about deferred action, Initial DACA requests, and ancillary issues.

TABLE OF CONTENTS

I. GENERAL INFORMATION..... 5

- What is deferred action? 5
- Will individuals who receive deferred action be eligible to work? 5
- Will individuals who request DACA be permitted to travel outside the United States? 6
- Can a grant of deferred action be extended beyond two years?..... 9
- Will family members of individuals who receive deferred action under this policy also be granted deferred action?..... 9
- What will happen to individuals whose requests for deferred action are denied? 9
- What will happen to individuals who meet the eligibility criteria but are stopped or arrested by ICE or CBP? 10
- Can individuals appeal a denial of deferred action under the DACA memorandum?..... 11
- Can an individual pursue DACA as well as other relief? 11

II. INITIAL DACA ELIGIBILITY 12

- What are the eligibility criteria for Initial DACA? 12
- Is there a minimum age requirement for DACA requestors? 12
- Under what circumstances may requestors admitted into the United States as nonimmigrants satisfy the requirement of having “no lawful immigration status on June 15, 2012”? 13
- How will USCIS determine whether an individual has continuously resided in the United States? 13
- What constitutes a “brief, casual, and innocent” absence from the United States? 13
- Are individuals eligible for DACA if they came to the United States before turning 16, subsequently departed, returned after reaching age 16 but prior to June 15, 2007, have continuously resided here since then, and satisfy all other requirements? 14
- Which requestors may be eligible for DACA under the “currently in school” requirement, and what additional information will they need to provide to request a renewal? 14
- How will DHS determine whether or not a particular education program is a qualifying education program for purposes of DACA? 15
- What crimes render a requestor ineligible for DACA?..... 15
- How will DHS treat juvenile delinquency adjudications? 17
- Will expunged convictions be considered under the new policy? 18
- What other conduct-based activities are bars to deferred action?..... 18
- What constitutes an exceptional circumstance to overcome a bar to DACA?..... 20
- Are individuals who are currently in removal proceedings or subject to a final removal order or a voluntary departure order eligible for DACA? 20
- Can individuals request DACA if they were previously offered, but did not accept an offer of administrative closure, or if a request for prosecutorial discretion was declined? 21

- Why does Form I-812D request demographic information in the Processing Information Section? Where can I find more information about completing this section? 22

III. INITIAL DACA APPLICATION PROCESS 22

- What is the process for requesting Initial DACA? 22
- What Social Security numbers are DACA applicants required to provide? 22
- How should individuals who were waved through inspection or who entered the United States with fraudulent documents characterize their status at the time of entry? 23
- What documentation can be used to establish a requestor’s identity? 23
- What documentation can be used to establish immigration status on June 15, 2012? 23
- What documentation can be used to establish physical presence and continuous residence in the United States? 24
- What documentation can be used to establish that an individual has fulfilled the educational requirements? 26
- What documentation can be used to establish that an individual has fulfilled the military service requirements? 26
- Will USCIS accept affidavits to fulfill the eligibility criteria for DACA? 27
- Will USCIS consider circumstantial evidence to establish eligibility for DACA? 27
- What additional documents must requestors who have been arrested submit? 28

IV. DACA RENEWAL ELIGIBILITY 29

- What are the eligibility criteria for DACA Renewal? 29
- If an individual met the Initial DACA education requirement because he or she was “currently in school” at the time of his or her initial request and then subsequently stopped attending school, will that individual be disqualified from renewal? 30
- How does travel abroad after receiving DACA impact an individual’s eligibility for DACA Renewal? 30
- When a DACA recipient requests DACA Renewal, will USCIS consider the requestor’s entire criminal history or only his or her criminal history within the most recent DACA period? 30

V. DACA RENEWAL APPLICATION PROCESS 30

- When should a DACA recipient request renewal? 30
- Will USCIS notify DACA recipients of impending expiration dates? 31
- When must a DACA Renewal requestor submit supporting evidence? 31
- What should a complete DACA Renewal request contain? 31
- What is the process for requesting DACA Renewal for individuals who were initially granted DACA by Immigration and Customs Enforcement? 32
- How can an individual determine which “USCIS Office” to identify in response to question 11 on Form I-765? 32

VI. ANCILLARY ISSUES 32

- Are attorneys and accredited representatives who provide pro bono assistance to DACA requestors and individuals at group workshops required to enter an appearance? 32

- Are fee waivers available under DACA? 33
- What should I do if my client appears eligible for DACA but has voluntary departure? 33
- What are the potential immigration or criminal consequences of submitting certain documents or information as evidence with Form I-821D? 34
- What are the potential immigration consequences for an employer of providing a DACA requestor with information regarding his or her employment? 34
- How can I determine whether my client has been convicted of any disqualifying crimes? 35
- Will deferred action requestors accrue unlawful presence while their requests are pending? .. 35
- Can individuals in removal proceedings who are granted deferred action influence whether their cases are terminated, administratively closed or pursued? 36

I. GENERAL INFORMATION

What is deferred action?

Deferred action is a discretionary decision by DHS not to pursue enforcement against a person for a specific period. Though an individual granted deferred action is considered by DHS to be lawfully present during the period deferred action is in effect, a grant of deferred action does not alter an individual’s existing immigration status or provide a path to citizenship.⁴ Thus, deferred action cannot be used to establish eligibility for an immigration status that requires maintenance of lawful status. Deferred action, however, may allow a person to qualify for certain state benefits, such as drivers licenses, although state requirements vary.

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 status⁵ or while a request for Initial DACA or DACA Renewal is pending, assuming that the individual filed a request before reaching age 18. DHS can renew or terminate a grant of deferred action at any time, with or without a Notice of Intent to Terminate.

Will individuals who receive deferred action be eligible to work?

Yes. Under 8 C.F.R. § 274a.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.” An [application](#) for employment authorization and the accompanying worksheet should be filed concurrently with a DACA request. According to the Form I-765 [instructions](#), the correct eligibility category for a DACA requestor to enter in response to question 16 on the I-765 is (c)(33). An individual who applies for and receives a renewal of deferred action separately must request a renewal of his or her employment authorization. Renewal requestors are advised to mark the box on Form I-765 indicating they are

⁴ See USCIS [FAQs](#); ICE Detention and Removal Operations Policy and Procedure Manual §§ 1.2, 20.8(a) (2006).

⁵ 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.

applying for “Renewal of my permission to accept employment” and to include a copy (front and back) of their employment authorization document.

There is little guidance on what evidence is necessary to establish economic necessity for purposes of DACA, but it is important to distinguish between economic necessity and economic hardship. Economic necessity also governs requests for employment authorization by U visa holders, who are not required to demonstrate economic hardship. In practice, any individual with an approved DACA request who demonstrates a need for employment should be eligible for work authorization. The DACA Standard Operating Procedures Manual provides for “a general presumption that DACA requestors will need to work given their undocumented circumstances and the fact that they are not generally anticipated to have independent means.”⁶ The manual further provides that “absent evidence of sufficient independent financial resources, the Form I-765WS is sufficient to establish economic need, without any further economic analysis.”

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

Individuals who travel outside the United States *after* August 15, 2012 — either before they request DACA or while their requests are pending — will not be considered for DACA. Thus, all clients should understand that *any* departure after August 15, 2012, but before a grant of deferred action, will disqualify them from receiving DACA.

Individuals who have been granted deferred action may be permitted to travel abroad, but only pursuant to a grant of advance parole from USCIS.⁷ 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 \$360 filing fee. At this time, individuals may not concurrently request DACA and advance parole, although USCIS has indicated that it is reviewing this policy. If USCIS modifies this policy, it will update the Frequently Asked Questions page accordingly. USCIS will determine whether the purpose of travel is justifiable based on the individual circumstances described in an individual’s request. Generally, however, USCIS will 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. The travel authorization period for advance parole grants for DACA recipients has been limited to the period of time specified in the application.

The FAQs state that humanitarian purposes for travel include travel to obtain medical treatment, attend a family member’s funeral services, or visit an ill relative. Educational purposes for travel include semester-abroad programs and academic research, while employment-related reasons for travel include overseas assignments, interviews, conferences, training, or client meetings. The FAQs explicitly exclude travel for vacation as an acceptable basis for advance parole. The FAQs

⁶ U.S. Department of Homeland Security National Standard Operating Procedures, “Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765), version 2.0” (April 4, 2013) at 70, *available at* <http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf> (accessed June 25, 2014) [hereinafter “[DACA SOP](#)”].

