



PRACTICE ADVISORY¹

July 25, 2013

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 15, 2012, 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 requesters 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, 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 or the ICE Enforcement and Removal Operations (ERO) Community Outreach Office.³ Individuals who

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

³ The FAQ, which was last updated on January 18, 2013, directs detained individuals to contact the ICE Office of the Public Advocate. That office, however, was defunded on March 26, 2013. Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 567, 127

meet the eligibility criteria may request DACA by submitting [Form I-821D](#) (Consideration of Deferred Action for Childhood Arrivals), accompanied by [Form I-765](#) (Application for Employment Authorization), [Form I-765WS](#) (Worksheet), and the requisite fees totaling \$465. 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.

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, though 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 DACA request is pending if the individual filed a request before reaching age 18. DHS can renew or terminate a grant of deferred action at any time.

What are the eligibility criteria for DACA?

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

Stat. 198, 382 (2013). ICE has indicated that if a person is currently in immigration detention and believes he or she meets the guidelines for DACA, he or she should not request consideration of deferred action from USCIS but should reach out to a detention officer or contact ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>.

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.

- 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;⁶
- 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,⁷ 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.

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 requester 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.

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.

⁶ 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.

⁷ We are aware of DACA approvals involving individuals who were unable to complete high school on account of a developmental disability.

What is the process for requesting DACA?

On or after August 15, 2012, requesters — 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 \$465,⁸ to the USCIS lockbox designated for their state of residence.⁹ Requesters *must* submit an Application for Employment Authorization and the associated fee. Once USCIS determines that a request is complete, the agency will send the requester a receipt notice, followed by an appointment notice requiring the requester to attend a biometrics appointment at an Application Support Center. Requesters who wish to receive notices by email or text message may submit a [Form G-1145](#) (E-Notification of Application/Petition Acceptance).

All requesters will be subject to background checks as part of the review of their requests for deferred action. USCIS will issue a written Request for Evidence (RFE) if more information or evidence is needed or if an in-person interview will be required.¹⁰ Requesters 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 requester 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 requester need not be provided. Applying the same rationale to Question 5 of Part I of Form I-821D, requesters only should provide a Social Security number that was officially issued to them.¹¹

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

The FAQs state that an attorney or accredited representative who provides pro bono assistance to a potential DACA requester at a group workshop and who intends to represent the person after the workshop must file a Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative). If the attorney or accredited representative does not intend to represent the person after the workshop, he or she should assess the “extent of the relationship with the

⁸ This includes \$380 for employment authorization and \$85 for biometrics.

⁹ The mailing addresses and instructions are available at www.uscis.gov/i-821d.

¹⁰ In-person interviews will be used to obtain additional information regarding a requester’s eligibility for DACA and to conduct random quality control checks. We have received reports that interviews are increasingly common.

¹¹ Requesters should avoid submitting evidence of continuous residence in the United States that includes a Social Security number that is not their own, particularly if the evidence might be construed to indicate that the requester used that person’s Social Security number without that person’s consent.

individual and the nature and type of assistance provided” to determine whether a G-28 is necessary. The FAQs suggest that an attorney or accredited representative who decides not to submit a G-28 may want to clarify the limited scope of the representation to the individual and/or USCIS.

Are fee waivers available under DACA?

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

- Are under 18 and homeless;
- Are under 18, are in foster care or otherwise 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 \$25,000 or more in debt in the past 12 months as a result of unreimbursed medical expenses for themselves or an immediate family member, and their income is less than 150% of the poverty level.

Requests for such exemptions must be filed and granted *before* an individual files a DACA 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 requester or responsible third parties attesting that the requester 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 \$25,000.

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

Is there a minimum age requirement for DACA requesters?

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 detention officer or ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>. In emergent circumstances, the individual should consider contacting the Law Enforcement Support Center hotline, at 1-855-448-6903 (24 hours/day, 7 days/week).

What should I do if my client appears eligible for DACA but 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 Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday).

If an individual overstays a period of voluntary departure without having his or her case reopened, the grant of voluntary departure will automatically convert to a final order of removal and subject him or her to severe consequences.¹² 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.

Is my client eligible for DACA if he or she was admitted for duration of status or for a period of time that extended past June 14, 2012, but violated that status before June 15, 2012?

Not necessarily. A person who lawfully entered the United States would not become eligible merely based on an immigration status violation. If such a person violated his or her status by, for example, engaging in unauthorized employment, failing to report for work, or failing to pursue a designated course of study, that person would not automatically be eligible for deferred action. He or she would only be eligible if the Executive Office for Immigration Review issued a final order of removal before June 15, 2012.

