

Q&A From Webinar on Executive Action

“Getting Ready For Administrative Relief: What We Know Now”

On November 24, 2014, the Committee for Immigration Reform Implementation (CIRI) sponsored a one-hour webinar reviewing several of the components of the President's executive action. Listeners were invited to submit written questions, and after the webinar we reviewed the questions to eliminate duplicates and organize them by topic. We generally did not rephrase listeners' questions. However, in a few instances, we edited questions for brevity and clarity. Look for the answers to your questions below.

DAPA Questions

Parent/Child Relationship

- **Q. Are there any restrictions in marriage dates for parents with a stepchild? Let's say a couple has a one year relationship and decides to get married now, after the immigration provision was published, is there any negative issue about getting married (in a real relationship) and then applying when the application period begins?**
 - *A. To qualify for DAPA, the parent/child relationship must have been in existence on November 20, 2014. If an individual marries after November 20, 2014 and has a stepchild as a result of that marriage, that stepchild cannot be the basis of DAPA eligibility.*

- **Q. Will stepparents be eligible (as they are under family petitions) to apply based on a relationship with citizen/resident stepchild?**
 - *A. Unknown. USCIS has not stated how the term parent/child relationship will be defined for DAPA. The immigration law definition of child at INA Sec. 101(b) however, does include stepchildren, as long as the marriage creating the relationship took place by the time the child turns 18. If DHS applies this definition to DAPA applicants, a DAPA applicant will qualify based on having a U.S. citizen (USC) or Lawful Permanent Resident (LPR) stepchild as long as (a) that relationship existed by November 20, 2014, and (b) the marriage creating the parent/stepchild relationship took place before the stepson or stepdaughter was age 18.*

- **Q. Is there a minimum or maximum age for the USC or LPR child of a potential DAPA applicant?**
 - *A. The [2014 Deferred Action Memo](#) just states that a DAPA applicant must show that she or he was the parent of a USC or LPR son or daughter as of November 20, 2014. There is no minimum or maximum age with respect to the child. Presumably, an individual will be eligible for DAPA based on a USC child born on or before November 20, 2014, assuming she or he meets the other DAPA eligibility requirements.*

- **Q. What if the daughter/son is married? Are parents still eligible for DAPA?**
 - A. Yes.
- **Q. Can a person be too old or too young to apply for DAPA?**
 - A. *The 2014 Deferred Action Memo does not include any minimum or maximum age limits for DAPA applicants.*
- **Q. Will the parents of a USC child who has just died be eligible?**
 - A. *Unknown. The [2014 Deferred Action Memo](#) does not speak to this issue. In a [November 25, 2014 discussion on Univision](#), White House Domestic Policy Council Director, Cecilia Muñoz, indicated that the parents of deceased children would not qualify for the program.*
- **Q. What about parents who have very little to do with their citizen child?**
 - A. *Unknown. The 2014 Deferred Action Memo merely requires a parent/child relationship. However, because DAPA is discretionary, it is possible that a failure to care for the USC or LPR child will be taken into consideration in deciding the application.*
- **Q. Does DAPA apply semi-retroactively? In other words, if a child becomes a resident after November 20, 2014, but before the executive action becomes implemented, can the parents qualify for DAPA?**
 - A. *Unknown. We will advocate with USCIS about the benefits of including parents of children who become LPRs after November 20, 2014.*
- **Q. What about the situation of a father who entered EWI, but has a pending I-130 by father's U.S. citizen mother that is still pending. Yet Father has three minor children, does he qualify for DAPA?**
 - A. *Yes, assuming he meets all of the criteria. A pending I-130 has no impact on eligibility for DAPA.*
- **Q. Do we know if parents of LPR sons/daughters, kids who achieved their residency based on SIJ status, would qualify through these kids?**
 - A. *Unknown. A person who became an LPR as a special immigrant juvenile (SIJ) may not petition for his or her natural or prior adoptive parents, even if parental rights were not terminated. DHS has not indicated whether this same rule will extend to DAPA to prevent parents of children with LPR status based on SIJ from qualifying for the DAPA program.*

Unlawful Status

- **Q. Would DAPA be available to the parent of a USC child, even if the parent is a Visa Waiver Program (VWP) overstay?**
 - A. *DAPA applicants must be unlawfully in the U.S. as of November 20, 2014, and this would include those who have overstayed authorized stays, as well as those who entered without inspection and have no status. DAPA applicants also must not fall within the new [DHS Enforcement Priorities Memo](#), which includes a category relating to individuals who have "significantly abused the visa or visa waiver programs." By all*

accounts, this phrase is entirely new to immigration law and policy. While we will have to wait for additional guidance from DHS on this issue, we do not expect mere overstays to be considered ineligible for DAPA.