⁷ For more information about DACA and advance parole, see the American Immigration Council and CLINIC Practice Advisory, [Advance Parole for Deferred Action for Childhood Arrivals \(DACA\) Recipients](#) (August 27, 2013).

updated on June 5, 2014 provide that DHS is “reviewing eligibility criteria for advance parole.” If USCIS modifies its advance parole policy, it will update the Frequently Asked Questions page accordingly.

Individuals who receive deferred action but are subject to a final order of removal may apply for advance parole. However, the FAQs caution that before leaving the United States, such individuals should seek to reopen their cases before the immigration courts and obtain administrative closure or termination of their removal proceedings prior to departure.⁸ Otherwise, their departures may cause them to be “considered deported or removed, with potentially serious future immigration consequences.” Counsel representing a DACA recipient with a final order of removal and advance parole should consider contacting the relevant ICE Office of the Chief Counsel to pursue a Joint Motion To Reopen.⁹

If a person has already triggered inadmissibility under 212(a)(9)(B) or (C), travel under advance parole will not cure the previously triggered bar.¹⁰

Even if travel abroad is permitted via advance parole, it may not be in an individual’s best interest. A DACA recipient granted advance parole who returns to the United States will be considered an applicant for admission.¹¹ As such, the inspecting immigration officer may deny entry into the United States if the officer finds that any of the inadmissibility grounds apply.¹² Thus, prior to departing the United States, DACA recipients with advance parole must consider not only whether they run afoul of the unlawful presence bars, but also all other inadmissibility grounds except for INA § 212(a)(7) (documentation requirements). Although unlawful presence will not accrue during any deferred action period, individuals may be subject to the inadmissibility bars if they have previously been unlawfully present in the United States for more than 180 days.¹³ Counsel should also pay particular attention to the criminal inadmissibility grounds identified at INA § 212(a)(2), which are different from than the crime disqualifications

⁸ If the requestor’s case is before the Board of Immigration Appeals (BIA) and the case is administratively closed, departure will automatically withdraw the appeal. 8 C.F.R. § 1003.4.

⁹ See ICE (OCC, ERO, HSI) & CO AILA Liaison Meeting Minutes (May 6, 2013), AILA InfoNet Doc. No. 13071540. (Posted 7/15/13). Joint Motions to Reopen are not subject to the time and number limitations that ordinarily govern motions to reopen. 8 CFR § 1003.2(c)(3)(iii).

¹⁰ A person travelling to U.S. territories may be subject to grounds of inadmissibility. See 8 C.F.R. 235.5.

¹¹ Form I-131 instructions at 5.

¹² See generally INA §§ 212(a) (inadmissibility grounds); 235(a) and (b) (inspection of applicants for admission); 8 C.F.R. § 235.1(f)(1) (applicants for admission must establish entitlement to enter).

¹³ Minors are protected by statutory exceptions under INA § 212(a)(9)(B), so no period of time in which a person was under 18 years of age will be taken into account when determining the period of unlawful presence for purposes of the three- and ten-year bar. However, this same protection does not extend to minors subject to the permanent bar under INA § 212(a)(9)(C). See [AFM 40.9.2\(b\)\(2\)](#) (interpreting the exception at INA §212(a)(9)(B)(iii) to apply only to the three- and ten-year bar); [Memorandum from Paul Virtue, Acting Executive Associate Commissioner \(INS\), to Management Team \(March 31, 1997\)](#) (same).

for DACA.¹⁴ Counsel should be mindful that immigration-related fraud or misrepresentation and false claims to U.S. citizenship can bar admission.¹⁵

In some circumstances, DACA recipients may reap benefits from traveling abroad under advance parole. The Board of Immigration Appeals' (BIA or Board) decision in *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), creates an avenue for adjustment of status for certain admissible individuals who are the immediate relatives of U.S. citizens and whose last entry into the United States occurred without inspection. Under the specific circumstances of that case (where an applicant for adjustment appeared to have triggered the unlawful presence ground of inadmissibility solely because of travel on advance parole), the BIA held that a departure under advance parole after more than 180 days of unlawful presence did not trigger the three- and ten-year bars.¹⁶ The authors are aware of immediate relatives of U.S. citizens who (i) initially entered the United States without inspection; (ii) obtained DACA; (iii) traveled abroad pursuant to advance parole and were paroled into the United States; and then, (iv) in the wake of *Matter of Arrabally*, successfully adjusted their status to that of lawful permanent resident without a waiver of the three- or ten-year bar. Moreover, the Administrative Appeals Office recently found that an individual who left the United States on advance parole, and subsequently reentered had not made a departure within the meaning of INA § 212(a)(9)(B)(i)(II) and that a waiver of inadmissibility was thus unnecessary.¹⁷ Given the short time *Arrabally* has been in play and the lack of guidance on how USCIS may treat such departures,¹⁸ 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. A DACA recipient's departure from the United States without advance parole automatically terminates the individual's deferred action under DACA.

¹⁴ For example, an individual convicted of misdemeanor simple possession of a controlled substance and sentenced to fewer than 90 days in prison would not be ineligible for DACA on that basis alone, but would be inadmissible. *Compare* DACA FAQ with INA § 212(a)(2)(A)(i)(II).

¹⁵ INA § 212(a)(6)(C).

¹⁶ An advance parole authorization (Form I-512L) issued to a DACA recipient in May of 2013 and shared with the American Immigration Council provided as follows: "Traveling abroad and returning to the United States under a grant of advance parole is not, itself, a 'departure' for purposes of section 212(a)(9)(B). *Matter of Arrabally*, 25 I&N Dec. 771 (BIA 2012). **Obtaining advance parole authorization for parole will not relieve you of inadmissibility under 212(a)(9)(B)(i) on the basis of any other departure, past or future, undertaken without grants of advance parole.**" (Emphasis in original).

¹⁷ AILA InfoNet Doc. No. 12102242.

¹⁸ In a recent stakeholder meeting with AILA Liaison, USCIS stated that the agency generally is not holding adjustment of status applications impacted by *Matter of Arrabally* in abeyance pending guidance, with the narrow exception of cases where the applicant is inadmissible under section 212(a)(9)(A) of the Act. AILA InfoNet Doc. No. 14050844. (Posted 5/8/14).

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 requests, these requests will be considered on a case-by-case basis. The DACA Renewal process is discussed in greater detail below.

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 DACA memorandum. Family members, including dependents who do not independently qualify, will not receive deferred action pursuant to this process.

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

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.¹⁹ At a May 2014 USCIS Ombudsman Stakeholder meeting, the Ombudsman revealed that, as of April of 2014, USCIS had not issued any Notices to Appear to DACA requestors, but had referred 120 cases to ICE.²⁰ The Ombudsman did not know how many of those referrals to ICE resulted in the issuance of a Notice to Appear.

In addition, DHS said in the FAQs that any individual who knowingly makes a misrepresentation or knowingly fails to disclose facts in the deferred action request 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 will be referred to ICE for removal proceedings only where DHS determines that there are “exceptional circumstances,” a term which is not defined. However, USCIS has indicated that, even where a DACA requestor is referred to ICE for immigration purposes, information regarding that individual's family members or guardians will *not* be given to ICE for the purpose of seeking the removal of the family member or guardian.

¹⁹ 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 applications for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act (NACARA) and the Haitian Refugee Immigration Fairness Act (HRIFA) (limited provisions which provide relief to certain Nicaraguan and Cuban nationals and Haitian nationals, respectively), asylum referrals, termination of asylum or withholding of removal, positive credible fear findings, and certain NACARA 203 cases.

²⁰ USCIS had accepted 642,685 DACA requests as of March 31, 2014.

<http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-deferred-action-childhood-arrivals> (follow “Deferred Action for Childhood Arrivals Process (Through Fiscal Year 2014, 2nd Qtr)” hyperlink) (last visited July 14, 2014).

USCIS may share information regarding requestors, 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 requests, to identify or prevent fraudulent claims, for national security purposes, or to investigate or prosecute criminal offenses. Keep in mind, however, that all of these policies may be changed at any time.