¹² 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 Legal Action Center's Practice Advisory, [*Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart*](#) (July 6, 2009).

What documentation can be used to establish a requester's identity?

According to the FAQs and Form I-821D instructions, a requester 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 requester's name and photograph, and/or other relevant documents.

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?

Such individuals do not fall neatly into the categories listed in the drop-down box under Question 15 (Status at Entry) on Form I-821D. In both cases, the best answer to this question is generally "No lawful status," which is listed in the parenthetical preceding the drop-down box. This response can be written directly on the form.¹³

Similar questions arise with respect to Question 14 (Manner of Entry) and Question 15 (Current Immigration Status) on Form I-765. Once again, "No lawful status" should suffice both for individuals who were waved through inspection and for those who entered with fraudulent documents.¹⁴

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 requesters 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 requester'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 requester in removal proceedings; and/or other relevant documents. Requesters who entered the United States without inspection and have never been in removal proceedings need not submit evidence of their lack of immigration status. A requester 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.

¹³ For information about different types of entries into the United States and their impact on a DACA request, see the Legal Action Center's Practice Advisory, [Inspection and Entry at a Port of Entry: When is there an Admission?](#) (January 29, 2013).

¹⁴ 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.

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

Those who request deferred action 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 requester 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 requesters 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 requester was present at a religious ceremony on a particular date; and/or
- Other relevant documents.¹⁵

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

Documents that a requester may use to establish his or her physical presence in the United States on June 15, 2012 and continuous residence for the five previous years include, but are not limited to:

- Rent receipts, utility bills, or other receipts or letters from companies that include the dates on which a requester received services in the United States;
- Records from U.S. schools requesters have attended that include the name of the school and dates of attendance, including transcripts or report cards;

¹⁵ Unlike previous versions of the USCIS FAQ, current instructions no longer list financial, employment, or military documents as examples of acceptable evidence of a requester's arrival in the United States prior to his or her 16th birthday. However, the list of acceptable forms of evidence provided by USCIS is not exhaustive, and given the potential verifiability of such evidence, it is not clear if this omission was deliberate or an oversight.

- Employment records that include relevant dates as well as the name of the requester 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 requester’s address at the time of employment, exact periods of employment and layoffs, and duties for the employer; or, for self-employed requesters, letters from banks and firms with whom the requester has done business;¹⁶
- 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 requester was a party;
- Automobile license receipts, titles, or registrations;
- Official records from a religious institution establishing that a requester was present at a religious ceremony;
- Hospital or medical records that include the name of the medical facility or provider and the dates of treatment;
- Passport entries;
- Birth certificates for children born in the United States;
- U.S. Social Security card;
- Postmarked letters and correspondence between the requester and another person or organization establishing the requester’s U.S. address and the date of correspondence; and/or
- Other relevant documents.

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

The USCIS guidance does not require *uninterrupted* physical presence for five years—only *continuous residence*. The FAQs state that requesters should provide documentation of as much of the five year 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 requester may submit evidence that he or she resided in the United States for every *year* of the five year period, which will be examined “in its totality” to determine if it is “more likely than not” that the requester has continuously resided in the United States since June 15, 2007. USCIS may be more likely to request additional evidence in cases where requesters have failed

¹⁶ See discussion *infra* p. 15 (“What are the potential immigration or criminal consequences of submitting certain documents or information as evidence with Form I-821D?”).

to document their physical presence in the United States at the beginning and the end of the five-year period.

As discussed further below, brief, casual, and innocent absences from the United States will not interrupt continuous residence.¹⁷ If documents submitted in support of the continuous residence requirement indicate that the requester has been out of the country for a period of time that was not “brief, casual and innocent” or there are lengthy gaps in residence, USCIS may ask for additional documentation.

Other applications that require proof of physical presence and/or residence¹⁸ 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 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 constitutes a “brief, casual, and innocent” absence from the United States?

An absence will be considered “brief, casual, and innocent” if it occurred on or after June 15, 2007, and before August 15, 2012 and:

- 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

¹⁷ 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); Legal Action Center Practice Advisory, [*Brief, Casual and Innocent Absences” from the United States*](#) (January 29, 2013) (discussing the “brief, casual and innocent” standard under existing case law).

