



Tip of the Month February 2013

Basics of Deferred Action for Childhood Arrivals

Submitted by Diana Villella Larson, Managing Attorney of the Spanish Legal Services Program

On June 15, 2012, the Secretary of Homeland Security announced the issuance of President Obama's Executive Order that allowed consideration for deferred action of childhood arrivals (DACA) who meet certain eligibility requirements as outlined below. This is a determination to defer removal action of a person as an act of prosecutorial discretion. A person who has received deferred action will stop accruing unlawful presence during the time the deferred action is in effect. Upon approval, childhood arrivals receive deferred action status for a period of two years, subject to renewal, and may be eligible for employment authorization. Deferred action does not erase previous or subsequent periods of unlawful presence. Due to the fact that this is a discretionary determination, the Department of Homeland Security can terminate at any time.

ELIGIBILITY REQUIREMENTS (To be considered for deferred action status a person must):

- 1) Be under the age of 31 as of June 15, 2012¹;
- 2) Have arrived in the United States prior to his/her 16th birthday;
- 3) Have continually resided in the United States since June 15, 2012, and at the time of making his/her request;
- 4) Be physically present in the United States on June 15, 2012, and at the time of making his/her request;
- 5) Have entered into the United States without immigration inspection before June 15, 2012, or his/her lawful immigration status expired as of June 15, 2012;
- 6) Be in school², or have graduated or obtained a certificate of completion from high school, obtained a general education development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and,
- 7) Not have been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and not otherwise pose a threat to national security or public safety.

¹ Must be at least 15 years of age at time of filing

² Must be enrolled in:

- a public or private elementary school, junior high or middle school, high school, or secondary school;
- an education, literacy, or career training program (including vocational training) that is designed to lead to placement in postsecondary education, job training, or employment; or
- an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law.

PRACTICAL IMPLICATIONS

Many clients question whether Deferred Action for Childhood Arrivals creates a path to permanent residence or citizenship. The unfortunate answer is, no, it does not. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon **unlawful presence**, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by the Department of Homeland Security (DHS) to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer **lawful status** upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence. Additional benefits of deferred action status include potential employment authorization and the ability to apply for a license to drive.

PROCESS

To apply for DACA an applicant must submit the I-821D, I-765, and I-765WS forms in addition to evidence of the eligibility requirements. The forms and instructions can be found on the government website [here](#). There is no limit to the amount of evidence an applicant can submit. Including as much evidence as possible will improve the chances of having the application approved.

Once an application for DACA has been received, a receipt notice will be sent to the applicant. U.S. Citizenship and Immigration services (USCIS) will then set an appointment at an Application Support Center. At this appointment a background check will be conducted. The background check involves checking biographic and biometric information provided by the individuals against a variety of databases maintained by DHS and other government agencies. Failure to attend the appointment may result in a delay of the processing the request.

CRIMINAL RECORDS

If an applicant has a felony conviction, significant misdemeanor offense or multiple (three or more) misdemeanors not occurring on the same date and not arising out of the same act, omission or scheme of misconduct, **they will not be considered for deferred action**. A **felony** is a federal, state, or local criminal offense *punishable* by imprisonment for more than one year.

A **significant misdemeanor** is a misdemeanor as defined by federal law (one for which the maximum term of imprisonment *authorized* is one year or less but greater than five days) and meets the following criteria: domestic violence, sexual abuse, or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or a DUI; or, if none of the offenses listed, is one for which the individual was sentenced to time in custody or more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence. A **non-significant misdemeanor** is any misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria: 1) is not an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or a DUI, and (2) is one for which the individual was sentenced to time in custody of 90 days or less. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE.

POTENTIAL RISKS

As with any application made to USCIS, there are risks involved, especially when an applicant has a criminal history. Applicants should consult with an attorney prior to their submission. The information shared in the request for deferred action for childhood arrivals is protected from disclosure to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) for the purposes of enforcement proceedings. However, if the applicant meets the criteria for a Notice to Appear or a referral to U.S. Immigration and Customs Enforcement under the criteria set by the USCIS they could be at risk of removal. More information regarding these criteria can be found at: www.uscis.gov/NTA. Those applications that are

approved for deferred action will not be referred to ICE. The information could be shared with ICE, CBP and other law enforcement agencies for reasons other than removal. This information sharing policy covers family members and guardians, in addition to the requestor. This policy can be changed at any time without notice to the applicants.

All this information and more can be found at <http://www.uscis.gov/portal/site/uscis>

PLEASE NOTE:

When assisting a client with a DACA application, complex issues may arise. VLN volunteers are strongly encouraged to speak with a mentor attorney or VLN resource attorney if they have any questions. In addition, VLN is presenting a webinar CLE entitled, “**Deferred Action for Childhood Arrivals: Nuts, Bolts, and Wrenches**” on **February 26th, 2013 from 12-1:30 p.m.** which will provide a more detailed look at the complex issues that can arise. Registration information available [here](#).