It is recommended that attorneys warn their clients in writing that even for prima facie eligible cases, deferred action is not guaranteed. The warning should further explain that requestors will be revealing and, in most cases, documenting their removability to a government agency that can initiate removal proceedings.²¹ If USCIS denies deferred action to a requestor subject to a final order of removal, that individual may still request prosecutorial discretion pursuant to prior guidance issued by ICE.²² Such requests may be submitted to the local ICE Office of Chief Counsel or Field Office Director, as appropriate.

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

On June 15, 2012, former DHS 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.²³ On a June 18, 2012 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 file a DACA request with USCIS.

If ICE or CBP has pursued enforcement action in violation of this policy, contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (24 hours/day, 7 days/week) or the Detention Reporting and Information Line at 1-888-351-4024 or submit an email to ERO.INFO@ice.dhs.gov.

²¹ Confidentiality provisions outlined in the FAQs indicate that information regarding requestors is protected from disclosure for the purpose of immigration enforcement unless the requestor meets the USCIS criteria for the issuance of a Notice to Appear. Where an individual's case is referred to ICE for potential issuance of a Notice to Appear, information related to the individual's family or guardians "will not be referred to ICE for purposes of immigration enforcement against family members or guardians." Notably, this policy is subject to change.

²² For more information about ICE prosecutorial discretion policy, see the American Immigration Council's Practice Advisory, *Prosecutorial Discretion: How To Advocate For Your Client* (June 24, 2011).

²³ See also John Morton, Director, ICE, "Secretary Napolitano's Memorandum Concerning the Exercise of Prosecutorial Discretion for Certain Removable Individuals Who Entered the United States as a Child" (June 15, 2012), available at <http://1.usa.gov/16iv8hV>.

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

No. However, requestors or their attorneys can contact the National Customer Service Center (NCSC) at 1-800-375-5283 to have NCSC create a service request for the relevant USCIS service center if the requestor or counsel believe that the requestor actually did meet all of the DACA guidelines at the time the request was filed and the request was denied due to one of the following errors:

- USCIS denied the request based on abandonment when the requestor actually responded to a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) within the prescribed time;
- USCIS mailed the RFE or NOID to the wrong address although the requestor had submitted a Form AR-11, Change of Address, or the requestor changed his or her address online before USCIS issued the RFE or NOID;
- USCIS denied the request on the grounds that the requestor did not come to the United States prior to turning 16 years old, but the evidence submitted at the time of filing shows that the requestor did indeed arrive before that time;
- USCIS denied the request on the grounds that the requestor was under the age of 15 at the time of filing but not in removal proceedings, but the evidence submitted at the time of filing shows that the requestor was in removal proceedings when the request was filed;
- USCIS denied the request on the grounds that the requestor was 31 years old or older on June 15, 2012, but the evidence submitted at the time of filing shows that the requestor under the age of 31 as of that date;
- USCIS denied the request on the grounds that the requestor had lawful status on June 15, 2012, but the evidence submitted at the time of filing shows that the requestor indeed was in an unlawful immigration status on that date;
- USCIS denied the request on the grounds that the requestor was not physically present in the United States on June 15, 2012, but the evidence submitted at the time of filing shows that the requestor indeed was physically present on that date;
- USCIS denied the request due to the requestor's failure to appear at a USCIS Application Support Center (ASC) for biometrics collection, when the requestor in fact either did appear at a USCIS ASC for biometrics or timely requested rescheduling;
- USCIS denied the request due to failure to pay the filing fees for Form I-765, when the requestor in fact paid the fees.

Where this review does not produce the proper result, counsel may wish to request the assistance of the USCIS Ombudsman. To learn how to submit a request for case assistance with the Ombudsman, visit <http://www.dhs.gov/case-assistance>.

Can an individual pursue DACA as well as other relief?

Yes. However, an individual cannot be a visa holder and a DACA recipient at the same time, as DACA is reserved for individuals who do not have a lawful immigration status.

II. INITIAL DACA ELIGIBILITY

What are the eligibility criteria for Initial DACA?

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

- Were under the age of 31 on June 15, 2012;
- Arrived in the United States before turning 16;
- 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;²⁴
- On the date of the request, are in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate,²⁵ 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 occurring on different dates and arising out of different acts, omissions, or schemes of misconduct, 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. As with other applications, USCIS will evaluate a person's eligibility *at the time of filing*.

Is there a minimum age requirement for DACA requestors?

Individuals who have never been in removal proceedings or whose proceedings were terminated must be at least 15 years old at the time they request DACA. Individuals who are under 15 but otherwise meet the eligibility criteria for DACA can submit a request once they turn 15.

Individuals in removal proceedings or subject to a final removal or voluntary departure order can request DACA even if they are under 15. Eligible individuals who are in immigration custody may not submit a request to USCIS, but instead are advised to identify themselves to their ICE case officer, the Jail Liaison or the ICE Field Office Director. They may also notify ICE by contacting the Detention Reporting and Information Line at 1-888-351-4024 or by submitting an email to ERO.INFO@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).

²⁴ 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.

²⁵ We are aware of DACA approvals involving individuals who were unable to complete high school on account of a developmental disability.

Under what circumstances may requestors admitted into the United States as nonimmigrants satisfy the requirement of having “no lawful immigration status on June 15, 2012?”

Whether an individual admitted as a nonimmigrant will be able to establish that he or she lacked lawful immigration status on June 15, 2012 depends on the status in which he or she was admitted, the date of admission, and other factors.

With respect to individuals admitted for “duration of status” or for a period of time that extended past June 14, 2012, the **general rule** is that these individuals may not establish that they lacked lawful immigration status unless the Executive Office for Immigration Review issued a final order of removal before June 15, 2012. There are **two exceptions**. First, individuals meeting the description above who “aged out” of their dependent nonimmigrant status as of June 15, 2012 meet the “no lawful immigration status on June 15, 2012” requirement. Second, individuals whose status in the Student and Exchange Visitor Information System (SEVIS) is listed as terminated on or before June 15, 2012 also meet the requirement.²⁶

The recently updated DACA FAQs create special rules for those who entered on Border Crossing Cards and Canadians:

- Where an individual used a Border Crossing Card to obtain admission to the United States on or before May 14, 2012 and was not issued an I-94 at the time, DHS will presume that his or her status expired as of June 15, 2012.
- A Canadian citizen who entered the United States on or before December 14, 2011 following inspection by Customs and Border Protection but not issued an I-94 will be presumed to have lost his or her status as of June 15, 2012.

How will USCIS determine whether an individual has continuously resided in the United States?

To be considered for DACA, a requestor is to reside continuously in the United States for the entire period specified in the guidelines —namely, from June 15, 2007 until the present. The guidelines do not require uninterrupted physical *presence* in the United States from June 15, 2007 until the present. A requestor shall not be considered to have failed to maintain continuous residence by reason of a brief, casual, and innocent absence from the United States.

What constitutes a “brief, casual, and innocent” absence from the United States?

A brief, casual, and innocent absence from the United States before August 15, 2012 will not interrupt continuous residence for purposes of DACA.²⁷ An absence will be considered “brief, casual, and innocent” if it occurred on or after June 15, 2007, and before August 15, 2012 and:

²⁶ Certain nonimmigrants holding F (academic student), J (exchange visitors), and M (vocational students) visas are required to register with SEVIS. 8 C.F.R. § 214.13.

²⁷ 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); American Immigration Council Practice Advisory, “[Brief](#).”

- Was short and reasonably calculated to accomplish its purpose;
- Was not because of an order of exclusion, deportation, or removal;
- 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
- The purpose of the absence and the requestor’s actions while outside the United States were not contrary to the law.²⁸

Any departure on or after August 15, 2012 without advance parole necessarily interrupts an individual’s continuous residence for purposes of DACA.

Are individuals eligible for DACA if they came to the United States before turning 16, subsequently departed, returned after reaching age 16 but prior to June 15, 2007, have continuously resided here since then, and satisfy all other requirements?

Yes, provided the DACA requestor “established residence” in the United States prior to turning 16. Such individuals satisfy the eligibility requirements for DACA because they were under age 16 at the time of their initial entries and have continuously resided in the United States since June 15, 2007. For such a requestor to demonstrate that he or she “establish residence” prior to turning 16 years old, the requestor may submit records showing that the requestor attended school, worked in the United States, or lived in the United States for multiple years prior to turning 16. A requestor who meets these requirements also must demonstrate that he or she continuously resided in the United States from June 15, 2007 until the present to be eligible for DACA.