¹⁸ Examples include: the Nicaraguan Adjustment and Central American Relief Act (NACARA), the Haitian Refugee Immigration Fairness Act (HRIFA), and Temporary Protected Status (TPS). Attorneys may also wish to review guidance found in the instructions to other applications for immigration benefits that require a showing of continuous residence or physical presence, such as EOIR-40 (Suspension of Deportation), EOIR-42A (Cancellation for Lawful Permanent Residents), EOIR-42B (Cancellation for Non-Lawful Permanent Residents), I-687 (Application for Temporary Residence under 245A), and I-881 (Special Rule Cancellation).

- The purpose of the absence and the requester's actions while outside the United States were not contrary to the law.¹⁹

While it is important to remember that DACA is a type of prosecutorial discretion, which means that all requests will be evaluated on a case-by-case basis, the following DACA grants may serve to illustrate how the agency is construing the phrase:

One trip lasting several months:

- Requester traveled to Requester's native country for 3 months in 2008 when Requester was 12 years old for the purpose of obtaining original documents that could only be obtained in person in Requester's native country. Requester never left the United States after returning from that trip.
- Requester included with DACA application a letter describing the trip. The letter indicated that Requester was brought to Requester's native country by Requester's parents because they wanted to obtain a passport for Requester and Requester's siblings.

Multiple departures:

- Requester departed and reentered the United States three times during the continuous residence period to visit Requester's ailing grandmother (three weeks in summer 2007, two weeks in winter 2008, and a few days in spring 2011). Requester corroborated the travel with school records, photos and Requester's grandmother's death certificate.

USCIS encourages requesters to submit evidence that any absences from the United States prior to August 15, 2012 were brief, casual, and innocent. This evidence may include, but is not limited to:

- Passport entries,
- Transportation tickets,
- Hotel receipts,
- Evidence of the purpose of the requester's travel,
- An advance parole document, and/or
- Any other relevant information.

For many DACA requesters, the submission of evidence regarding departures and reentries may constitute an admission of inadmissibility under INA § 212(a)(9)(C). While such an admission does not affect eligibility for DACA, it may have adverse implications for future immigration applications.

¹⁹ USCIS has not indicated that this bar would apply to illegal conduct necessary to return to the United States, like entering in violation of INA §§ 275-76. Moreover, we are aware of DACA approvals in which the applicant's reentry into the United States occurred without inspection.

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. Such individuals satisfy the eligibility requirements for DACA because they were under age 16 at the time of their initial entries and have continually resided in the United States since June 15, 2007. These DACA requesters, however, must have “established residence” in the United States prior to turning 16. According to the FAQs, evidence that a DACA requester established residence can include records showing that the requester attended school, worked in the United States, or lived in the United States for multiple years prior to turning 16. A requester 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.

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

The FAQs and Form I-821D instructions provide a non-exclusive list of documents that can be used to prove compliance with the educational requirements, but note that circumstantial evidence will not be accepted for this purpose.²⁰ Individuals may demonstrate that they are enrolled in school on the date they request DACA, have graduated from high school,²¹ or have obtained a GED certificate by presenting:

- A diploma from a public or private U.S. high school or secondary school;
- A GED certificate or other recognized equivalent of a high school diploma under state law, including certificate of completion, certificate of attendance, or alternate award from a public or private U.S. high school or secondary school;
- Other documentation that the requester has passed a GED or comparable state-authorized exam;
- School or educational program records, including report cards transcripts, progress reports, acceptance letters, school registration cards, and/or letters from the school or program, that include the name of the U.S. school or educational program a requester is currently attending, the requester’s current educational or grade level, and the requester’s dates of attendance; and/or
- Other relevant records.

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

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

²⁰ See discussion *infra* pp. 14-15 (“Will USCIS accept affidavits to fulfill the eligibility criteria for DACA?” and “Will USCIS consider circumstantial evidence to establish eligibility for DACA?”).

²¹ We are aware of DACA approvals involving individuals who were unable to complete high school on account of a developmental disability.

- Public or private elementary school, junior high or high school (including home school);²²
- Education, literacy, vocational, or career training programs, including but not limited to those funded wholly or partially by federal or state grants,²³ that seek to place requesters in postsecondary education, job training, or employment, if requesters are working towards such post-program placement;
- English as a Second Language (ESL) program, *only if* requesters are participating in the program as a prerequisite to enrollment in postsecondary education, job training, or employment *and* working towards such post-program placement;²⁴ or
- Educational programs that assist students in obtaining a high school diploma or its equivalent under state law, or in passing a GED or other state-authorized exam, if the program is funded in whole or in part by federal or state grants or is of demonstrated effectiveness.

Those requesters seeking to fulfill the “currently in school” educational requirement may need to provide additional information to renew their deferred action status two years after making an initial request. Although details will be forthcoming, according to the FAQs, requesters enrolled in schools or programs would need to demonstrate the following to renew deferral after two years:

- Requesters enrolled in high school or secondary school must show either that they have graduated from the school in which they were enrolled at the time of their original request or made “substantial, measurable progress” towards graduation;
- Requesters enrolled in elementary or middle school must demonstrate they have graduated from the school in which they were enrolled at the time of their original request *and* made “substantial, measurable progress” towards graduation from high

²² See U.S. Department of Homeland Security National Standard Operating Procedures, “Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)” (Sep. 13, 2012) at 55, available at http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf (accessed July 25, 2013) (home schooling satisfies “currently in school” requirement, however cases involving home school claims are to be referred to the Center Fraud Detection Operations).

²³ According to the FAQs, enrollment in programs not partially or wholly funded by federal or state grants may meet the educational requirements of DACA, where such programs are “administered by providers of demonstrated effectiveness, such as institutions of higher education, including community colleges, and certain community-based organizations.” Requesters will have the burden of proving the demonstrated effectiveness of such programs. USCIS will consider factors including the duration, effectiveness, and overall quality of particular programs.

²⁴ According to the FAQs, requesters seeking to fulfill the “currently in school” educational requirement with an ESL program must demonstrate that their enrollment “is connected to . . . placement in postsecondary education, job training or employment” and of the program’s demonstrated effectiveness. ESL programs qualify for DACA purposes if they are administered by a 501(c)(3) non-profit organization.

school, or have made “substantial, measurable progress” towards graduation from the school in which they were enrolled at the time of their original request;

- Requesters enrolled in educational programs assisting students in obtaining a high school diploma or GED must show that they have received a high school diploma or its equivalent or passed the GED exam or equivalent state-authorized exam; and
- Requesters enrolled in educational, literacy, vocational, or career training programs must demonstrate that that they are enrolled in postsecondary education, have obtained employment for which they were trained, or have made “substantial, measurable progress” towards completing the program.

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 requester meets the military service requirements. The FAQs and Form I-821D instructions provide a non-exclusive list of documents that can be used to prove that requesters 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, 10 U.S.C. § 504(b)(1), only U.S. citizens and nationals, lawful permanent residents, certain persons from Palau, Micronesia, and the Republic of the Marshall Islands, and certain other persons whose enlistment has been determined by a Service Secretary to be “vital to the national interest” may enlist. Among the limited number of individuals who are “honorably discharged veterans” under age 31, and otherwise eligible for deferred action, most also would be eligible for naturalization under INA § 329, and therefore not in need of deferred action.

Importantly, the June 15, 2012 memorandum did not alter the enlistment rules for individuals who receive deferred action. To date, no Service Secretary has 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.

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 a request for evidence (RFE).

Affidavits may be used to fill a gap in other documentation demonstrating that a requester 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, requesters 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 guideline, rental agreements in the name of the DACA requester’s parent, though merely circumstantial evidence of the requester’s residence, could be submitted.

This suggests that DHS will likely apply a presumption of presence for individuals who can show presence on days near June 15, 2012, but not necessarily on that day. This is similar to the approach employed for adjustment applications under INA § 245(i), in which a requester 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 requester’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 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 in the DACA process is protected from disclosure to ICE or CBP for the purpose of immigration enforcement unless the requester 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 requester 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, even these restrictions are not guaranteed, and 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 requester. 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 requester with information regarding his or her employment?

The FAQs indicate that employers may provide DACA requesters with information verifying their employment and that USCIS will not share this information with ICE for civil immigration enforcement purposes pursuant to INA § 274A unless 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 the same statutory provision.²⁵ Also, as with the general confidentiality provisions, these protections may be subject to change.

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.²⁶ In addition, many states have web-based systems that enable individuals and their attorneys to access criminal records.²⁷

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

State laws govern access to juvenile records. Most states consider those records to be public, but restrict access after the person attains the age of majority. Attorneys should seek records relating to juvenile delinquency, including diversion or referrals to restorative justice programs, for all clients interested in requesting DACA. In cases where records are unavailable, attorneys should explain the reasons on Form I-821D and cite to any relevant state statutes.