Which requestors may be eligible for DACA under the “currently in school” requirement, and what additional information will they need to provide to request a renewal?

Requestors who are enrolled in the following types of education programs may be considered “currently in school” for the purposes of DACA:

- A public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program meeting state requirements;
- An education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where the requestor is working toward such placement;

Casual and Innocent” Absences from the United States (January 29, 2013) (discussing the “brief, casual and innocent” standard under existing case law).

²⁸ USCIS has not indicated that this bar would apply to illegal conduct necessary to return to the United States, like an improper entry (INA § 275) or reentry (INA § 276). Moreover, we are aware of DACA approvals in which the applicant’s reentry into the United States occurred without inspection.

- An education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other state authorized exam (e.g., HiSET²⁹ or TASC³⁰) in the United States.

How will DHS determine whether or not a particular education program is a qualifying education program for purposes of DACA?

If an education program is funded, in whole or in part, by federal, state, county or municipal grants, then it is a qualifying education program. Alternatively, if an education program is administered by a nonprofit organization, it is a qualifying education program. Where an education program does not receive government funding and is not administered by a nonprofit organization, DHS will assess whether the program is administered by a provider of demonstrated effectiveness. In making this assessment, DHS will consider the duration of the program's existence; the program's track record in assisting students to obtain a regular high school diploma or its recognized equivalent, in passing a GED or other state-authorized exam (e.g., HiSet or TASC), or in placing students in postsecondary education, job training, or employment; and other indicators of the program's overall quality.

What crimes render a requestor ineligible for DACA?

Individuals are not eligible for Initial DACA or DACA Renewal if they have been convicted of a felony, a significant misdemeanor,³¹ 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. Attorneys relying on the exceptional circumstances exception are strongly encouraged to expressly request in the cover letter accompanying the application that USCIS consider the case under the exceptional circumstances rubric.³² Moreover, counsel should submit evidence supporting the assertion that the case presents exceptional circumstances. The FAQs specify that immigration-related offenses classified as felonies and misdemeanors under state laws (such as Arizona's SB 1070) do not make an individual ineligible for DACA. Presumably, criminal violations of federal immigration law will be considered.

With some notable exceptions, the term "conviction" in the DACA context has the same meaning as in the immigration context.³³ Pursuant to INA § 101(a)(48)(A), a conviction is a formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or

²⁹ HiSET is a high school equivalency exam offered in the following states: Iowa; Louisiana; Maine; Massachusetts; Missouri; Montana; Nevada; New Hampshire; New Jersey; Tennessee; and Wyoming. More information about the HiSET Exam is available at <http://hiset.ets.org/about/overview/>.

³⁰ TASC is a high school equivalency exam offered in the following states: Indiana; New Jersey; New York; Nevada; and West Virginia. More information about the TASC Exam is available at <http://www.tasctest.com/faqs-for-test-takers.html>.

³¹ This term does not appear in the Immigration and Nationality Act or elsewhere in the U.S. Code.

³² [DACA SOP](#) at 80.

³³ [DACA SOP](#) at 82.

nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty. The analysis of criminal convictions in the DACA context deviates from criminal-immigration analysis under the INA in three important respects: (i) juvenile adjudications are per se *not* convictions for DACA purposes; (ii) expunged convictions are also per se *not* convictions for DACA purposes; and (iii) suspended sentences do not count when calculating the number of days to which an individual was sentenced for purposes of the significant misdemeanor bar to DACA.

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 imprisonment of more than five days but not more 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, are felonies for purposes of DACA. 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 also should be cautious of federal tickets, which under the Assimilated Crimes Act, could be counted as a misdemeanor.³⁴

A "significant misdemeanor" for purposes of the DACA process includes a misdemeanor as defined by federal law and for which the maximum term of imprisonment authorized is one year or less but greater than five days and that, regardless of the sentence imposed, involves 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 a requestor 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.³⁵

³⁴ A violation notice or "ticket" is issued by a federal law enforcement officer for violations of certain federal laws and, if occurring on federal property, certain state laws. Violations include improper parking, illegal camping, speeding, civil disturbances, fish and wildlife infractions, and other offenses. Central Violations Bureau, Frequently Asked Questions, available at <http://www.cvb.uscourts.gov/faq.html> (last visited Aug. 26, 2014).

³⁵ In cases involving DACA requestors who had been convicted of offenses related to driving after the consumption of alcohol that did not rise to the level of driving under the influence (DUI) offenses, practitioners have reported receiving mostly denials. For example, practitioners have reported receiving denials where their clients were convicted under a driving while ability impaired statute. *See, e.g.*, Col. Rev. Stat. § 42-4-1301(1)(g). A driving while ability impaired offense ordinarily punishes driving after the consumption of a lesser amount of alcohol than that which is required for conviction under the state's DUI law. We are aware, however, of DACA approvals involving California 'wet reckless' offenses. Cal. Veh. Code §23103(a), §23103.5(a), *Mosier v. Dep't of Motor Vehicles*, 18 Cal. App. 4th 420, 422, 22 Cal. Rptr.2d 249 (1993). A wet reckless offense is typically one in which the defendant pleads guilty to reckless driving but acknowledges at the plea colloquy stage that the consumption of alcohol or drugs was involved in the commission of the offense. We have not heard of approvals for 'wet reckless' offenses in states other than California. Finally, more than one practitioner has reported receiving an approval for a case in which the DACA requestor had obtained an expungement of a DUI. It bears emphasis that each

The FAQs separately define a “non-significant misdemeanor.” The term includes any misdemeanor punishable by imprisonment of more than five days but not more than a year that is not identified as a per se “significant misdemeanor”, 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 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.

Further, Form I-821D asks whether a requestor has ever been “arrested for, charged with, or convicted of a crime in any country other than the United States.” The DACA Standard Operating Procedures Manual provides that DHS will not generally treat foreign convictions as disqualifying.³⁶ Rather, DHS will consider them when addressing whether a requestor poses a threat to public safety and whether, under the circumstances, the exercise of discretion is warranted.

When representing requestors who have been convicted of crimes or whose cases may otherwise implicate public safety or national security concerns, counsel should carefully review the [Notice to Appear guidance](#) governing referral of cases to ICE and issuance of notices to appear.

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 a requestor from DACA. 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 an offense that otherwise would have been considered a significant misdemeanor for an adult, may be denied DACA on discretionary grounds. A noncitizen convicted of a disqualifying crime as an adult offender has an adult conviction, and does not receive case-by-case treatment based on age.

case is considered under the totality of the circumstances and each requestor must demonstrate that he or she meets the DACA criteria and deserves deferred action as a matter of discretion. The available evidence suggests that arrests or convictions for driving offenses, in which the arrest or disposition records include references to alcohol, can be extremely deleterious to an individual’s DACA request.

³⁶ [DACA SOP](#) at 83.

Some requestors may be precluded from accessing records due to a court seal or a state law. For example, California law permits juvenile records to be unsealed under very limited circumstances that do not encompass DACA. As previously mentioned, attorneys should explain the reason that relevant records are unavailable and cite to any applicable state statutes.

Will expunged convictions be considered under the new policy?

The same policy relating to juvenile “convictions” applies to expunged convictions. Requestors with expunged convictions will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. 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.

Under a 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, among other factors. Attorneys should review the circumstances of any dismissed charges to see if the requestor could nonetheless be found ineligible for deferred action or even at risk of enforcement action. Police reports or complaints suggesting impaired driving, drug use or drug trafficking, assaults against family members or partners, sex crimes, and other conduct of concern to USCIS should be explored in detail to see if the conduct could be construed as “participation in criminal activities.”

Suspected gang membership also presents a bar to DACA.³⁷ The Form I-821D asks whether the applicant has now or ever been a member of a gang. Even if a person does not answer “yes” when asked about prior or current gang membership, USCIS may suspect a gang affiliation after completing a background check through the National Crime Information Center (“NCIC”), which cross-references the Violent Gang and Terrorist Organization File (“VGTOF”).³⁸

³⁷ Gang membership has proven to be an area of particular concern for potential requestors, given the reported difficulties former gang members face obtaining other immigration benefits and prosecutorial discretion in general.

³⁸ All cases processed by the adjudications unit within a USCIS service center or local office include an NCIC query. See General Adjudication Procedures; Chapter 10.3(f), available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html>. The NCIC contains VGTOF information. A 2007 Bureau of Justice Statistics report states that 17% of police departments submit VGTOF information to NCIC. Lynn Langton, Bureau of Justice Statistics, *Gang Units in Large Local Law Enforcement Agencies*, at 8 (2007), available at <http://www.bjs.gov/content/pub/pdf/gulllea07.pdf>; see also Michael D. Kirkpatrick, Asst. Dir., FBI, Statement before the United States Senate Subcommittee on Immigration (Nov. 13, 2003) (describing the role of VGTOF within NCIC), available at <http://www.fbi.gov/news/testimony/the-fbis-national-crime-information-center>.

Additionally, practitioners should be aware that ICE maintains a database containing information about “suspected or confirmed gang members and associates” called ICEGangs.³⁹

Additionally, 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 request, much less whether a requestor will be notified of the issue and provided an opportunity to rebut allegations of gang membership. Attorneys should carefully review criminal history information, as well as any tickets,⁴⁰ for any gang references. Attorneys should submit an FBI background check request,⁴¹ a FOIA request to ICE and/or a public records act request to the local police department to determine if a client is believed to be a current or former gang member.⁴²

A similar analysis would apply when reviewing whether someone could be deemed to be a national security threat. According to the SOP manual, USCIS handles cases posing national security concerns through its “Controlled Application Review and Resolution Program” (CARRP) protocols.⁴³

Form I-821D has two new questions related to “child soldiers” in the Criminal, National Security and Public Safety section. USCIS has not specified how it will treat individuals who respond “Yes” to one or both of these questions. The presence and location of these questions on the form

³⁹ ICE Intelligence Records System of Records, 75 Fed. Reg. 9233, 9234 (March 1, 2010) (ICEGangs stores biographic information (name, date of birth, etc.), immigration status, gang affiliation, physical description, government-issued identification numbers, photos of the individual, identities of gang associates, field interview notes, and criminal history information. ICEGangs also stores general comments entered by the ICE agent that created the gang member or associate record as well as a reference to the official evidentiary system of records where official case files are stored.)

⁴⁰ For example, in Texas, an individual can be ticketed with being a gang member on campus, which is a violation of the Texas education code. Tex. Educ. Code § 37.121 (Fraternities, Sororities, Secret Societies, and Gangs).

⁴¹ Attorneys may wish to request information contained in the VGTOF on the FBI background check fingerprint form in the “Reason Fingerprinted” field.

⁴² Attorneys should carefully scrutinize evidence of alleged gang membership. 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. Factors that should be taken into account when deciding to apply for DACA are the recency of the gang activity, the age of the applicant, the age of the applicant at the time he or she was in a gang, any mitigating facts behind a delinquency adjudication or conviction, and other significant equities. Individuals might still receive favorable consideration despite negative equities. However, practitioners have reported little success in cases involving individuals once accused of gang association. Moreover, as discussed above, such an individual risks removal if he or she is considered an enforcement priority. Practitioners are advised to follow trends in this area closely.

⁴³ [DACA SOP](#) at 33. For information regarding the CARRP process, see *Muslims Need Not Apply: How USCIS Secretly Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans*, co-authored by the ACLU of Southern California, the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, and the law firm of Mayer Brown, at 15-37. The report is available at <https://www.aclusocal.org/CARRP/> (follow “Download the Report” hyperlink) (last visited July 14, 2014).

suggests that an affirmative response would render a denial more likely, either on national security or public safety grounds, or on discretionary grounds. Counsel should be mindful of inadmissibility and deportability grounds implicated by this question.⁴⁴

Individuals in immigration detention who have been accused of gang activity face different and more difficult hurdles than those who are not detained. ICE agents will check with local law enforcement and other databases in assessing whether a person is in a gang and may determine that a person is ineligible for DACA based on evidence that is not substantiated. We have heard reports that ICE declines to release individuals whom ICE deems ineligible for DACA. In the event of an imminent removal where evidence of DACA eligibility is not immediately available, attorneys should prepare a prosecutorial discretion request and, if appropriate, a request for an administrative stay of removal.

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. It is unclear whether evidence of rehabilitation, mitigating factors, equities, or significant time since the conduct 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 heightened risks associated with making a request in this type of case. Attorneys relying on the exceptional circumstances exception are strongly encouraged to expressly request in the cover letter accompanying the application that USCIS consider the case under the exceptional circumstances rubric.⁴⁵ Moreover, counsel should submit evidence supporting the assertion that the case presents exceptional circumstances.

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 FAQs, individuals who fall into these categories meet the eligibility guidelines. Any such individuals who are not currently in immigration detention should submit their requests to USCIS — not ICE. 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 prior memoranda.⁴⁶

⁴⁴ The Child Soldiers Accountability Act established a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA. The Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340 § 2(b)-(c), 122 Stat. 3735, 3736 (2008).

⁴⁵ [DACA SOP](#) at 80.

⁴⁶ For information on prior prosecutorial discretion guidance, see the American Immigration Council'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).

Individuals who are prima facie eligible for DACA in immigration detention should notify their deportation officer, the relevant Jail Liaison, the ICE Field Office Director or the ICE Detention Reporting and Information Line at 1-888-351-4024 or submit an email to ERO.INFO@ice.dhs.gov. Once ICE is made aware of the case, ICE's Office of the Principal Legal Adviser (OPLA), in consultation with Enforcement and Removal Operations (ERO), will determine whether the detainee meets the DACA guidelines.⁴⁷ If OPLA and ERO determine that an individual meets the DACA guidelines, ICE may, in the exercise of discretion, administratively close removal proceedings and release the detainee with or without conditions. It is the requestor's responsibility to apply for DACA with USCIS upon release. If a person is in danger of imminent removal, he or she should immediately contact the Law Enforcement Support Center hotline at 1-855-448-6903 (24 hours/day, 7 days/week). The authors have received anecdotal evidence that ICE has released individuals to apply for DACA where the person lacked only the educational requirement. Thus, if a client does not immediately meet the education requirement, attorneys still should consider requesting DACA. There is also anecdotal evidence of ICE offering deferred action to individuals prosecuted for felony identity theft or criminal impersonation when such individuals were working with documents that did not belong to them — crimes that would per se bar a person from eligibility for DACA. Attorneys should explore whether their clients can present evidence of "exceptional circumstances" to overcome the criminal bar, especially if they are not eligible for any other relief.

Counsel representing DACA recipients who are subject to final orders of removal may want to consider filing a motion to reopen in order to obtain administrative closure or termination. This may put the DACA recipient in a better position in the event DACA is rescinded, a renewal request is denied, or an individual becomes eligible for another form of relief from removal. An individual beyond the statutory reopening period specified in INA §240(c)(7)(C) may wish to approach the relevant ICE Office of the Chief Counsel to see whether it is amenable to filing a joint motion to reopen. Counsel may also wish to explore filing a motion to reopen seeking exercise of the court's *sua sponte* authority to reopen.⁴⁸ However, by filing a motion to reopen or seeking DHS's consent to file a joint motion to reopen, some requestors will be alerting the agency to the fact that they failed to leave the United States when ordered to do so. If DACA is not granted, ICE may be more likely to take action against such individuals.

Can individuals request 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.

⁴⁷ ICE/NGO DACA Meeting, April 16, 2013 (notes on file with the American Immigration Council).

⁴⁸ 8 CFR §§ 1003.2, 1003.23(b)(1). In an unpublished decision involving a DACA recipient seeking reopening and administrative closure over DHS opposition, the BIA denied the motion because the respondent "ha[d] already been granted a form of prosecutorial discretion, and...ha[d] not demonstrated any relief that may be granted by the Immigration Court." *In re Lopez-Chavez*, A087 686 593, 2014 WL 347637 (BIA Jan. 16, 2014).

Why does Form I-821D request demographic information in the Processing Information Section? Where can I find more information about completing this section?

The “Processing Information” section on the Form I-821D requests demographic information, including a requestor’s ethnicity, race, height, weight, eye color, and hair color. It is unclear whether the data will serve exclusively to expedite biometrics appointments and criminal records checks or achieve some other purpose. The questions may be intended to comply with the Office of Management and Budget’s requirements for the collection of race and ethnicity data. Form N-400, Application for Naturalization, requests similar information but explains that the requested information will be used to complete a background check. Practitioners may wish to reference the instructions to Form N-400 when completing this section of Form I-821D because those the Form N-400 instructions provide definitions for the various racial and ethnic categories that appear on Form I-821D.