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

²⁵ For more information regarding potential employer liability stemming from data provided to DACA requesters, see AILA Verification and Documentation Liaison Committee, *Practice Advisory: Counseling Employers on DACA Issues* (updated September 21, 2012), AILA InfoNet Doc. No. 12090749.

²⁶ More information about FBI criminal background checks is available at <http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi>.

²⁷ Information about state-based criminal history systems is available at http://www.publicrecordsinfo.com/criminal_records.htm.

What crimes render a requester ineligible for deferred action?

Individuals are not eligible for deferred action if they have been convicted of a felony, a significant misdemeanor,²⁸ 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.²⁹ 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.

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, will be a felony. A violation which carries a sentence of five days or less, such as a municipal violation, may not be counted as a misdemeanor, but may nonetheless be taken into consideration under the totality of the circumstances. Attorneys also should be cautious of federal tickets, which under the Assimilated Crimes Act, could be counted as a misdemeanor.

A "significant misdemeanor" for purposes of the DACA request 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 requester was sentenced to more than 90 days imprisonment, not including suspended sentences, pretrial detention or time held pursuant to an immigration detainer. The policy specifically notes that a conviction for driving under the influence of drugs or alcohol is a significant misdemeanor, regardless of the sentence imposed. The FAQ, however, does not define the term "driving under the influence," leaving it unclear whether USCIS will regard all -- or just some -- offenses involving driving

²⁸ This term does not appear in the Immigration and Nationality Act or elsewhere in the U.S. Code.

²⁹ The Standard Operating Procedures Manual provides that the requester "must fully document the exceptional circumstances." U.S. Department of Homeland Security National Standard Operating Procedures, "Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)" (Sep. 13, 2012) at 74, *available at* http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf (accessed July 25, 2013).

after the consumption of alcohol as significant misdemeanors. In some situations, counsel representing potential DACA requesters who have been convicted of certain state offenses involving driving after the consumption of alcohol may consider arguing that their clients have not been convicted of “driving under the influence” for DACA purposes. It could be argued that “driving under the influence” for DACA purposes should mean what it ordinarily means in federal law -- namely, driving with a Blood Alcohol Concentration (“BAC”) or Breath Alcohol Concentration (“BrAC”) at or above 0.08.³⁰ Some states criminalize driving after the consumption of lesser quantities of alcohol.³¹ If your client has been convicted of such a lesser offense, arguably your client has not been convicted of a “driving under the influence” for DACA purposes. Bear in mind that even if USCIS concurs with this argument, a request may nevertheless be denied in the exercise of discretion. Thus, attorneys representing potential DACA requesters with such convictions should advise the client in writing of the substantial risks inherent in requesting DACA with a conviction for driving after the consumption of alcohol. Moreover, it may be wise to argue in the alternative that if USCIS concludes that the individual is barred from DACA on account of the offense, the case presents exceptional circumstances warranting a grant of DACA.

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” (The federal criminal classification scheme see above), 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

³⁰ For Federal lands under the administration of the National Park Service, a 0.08 per se Blood Alcohol Concentration or Breath Alcohol Concentration limit has been operative since 2003. 36 CFR § 4.23(a)(2). A 0.08 standard also applies on military installations, which are administered by the Department of Defense. 32 CFR § 634.34(a)(3). Likewise, the Coast Guard embraces this limit for recreational vessel operators on waters subject to its jurisdiction. 33 CFR § 95.020(a). The Uniform Code of Military Justice embraces a default limit of 0.10, an even higher concentration of alcohol than 0.08. 10 U.S.C. § 911. In addition, Congress restricts certain transportation funding to those States that enact and enforce a 0.08 limit. 23 U.S.C. § 163.

³¹ Col. Rev. Stat. § 42-4-1301(1) (g) (“Driving while ability impaired”); D.C. Code § 50-2205.02(2) (if BAC is 0.05 or more, prima facie evidence that driver under the influence); MD Code, Transportation § 21-902(b)(1)(driving while impaired by alcohol, *Turner v. State*, 956 A.2d 820, 828 (Md. Ct. Spec. App. 2008) (driving “under the influence” requires “substantial” impairment whereas conviction for driving “while impaired” requires simple impairment “to some extent.”)); Mich. Comp. Laws § 257.625(3) (“driving while visibly impaired,” a lesser included offense under Michigan’s DUI statute, *People v. Prehn*, 396 NW 2d 472 (Mich. Ct. of App. 1986)); NY VTL § 1192(1) (driving while ability impaired, a lesser included offense under New York’s DWI statute, *People v. Smith*, 18 NY 3d 544 (NY 2012)); Okla. Stat. Ann. § 47-761(A) (driving while ability impaired held a lesser included offense to driving under the influence, *Bernhardt v. State*, 719 P.2d 832, 834 (Okla. Crim. App. 1986)).