III. INITIAL DACA APPLICATION PROCESS

What is the process for requesting Initial DACA?

Initial DACA requestors — other than those in detention — should send a completed and signed [Form I-821D](#) (Consideration of Deferred Action for Childhood Arrivals) and supporting documentation, along with [Form I-765](#) (Application for Employment Authorization), the [Form I-765WS](#) (Worksheet), and the requisite fees totaling \$465 and two passport photographs, to the USCIS lockbox designated for their state of residence.⁴⁹ Requestors *must* submit an Application for Employment Authorization. Once USCIS determines that a request is complete, the agency will send the requestor a receipt notice, followed by an appointment notice requiring the requestor to attend a biometrics appointment at an Application Support Center. Requestors who wish to receive notices by email or text message may submit a [Form G-1145](#) (E-Notification of Application/Petition Acceptance).

All requestors will be subject to background checks as part of the review of their requests for deferred action. USCIS will issue a written RFE if more information or evidence is needed or if an in-person interview will be required.⁵⁰ Requestors will be able to track the status of their DACA requests online and will receive a final written decision from USCIS.

What Social Security numbers are DACA applicants required to provide?

USCIS guidance states that Question 9 of Form I-765 asks only for Social Security numbers that were “officially issued” to the requestor by the Social Security Administration. This would presumably include Social Security numbers that were “officially issued” based on fraudulent underlying documents. However, other numbers (real or invented) used by the requestor need

⁴⁹ The mailing addresses and instructions are available at www.uscis.gov/i-821d.

⁵⁰ In-person interviews will be used to obtain additional information regarding a requestor’s eligibility for DACA and to conduct random quality control checks. We have received reports that interviews are increasingly common.

not be provided. Applying the same rationale to Question 5 of Part I of Form I-821D, requestors only should provide Social Security numbers that were officially issued to them.⁵¹

How should individuals who were waved through inspection or who entered the United States with fraudulent documents characterize their status at the time of entry?

Form I-765 requires individuals to identify their immigration status at last entry. Individuals who lacked proper entry documents but were waved through inspection as well as individuals whose last entry into the United States was effectuated with fraudulent documents may characterize their immigration status at last entry as “No lawful status.”⁵²

What documentation can be used to establish a requestor’s identity?

According to the FAQs and Form I-821D instructions, a requestor may establish identity by providing passports or other national identity documents that include a photograph or fingerprint, birth certificates or school or military identification documents that include a photograph, U.S.-government immigration or other documents that include both a requestor’s name and photograph, and/or other relevant documents. Expired documents are acceptable.⁵³

What documentation can be used to establish immigration status on June 15, 2012?

The FAQ and Form I-821D instructions also provide a list of documents that requestors may submit to demonstrate that they were not in lawful immigration status on June 15, 2012. Acceptable documents include an Arrival/Departure Record, which indicates that a requestor’s authorized stay in the U.S. has expired; final orders of exclusion, deportation, or removal issued before June 15, 2012; charging documents placing a requestor in removal proceedings; and/or other relevant documents. Requestors who entered the United States without inspection and have never been in removal proceedings need not submit evidence of their lack of immigration status.⁵⁴

⁵¹ Requestors should avoid submitting evidence of continuous residence in the United States that includes Social Security numbers that are not their own, particularly if the evidence might be construed to indicate that the requestor used someone else’s Social Security number without that person’s consent.

⁵² Under *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), an individual who was waved through a port of entry has been “admitted” under INA § 245(a). Accordingly, such individuals should not characterize their manner of entry as “Entered Without Inspection” or “EWI,” which could have adverse implications for future immigration applications.

⁵³ [DACA SOP](#) at 48.

⁵⁴ A requestor who was inspected and admitted, but nonetheless was not issued any documentation at entry (e.g., a procedurally valid entry under *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980) and *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)), should consider what evidence may be produced to establish the date and manner of entry. It is important that he or she consistently claim an entry with inspection rather than erroneously concede entry without inspection.

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

Those who request Initial DACA must document three aspects of their physical presence in the United States, namely, that they:

- Entered the United States before turning 16;
- Have continuously resided in the country since June 15, 2007 (i.e., for the five year period prior to June 15, 2012); and
- Were physically present in the United States on June 15, 2012.

Documents that a requestor may use to establish when he or she entered the United States include, but are not limited to:

- Passports with admission stamps;
- Arrival/Departure records (Form I-94, I-95, or I-95W);
- Any INS or DHS document stating date of entry to the U.S., including Form I-862 (Notice to Appear);
- Records from U.S. schools requestors have attended that include the name of the school and dates of attendance, including transcripts or report cards;
- Travel records, including transportation tickets;
- Hospital or medical records that include the name of the medical facility or provider and the dates of treatment;
- Official records from a religious institution establishing that a requestor was present at a religious ceremony on a particular date; and/or
- Other relevant documents.

USCIS will accept circumstantial evidence that requestors entered the country before reaching age 16.

Documents that a requestor may use to establish his or her physical presence in the United States on June 15, 2012 and continuous residence from June 15, 2007 up to the present, but are not limited to:

- Rent receipts, utility bills, or other receipts or letters from companies that include the dates on which a requestor received services in the United States;
- Records from U.S. schools requestors have attended that include the name of the school and dates of attendance, including transcripts or report cards;
- Employment records that include relevant dates as well as the name of the requestor and the employer or other interested party, including W-2 Forms, certifications of filing federal or state income tax returns, pay stubs, signed letters from employers that include the employer's contact information and the requestor's address at the time of employment, exact periods of employment and layoffs, and duties for the employer; or,

for self-employed requestors, letters from banks and firms with whom the requestor has done business;⁵⁵

- Military records, including Certificates of Release or Discharge from Active Duty (Form DD-214) or National Guard Report of Separation and Record of Service (NGB Form 22);
- Tax receipts or insurance policies;
- Money order receipts for money sent into or out of the United States;
- Dated bank transactions;
- Deeds, mortgages, rental agreement contracts, or other contracts to which the requestor was a party;
- Automobile license receipts, titles, or registrations;
- Official records from a religious institution establishing that a requestor was present at a religious ceremony;
- Passport entries;
- Birth certificates for children born in the United States; and/or
- Other relevant documents.

USCIS will accept circumstantial evidence that requestors were present in the United States on June 15, 2012. In addition, although requestors must provide some direct evidence that they meet the continuous residence requirement, they may provide circumstantial evidence to fill in gaps in their direct evidence. For example, a requestor may submit two or more affidavits from other people who have direct personal knowledge of the events and circumstances during the gap period.

As previously discussed, the USCIS guidance does not require *uninterrupted* physical presence since June 15, 2007—only *continuous residence*. The FAQs state that requestors should provide documentation of as much of the continuous residence period as possible, but are not required to demonstrate that they resided in the United States for every day or even every month of that period. USCIS states that a requestor may submit evidence that he or she resided in the United States for every *year* of the continuous residence period, which will be examined “in its totality” to determine if it is more likely than not that the requestor has continuously resided in the United States since June 15, 2007. USCIS may be more likely to request additional evidence in cases where requestors have failed to document their physical presence in the United States at the beginning and the end of the five-year period.

Other applications that require proof of physical presence and/or residence⁵⁶ may provide insight into documenting eligibility for DACA. *See, e.g.*, 8 C.F.R. §§ 244.9(a)(2); 245.13(e), (f); 245.15(i), (j); and 245.22. Acceptable documents also have included immigration court records, applications for immigration benefits, correspondence with immigration agencies, driver’s

⁵⁵ See discussion *infra* p. 34 (“What are the potential immigration or criminal consequences of submitting certain documents or information as evidence with Form I-821D?”).

⁵⁶ Examples include: NACARA, 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).

licenses, marriage certificates, personal checks bearing a dated bank cancellation stamp, and credit card statements.

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.

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

The FAQs and Form I-821D instructions provide an exhaustive list of documents that can be used to prove compliance with the educational requirements. Further note that circumstantial evidence will not be accepted for this purpose.⁵⁷

Individuals may demonstrate that they are “currently in school” on the date they request DACA by presenting:

- Education program acceptance letters, school registration cards, letters from a school or program, transcripts, report cards, or progress reports which may show the name of the school or program, date of enrollment, and current educational or grade level, if relevant.