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 requester has ever been "arrested for, charged with, or convicted of a crime in any country other than the United States." Unlike the question on the I-821D regarding convictions in the United States, the question on foreign crimes neither mentions the words "felony or misdemeanor" nor the exception for minor traffic violations. Although the Board of Immigration Appeals has case law regarding how to classify a foreign crime,³² DHS does not indicate how it intends to treat these offenses for DACA purposes. A question remains whether DHS will use the maximum punishment under the foreign law to determine whether the offense is a felony or a misdemeanor for DACA purposes.

A requester who does not meet the eligibility requirements risks being placed in removal proceedings or being detained. In addition, for cases that involve a "criminal offense, fraud, or a threat to national security or public safety," confidentiality protections, which are discussed above, will likely not apply unless DHS determines there are exceptional circumstances. USCIS will apply its existing [Notice to Appear guidance](#) governing referral of cases to ICE and issuance of notices to appear, which is also discussed below. As to how DACA will interact with other provisions of immigration law, such as mandatory detention or reinstatement provisions, there is no clear guidance at this time; requesters with such issues may wish to delay applying until further guidance is provided.

What additional documents must requesters who have been arrested submit?

Form I-821D requires a requester who answers "yes" to Part III, question 1, regarding arrests, charges and convictions in the United States to furnish "copies of all arrest records, charging documents, dispositions (outcomes), sentencing records, etc." A requester with a foreign conviction must furnish the same level of documentation.

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 requester from DACA relief. A minor with a delinquency adjudication will get a case-by-case review to see if the "particular circumstances" of his or her case warrant a positive exercise of prosecutorial discretion. Attorneys should explore the circumstances and facts surrounding any juvenile delinquency adjudication to anticipate how DHS might characterize the underlying conduct that gave rise to the delinquency adjudication, as well as seek out evidence of mitigation or rehabilitation, as appropriate. For example, a noncitizen who receives a delinquency adjudication because of an offense that otherwise would have been considered a significant

³² See, e.g., *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) (requiring offense to be for conduct deemed criminal in the United States and evaluating crime in light of U.S. standards for purposes of determining whether offense was criminal or delinquent).

misdemeanor for an adult, may be found ineligible. A noncitizen convicted as an adult offender has an adult conviction, and does not receive case-by-case treatment based on age.

Some requesters 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, which 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. Requesters 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.³³

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 requester could nonetheless be found ineligible for deferred action or even at risk of enforcement action. Police reports or complaints suggesting drug use or drug trafficking, assaults against family members or partners, and sex crimes should 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. Unfortunately, many people will not know if they are suspected of being gang members until USCIS completes a background check through the National Crime Information Center (“NCIC”), which cross-references the Violent Gang and Terrorist Organization File (“VGTOF”).³⁴ The criteria for inclusion in the VGTOF are

³³ Gang membership may prove to be an area of concern for potential requesters, given the reported difficulties former gang members face obtaining other immigration benefits and prosecutorial discretion in general.

³⁴ 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*

either self-admission as a gang member upon arrest or incarceration, or two of the following: (1) identification “as a gang member by a reliable informant”; (2) identification “as a gang member by an informant whose information has been corroborated”; (3) “frequent[ing] a gang’s area, associat[ing] with known members, and/or affect[ing] gang dress, tattoos, or hand signals”; (4) being “arrested multiple times with known gang members for offenses consistent with gang activity”; or (5) “[s]elf-admission” as a gang member at some point other than upon arrest or incarceration.³⁵ 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 requester 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,³⁶ for any gang references. Attorneys should submit an FBI background check request,³⁷ 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.

Attorneys are advised to review distinctions between gang members and nonmembers. For example, a gang membership determination could be incorrect if a USCIS officer misreads tattoos and incorrectly concludes that the person in question belongs to a specific gang. Alternatively, an individual may have been a gang member in his teenage years, but subsequently left the gang. 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, as discussed above, such an individual risks removal if he or

at <http://www.bjs.gov/content/pub/pdf/gullea07.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>.