Individuals may demonstrate that they have graduated from high school, obtained a certificate of completion from high school or have obtained a General Educational Development (GED) certificate by presenting:

- A diploma from a public or private U.S. high school or secondary school, a certificate of completion, a certificate of attendance, an alternate award from a public or private high school or secondary school, a recognized equivalent of a high school diploma under state law, or a GED certificate or certificate from passing another such state authorized exam (e.g., HiSet or TASC) in the United States.

Where an individual is enrolled in school, particularly in an alternative education program like an English as a Second Language (ESL), literacy, vocational, or GED course, counsel should not only submit proof that the individual is enrolled in or attending the education program, but also submit documentation establishing that the program is a qualifying education program for DACA purposes.⁵⁸

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

USCIS states that circumstantial evidence will not be accepted to demonstrate that a requestor meets the military service requirements. The FAQs and Form I-821D instructions provide a non-

⁵⁷ See discussion *infra* p. 27 (“Will USCIS accept affidavits to fulfill the eligibility criteria for DACA?” and “Will USCIS consider circumstantial evidence to establish eligibility for DACA?”).

⁵⁸ For information about acceptable documentation, see pages 62-66 of the [DACA SOP](#).

exclusive list of documents that can be used to prove that requestors have been honorably discharged from the U.S. Coast Guard or U.S. Armed Forces. These include, but are not limited to Form DD-214 (Certificate of Release or Discharge from Active Duty), NGB Form 22 (National Guard Report of Separation and Record of Service), military personnel records, and military health records.

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, 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. *See* 10 U.S.C. § 504(b)(1). 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 exercised his or her statutory authority to enlist undocumented noncitizens or 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. While neither undocumented individuals nor individuals with DACA are permitted to enlist in the Armed Forces, attorneys should assess whether their male clients between the ages of 18 and 26 are required to register with the Selective Service.

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

As previously discussed, 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 an RFE.

Affidavits may be used to fill a gap in other documentation demonstrating that a requestor 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, requestors 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 and/or 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.” Circumstantial evidence is evidence that, though it requires an inference to connect it to a conclusion of fact, could lead an examiner to conclude that it is more likely than not that the fact sought to be proven is true. For example, to satisfy the continuous residence requirement, rental agreements in the name of the DACA requestor’s parent, though merely circumstantial evidence of the requestor’s residence, could be submitted.

USCIS’s willingness to consider circumstantial evidence in this context 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 a requestor 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 requestor’s burden.

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

What additional documents must requestors who have been arrested submit?

Form I-821D requires a requestor who answers “yes” to Part IV, questions 1 and 2, regarding arrests, charges and convictions in or outside of the United States to furnish “a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest.” These documents are not required where disclosure is prohibited under state law. 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 requesting DACA. In cases where records are unavailable, attorneys should explain the reasons on Form I-821D and cite to any relevant state statutes.

USCIS has expanded its criminal history evidentiary requirement for DACA. Question 12 on the instructions for Form I-821D, provides detailed guidance on the documentation required for requestors who have been arrested for or charged with a felony or misdemeanor in the U.S. (as defined in the DACA guidelines), or a crime in any country other than the U.S. Requestors must submit the following evidence demonstrating the results of the arrest or charges brought against them.

- In cases where no charges were filed, the instructions state that requestors must submit “an original official statement by the arresting agency or applicable court order confirming that no charges were filed for each arrest.”
- Where the requestor was charged or convicted of a felony or misdemeanor in the U.S., or a crime in any country other than the U.S., the instructions require an original or court-certified copy of the complete arrest record and disposition for each incident.
- If the requestor’s arrest or conviction has been vacated, set aside, sealed, expunged or otherwise removed from the person’s record, USCIS requires an original or court-certified copy of the relevant order or an original statement from the court that no record exists.

If requestors are unable to provide the documentation listed above, they must provide an explanation that includes a description of their efforts to obtain such evidence.⁵⁹

Records regarding minor traffic violations are not required unless they were related to drugs or alcohol.

With respect to criminal history records prohibited from disclosure under state law, the revised form and instructions are inconsistent. The language on the form exempts a broader category of records, while the instructions specify that state law protections apply only to juvenile records. Before the guidance in the instructions, some practitioners successfully argued that providing records of sealed or expunged convictions would violate state law.

Attorneys are reminded that any information or documentation related to the public safety bars provided in the DACA request may influence a DACA requestor's eligibility for relief in the future, should it become available.

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

IV. DACA RENEWAL ELIGIBILITY

What are the eligibility criteria for DACA Renewal?

An individual is eligible for DACA Renewal if he or she *met* the guidelines for Initial DACA **and** he or she:

1. Did not depart the United States on or after August 15, 2012 without advance parole;
2. Has continuously resided in the United States since submitting his or her most recent DACA request that was approved; and
3. Has not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and does not otherwise pose a threat to national security or public safety.

⁵⁹ Before these instructions appeared, practitioners reported that USCIS applied inconsistent standards in issuing requests for evidence for criminal history records. Some practitioners received DACA approvals after only providing a certified court disposition and a copy of the pertinent statute, while others received a Request for Evidence seeking arrest records and charging documents in addition to certified court dispositions for each arrest. Attorneys are advised to conduct an analysis of the records to be submitted and consider the risk of a denial of DACA, particularly where the requestor was initially charged with a significant misdemeanor or a felony. Even where charges against the requestor were ultimately dismissed or the case resulted in a conviction that is not a bar to DACA, attorneys have reported NOIDs and denials. For example, practitioners report receiving DACA denials in cases involving an initial DUI charge, but a conviction for negligent driving.

If an individual met the Initial DACA education requirement because he or she was “currently in school” at the time of his or her initial request and then subsequently stopped attending school, will that individual be disqualified from renewal?

No. Renewal requestors are not required to demonstrate that they completed their education program or made substantial, measurable progress towards completing their education program. In fact, renewal requestors are not required to answer any education-related questions or provide education-related supporting documents.

How does travel abroad after receiving DACA impact an individual’s eligibility for DACA Renewal?

If an individual travels abroad without obtaining advance parole, regardless of whether or not he or she has DACA, the travel *will* interrupt the individual’s continuous residence. If a DACA recipient departs the United States without advance parole, DHS will automatically revoke the individual’s DACA grant.

If an individual receives DACA as well as advance parole and then travels abroad, the FAQ provides that the travel “will not interrupt [the DACA recipient’s] continuous residence.” This statement, presumably, protects the continuous residence of DACA recipients who travel abroad with advance parole for a long period of time (e.g. for a year-long study abroad program). It is doubtful, though unclear, whether this blanket protection applies to individuals who return to the United States *after* their advance parole authorization has expired.

When a DACA recipient requests DACA Renewal, will USCIS consider the requestor’s entire criminal history or only his or her criminal history within the most recent DACA period?

USCIS will consider the requestor’s entire criminal history when adjudicating a DACA Renewal request. The renewal eligibility guidelines specify that an individual is ineligible if he or she has been convicted of a felony, a significant misdemeanor, or three or more non-significant misdemeanors, or otherwise poses a threat to national security or public safety. To illustrate, if an individual was convicted of two non-significant, non-disqualifying misdemeanors before receiving Initial DACA, and was then convicted of a third after receiving DACA, he or she would be ineligible for DACA Renewal, unless DHS determines the case presents exceptional circumstances.

V. DACA RENEWAL APPLICATION PROCESS

When should a DACA recipient request renewal?

The ideal time for a DACA recipient to request renewal is between 150 and 120 days before his or her expiration date. USCIS may reject applications filed before the 150 day mark. In cases where USCIS is “unexpectedly delayed” in processing a renewal request that is submitted more than 120 days before the requestor’s expiration date, USCIS will consider granting automatic

deferred action and work authorization extensions for a “short period of time until” USCIS completes processing the application.

In a stakeholder call held on June 26, 2014, USCIS indicated that individuals will not need to request an automatic extension of work authorization. When an individual’s application has been pending for approximately 100 days, the case will be sent to an adjudicator for a decision on the application itself or for the issuance of an interim benefit. Individuals who receive an automatic EAD extension will receive a Form I-766.

If an individual fails to request renewal for a full year after his or her DACA expires, the individual must apply for Initial DACA, and provide the same quantum of supporting evidence initial requestors are required to provide.