³⁵ NCIC 2000 Operating Manual: VGTOF File, § 9.2, *available at* <http://www.leads.ohio.gov/manuals/ncic/VGTOF.htm>; *see also* Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 Buff. L. Rev. 461, 474-78 (2013) (discussing history and over-inclusive nature of VGTOF). Counsel should be aware that, as compared to the VGTOF, state law enforcement agencies may have different -- and in some cases, narrower -- inclusion criteria for entry into state databases. *See, e.g.*, Minn. Stat. § 299C.091(2)(b) (individual may be entered into gang database only if the individual meets certain extra-conviction criteria *and* the individual has been convicted of a gross misdemeanor or felony, or has been adjudicated or has a stayed adjudication as a juvenile for an offense that would be a gross misdemeanor or felony if committed by an adult). For more information about state gang-related legislation, visit the Bureau of Justice Assistance’s National Gang Center website, which is available at <http://www.nationalgangcenter.gov/Legislation>.

³⁶ 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).

³⁷ Attorneys may wish to request information contained in the VGTOF on the FBI background check fingerprint form in the “Reason Fingerprinted” field.

she is considered an enforcement priority. Practitioners are advised to follow trends in this area closely. A similar analysis would apply when reviewing whether someone could be deemed to be a national security threat.³⁸

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 activity at issue will overcome the bar. Because individuals who would face these bars are necessarily likely to be considered enforcement priorities, attorneys should proceed with caution, if at all, in affirmative filings, and should consider providing clients with clear written warnings of the heightened risks associated with making a request under these circumstances. 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.³⁹ 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 as stated in the initial FAQs released on June 15, 2012. The request should include a copy of the removal order or the decision of the immigration court or the Board of Immigration Appeals, if available. Such individuals may be under 15 at the time of

³⁸ It is likely that USCIS will rely on the Fraud Detection and National Security (FDNS) Directorate which has placed FDNS officers in every USCIS office. According to USCIS, the Fraud Detection and National Security Data System (FDNS-DS) will be used to identify fraud and track potential patterns of abuse. The Terrorist Screening Database may also be used.

³⁹ The Standard Operating Procedures Manual provides that the requester “must fully document the exceptional circumstances.” U.S. Department of Homeland Security National Standard Operating Procedures, “Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)” (Sep. 13, 2012) at 74, *available at* http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf (accessed July 25, 2013).

the request, but cannot have been 31 or older as of June 15, 2012, to be considered for DACA. If an individual does not meet the age requirements for DACA, he or she may ask ICE to consider a request for prosecutorial discretion under the June 17, 2011 Morton memo.

Individuals who are prima facie eligible for DACA in immigration detention should notify their detention officer or contact the ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>. Once ICE is made aware of the case, ICE has explained that the Office of the Principal Legal Adviser (OPLA), in consultation with ERO, will determine whether the detainee meets the DACA guidelines.⁴⁰ 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 requester'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). There is anecdotal evidence that ICE has released individuals to apply for DACA where the person only lacked the educational requirement. Thus, if a client does not immediately meet the education requirements, attorneys still should consider requesting DACA. Additionally, anecdotal evidence exists of ICE offering deferred action to individuals prosecuted for felony identity theft or criminal impersonation when the person was 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 the individual can present evidence of "exceptional circumstances," to overcome the criminal bar, especially if the person is not eligible for any other relief.

Individuals who recently received a final order of removal and are still within the statutory time period for seeking reopening (within 90 days of the entry of a final order of removal under INA § 240(c)(7)(C)), may want to consider filing a motion to reopen based on the new DACA guidance. An individual beyond the reopening period may seek DHS's consent to file a joint motion to reopen or even present a motion to the immigration court or Board of Immigration Appeals (BIA) for *sua sponte* consideration.⁴¹ Even though such individuals are eligible for DACA, it is generally to their advantage to reopen the case in order to obtain administrative closure or termination. This may put them in a better position in the event DACA is rescinded, a renewal request is denied, or the individual becomes eligible for another form of relief from removal. However, by seeking DHS's consent to file a joint motion to reopen, some requesters 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.

⁴⁰ ICE/NGO DACA Meeting, April 16, 2013 (notes on file with the American Immigration Council).

⁴¹ Although some ICE offices have reportedly agreed to join motions to reopen for individuals with final orders who appear to be eligible for DACA, the agency does not have an official policy to this effect.