Will USCIS notify DACA recipients of impending expiration dates?

Yes. According to a stakeholder call held on June 5, 2014, when an individual is 100 days from his or her expiration date, USCIS will send a notice to the DACA recipient’s last known address regarding the impending expiration and the opportunity to renew his or her DACA.

When must a DACA Renewal requestor submit supporting evidence?

Most renewal requestors will not be required to submit supporting evidence. In fact, USCIS has made clear that renewal requestors need not submit supporting evidence unless they have new documents involving removal proceedings or criminal history that they did not previously submit to USCIS in a previously approved DACA request. As discussed below, special rules apply to individuals who received DACA from Immigration and Customs Enforcement.

Renewal requestors are not required to demonstrate any aspect of their presence or residence in the United States. Likewise, renewal requestors are not required to demonstrate that they continue to meet the Initial DACA education requirement.

On a June 26, 2014 stakeholder call, USCIS indicated that renewal requestors who traveled pursuant to a grant of advance parole may wish to include their Form I-512L, Authorization for Parole of an Alien into the United States, with their renewal requests in order to reduce the likelihood of adjudication delays.

What should a complete DACA Renewal request contain?

Ordinarily, a complete DACA Renewal request will contain the following items:

- Form I-821D (USCIS will not accept editions predating June 4, 2014);
- Form I-765;
- Form I-765WS;
- 2 passport style photographs;
- A copy (front and back) of the requestor’s EAD;
- Filing fee of \$465, unless the requestor is exempt; and
- If applicable, supporting evidence (see above).

What is the process for requesting DACA Renewal for individuals who were initially granted DACA by Immigration and Customs Enforcement?

The small subset of individuals granted DACA by Immigration and Customs Enforcement are subject to a different renewal process. These individuals must complete Form I-821D as if they were initial requestors (though they should mark box #2, Renewal Request, and indicate their DACA expiration date in Part 1), and they must submit the same quantum of evidence that is required of initial requestors.

How can an individual determine which “USCIS Office” to identify in response to question 11 on Form I-765?

This question is intended to solicit the name of the service center that *received* the renewal requestor’s most recent EAD request.⁶⁰ The receiving service center can be discerned in numerous ways. Perhaps the simplest is to examine the face of your client’s Employment Authorization Document, locate the “Card #”, and then use Table 1 below. Alternatively, if your client lost his or her EAD, find the receipt number associated with your client’s most recent I-765, and use Table 1 below. Do not identify the service center that adjudicated your client’s EAD.

Table 1

If the Card # begins with....	Then the issuing Service Center is....
EAC	Vermont Service Center
LIN	Nebraska Service Center
SRC	Texas Service Center
WAC	California Service Center
MSC	National Benefits Center

VI. ANCILLARY ISSUES

Are attorneys and accredited representatives who provide pro bono assistance to DACA requestors and individuals at group workshops required to enter an appearance?

8 C.F.R. §§ 292.3 and 1003.102 require practitioners to file a Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative) when they engage in practice in immigration matters before DHS, either in person or through the preparation or filing of any brief, application, petition, or other document. Practitioners who consistently violate this requirement may be subject to disciplinary sanctions; however on February 28, 2011, USCIS issued a statement indicating that it does not intend to initiate disciplinary proceedings against practitioners based solely on the failure to submit a Form G-28 in connection with pro bono services provided at group assistance events.⁶¹

⁶⁰ Correspondence with USCIS on file with the American Immigration Council.

⁶¹ USCIS, Statement of Intent Regarding Filing Requirement for Attorneys and Accredited Representatives Participating in Group Assistance Events, AILA InfoNet Doc. No. 11021833. (Posted 02/18/11).

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 meet one of the following conditions:

- Are under 18 and homeless or in foster care;
- Are under 18 and lack any parental or familial support, and have an income under 150% of the U.S. poverty level;
- Cannot care for themselves because they suffer from a serious, chronic disability and have an income under 150% of the U.S. poverty level; or
- At the time of the request, have accumulated \$10,000 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 request without the requisite fee.

Documentary evidence must be submitted in support of the fee exemption. Acceptable evidence includes:

- 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 requestor or responsible third parties attesting that the requestor 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 of at least \$10,000.

USCIS will issue RFEs if more information is needed. Additional information is provided on the [USCIS Fee Exemption Guidance Web page](#).

What should I do if my client appears eligible for DACA but has voluntary departure?

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. The filing of a motion to reopen automatically terminates the voluntary departure order. 8 C.F.R. § 1240.26(e)(1). Attorneys who have clients in this situation should immediately contact the ICE Detention Reporting and Information Line at 1-888-351-4024 (staffed 8:00 a.m. – 8:00 p.m., Monday – Friday) or submit an email to ERO.INFO@ice.dhs.gov.

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.⁶² DHS has not issued 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 or whether the voluntary departure period will be tolled during the period of the request for deferred action. For these reasons, attorneys should consider advising their clients to seek to withdraw a request for voluntary departure *prior* to the designated departure date if ICE has not joined or submitted a motion to reopen.

What are the potential immigration or criminal consequences of submitting certain documents or information as evidence with Form I-821D?

Confidentiality provisions outlined in the FAQs indicate that information provided to USCIS during the DACA application process is protected from disclosure to ICE or CBP for the purpose of immigration enforcement unless the requestor meets the [criteria](#) for the issuance of a Notice to Appear. Information may be shared, however, with other law enforcement agencies, including ICE and CBP, where the requestor meets the criteria for issuance of a Notice to Appear or for purposes *other* than removal. These “other purposes” include the identification or prevention of fraudulent claims, national security, and investigation or prosecution of criminal offenses. Importantly, all USCIS policy memoranda have expressly noted that the policy may be changed at any time.

Attorneys should carefully examine all documents before submitting them to USCIS in support of a DACA request to assess whether they might contain information that could adversely affect the requestor. These documents may include records related to employment, financial, and tax matters.

What are the potential immigration consequences for an employer of providing a DACA requestor with information regarding his or her employment?

The FAQs indicate that employers may provide DACA requestors with information verifying their employment and that USCIS generally will not share this information with ICE for civil immigration enforcement purposes pursuant to INA § 274A. The sole exception is if USCIS determines there is evidence of “egregious violations of criminal statutes or widespread abuses.” However, the guidance does not preclude the imposition of criminal sanctions against employers under INA § 274A.⁶³ Also, as with the general confidentiality provisions, these protections may be subject to change.

⁶² 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). For more information about the consequences of overstaying voluntary departure and how a grant of voluntary departure can be terminated, see the American Immigration Council’s Practice Advisory, [Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart](#) (July 6, 2009).

⁶³ For more information regarding potential employer liability stemming from data provided to DACA requestors, see AILA Verification and Documentation Liaison Committee, *Practice Advisory: Counseling Employers on DACA Issues* (updated September 21, 2012), AILA InfoNet Doc. No. 12090749.

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.⁶⁴ In addition, many states have web-based systems that enable individuals and their attorneys to access criminal records.⁶⁵

Some states require that an 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.

Will deferred action requestors accrue unlawful presence while their requests are pending?

Requestors who are 18 years old or older will continue to accrue unlawful presence while their DACA requests are pending. Individuals under 18 years old do not accrue unlawful presence. *See* INA § 212(a)(9)(B)(iii)(I). Based on the FAQs, those 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 DACA grant.

The 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. Under the BIA's decision in *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), an adjustment applicant who otherwise would trigger the three- or ten-year bar simply because he or she traveled abroad under advance parole, is not considered to have departed the United States.⁶⁶ Moreover, 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. Note, however, that 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.

⁶⁴ More information about FBI criminal background checks is available at <http://www.fbi.gov/about-us/cjis/background-checks/submitted-an-identification-record-request-to-the-fbi>.

⁶⁵ Information about state-based criminal history systems is available at http://www.publicrecordsinfo.com/criminal_records.htm.

⁶⁶ *See* discussion *supra* pp. 6-8 (“Will individuals who request DACA be permitted to travel outside the United States?”).

Can individuals in removal proceedings who are granted deferred action influence whether their cases are 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 generally granted. In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), however, the Board held that an immigration judge could grant a motion to administratively close proceedings filed by either party over the objection of the other party. Thus, a respondent can seek to administratively close a case 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 deciding on 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.