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. Since Secretary Napolitano's June 15th announcement, ICE has granted deferred action to certain individuals who met the DACA guidelines and whose cases had been identified previously for administrative closure.

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

Requesters 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 recent BIA 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.⁴² Thus, 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.

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

On June 15, 2012, Secretary Napolitano instructed ICE and CBP to immediately exercise their discretion, on a case-by-case basis, to prevent individuals who meet the eligibility criteria from being apprehended, held under ICE detainers, placed into removal proceedings, or removed from the United States. On a June 18, 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.

⁴² *See* discussion *infra* pp. 25-27 (“Will individuals who request DACA be permitted to travel outside the United States?”).

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 ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>.

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 invariably 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.

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 (regardless of being brief, casual and innocent) 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. 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. 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. We have heard reports that USCIS has granted advance parole to DACA recipients, however the travel authorization period 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.

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.⁴³

Otherwise, their departures may cause them to be “considered deported or removed, with potentially serious future immigration consequences.” Questions about this process may be directed to the ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>.

Even if travel abroad is permitted via advance parole, it may not be in an individual’s best interest. 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.⁴⁴

The Board’s recent decision in *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), however, hints at a possible advantage to travel on advance parole for those that have not already triggered inadmissibility bars. 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.⁴⁵

⁴³ If the requester’s case is before the BIA and the case is administratively closed, departure will automatically withdraw the appeal. 8 C.F.R. § 1003.4.

⁴⁴ 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 at 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).

⁴⁵ 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).

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.⁴⁶ Under *Arrabally*, an argument could be made that individuals who already have a path to residency, but who are not currently eligible to adjust (such as an EWI immediate relative of a U.S. citizen, entering as a parolee), may find they are not only eligible to apply to adjust after travel on advance parole (because they now are in parole rather than EWI status), but also need not apply for a waiver of the three- or ten-year bar.⁴⁷ Given the short time *Arrabally* has been in play and the lack of guidance on how USCIS may treat such departures, attorneys should monitor developments in this area before advising clients on the impact of travel.

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

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

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

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

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

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

⁴⁶ It is also important to note that a person travelling to U.S. territories may be subject to grounds of inadmissibility. *See* 8 C.F.R. 235.5.

⁴⁷ 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. AILA InfoNet Doc. No. 12102242.

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

Attorneys are advised to warn their clients in writing that even for prima facie eligible cases, deferred action is not guaranteed. The warning should further explain that requesters will be revealing and, in most cases, documenting their removability to a government agency that can initiate removal proceedings.⁴⁸ If USCIS denies deferred action to a requester subject to a final order of removal, that individual may still request prosecutorial discretion pursuant to the prior guidance issued by ICE on June 17, 2011, or the ongoing review of pending removal cases announced in August 2011. Such requests may be submitted to the local ICE Office of Chief Counsel or Field Office Director, as appropriate.

In cases where USCIS denies an individual's request for deferred action and the individual is not subject to a final order of removal, USCIS will apply its existing [Notice to Appear guidance](#) governing referral of cases to ICE and issuance of notices to appear. This guidance prioritizes the prosecution of cases involving criminal convictions, fraud, and threats to national security or public safety.⁴⁹ In addition, DHS said in the FAQs that individuals who knowingly make a misrepresentation or knowingly fail 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 requester 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.

USCIS may share information regarding requesters, 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.

⁴⁸ Confidentiality provisions outlined in the most recent FAQs indicate that such information regarding requesters or their family members or guardians is protected from disclosure for the purpose of immigration enforcement unless the requester meets the USCIS criteria for the issuance of a Notice to Appear. Notably, the policy is subject to change.

⁴⁹ In accordance with its existing guidance, USCIS also will continue to issue notices to appear as required by statute or regulation, including in cases involving denials of Form I-751 (Petition to Remove the Conditions of Residence), denials of Form I-829 (Petition by Entrepreneur to Remove Conditions), terminations of refugee status, denials of NACARA 202 and HRIFA adjustments, asylum referrals, termination of asylum or withholding of removal, positive credible fear findings, and certain NACARA 203 cases.

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

No. However, requesters or their attorneys can contact the National Customer Service Center at 1-800-375-5383 to request review if: (i) USCIS denied a DACA request based on abandonment in a case where the requester responded to a Request for Evidence within the prescribed time; or (ii) USCIS mailed the Request for Evidence to the wrong address despite the requester's prior submission of a [Form AR-11 \(Change of Address\)](#) or online change of address. There is no prejudice to filing a new request.

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.