Taxes

- **Q. Should we expect the DAPA form to ask about whether applicants have paid taxes?**
 - A. Although President Obama spoke about paying taxes when he described the DAPA program in his November 20, 2014 announcement, the [2014 Deferred Action Memo](#) describing requirements for DAPA does not list payment of taxes as an eligibility factor. However, DAPA is discretionary and the failure to pay taxes may be viewed as a negative factor.

Immigration Fraud

- **Q. Will a prior history of immigration fraud affect eligibility?**
 - A. In all likelihood, this will depend on the extent of the fraud. We know that a person is ineligible for DAPA if he or she is described under the [DHS Enforcement Priorities Memo](#). A person who has “significantly abused the visa or visa waiver programs” falls under Priority 2 of the DHS Enforcement Priorities Memo. The phrase “significantly abused the visa or visa waiver program” is a new phrase in immigration law and we do not know what it means. In addition, remember that DAPA is a discretionary form of relief and in certain circumstances immigration fraud is highly likely going to be viewed as a serious negative factor. Also, be aware that immigration fraud may be the basis for issuing a Notice To Appear. USCIS’s [NTA policy](#) specifically identifies “fraud cases with statement of finding substantiating fraud” as a category for issuing a NTA. Be sure to review an applicant’s A-file closely to determine if there has been a finding of fraud by DHS or INS.

Working under a false name

- **Q. How to advise someone who is using a false name regarding proof of eligibility?**
 - A. USCIS has not issued information about what evidence it will accept to demonstrate eligibility for DAPA. Be sure to check the USCIS website, as this information is likely to be forthcoming. Also, applicants should be aware that it is best not to submit documents that use false names or social security numbers where it can be avoided. There are many other ways to document their eligibility, beyond submitting documents that would show they have used a false name (which typically happens on employment documents). This includes: medical records, their child’s school records, utility bills, correspondence, etc.

Application and Fees

- **Q. Any idea what the filing fees will be for DAPA and what would be a reasonable fee for an attorney to charge?**
 - A. The fee for DAPA will be \$465. This is specified in the [2014 Deferred Action Memo](#). Moreover, the memo says that there will be no fee waivers and narrow fee exemptions, like DACA. We cannot advise you as to what fees to charge in private practice.

- **Q. When will we know when the DAPA program will start? I see that for DACA expansion, the application period will begin approximately 90 days after the announcement.**
 - *A. The USCIS application period for the DAPA program is expected to begin within six months of the announcement—or, by May 19, 2015. Meanwhile, ICE and CBP are instructed to immediately begin identifying—and exercising discretion on behalf of—individuals who meet the criteria for DAPA or expanded DACA.*

Continuous Residence Since January 1, 2010

- **Q. How is continuous residence defined? Can an applicant have left the United States for a short period, or must the residency since 01/01/10 been uninterrupted?**
 - *A. Residency need not have been uninterrupted since January 1, 2010; however it is unclear precisely how DHS will define continuous residence. We know that the [2014 Deferred Action Memo](#) requires continuous “residence” **not** uninterrupted physical presence. Immigration law distinguishes between residence and presence. Wherever a person is required to establish continuous residence for purposes of obtaining a benefit, departures are permissible provided they do not interrupt residence under the laws or policies of the benefit or program at issue. In DACA, a departure does not interrupt continuous residence if it is “brief, causal, and innocent.” We will have to see if similar guidance is issued with respect to the DAPA continuous residence requirement. A glossary provided on the USCIS Executive Action on Immigration website suggests DHS may adopt the continuous residence standard used in the naturalization context, but we don’t know this for sure, so stay tuned for guidance.*
- **Q. Would DAPA be available to the parent of a USC child, where the parent entered EWI but later departed and re-entered again as EWI?**
 - *A. DAPA applicants must show continuous residence in the U.S. since January 1, 2010. The unlawful presence and permanent bar inadmissibility grounds are inapplicable to DAPA eligibility. But if the parent’s absence was after January 1, 2010, you will need to assess whether the absence disrupted continuous residence. If the most recent EWI arrival of the parent was on or after January 1, 2014, the individual could be considered a priority under the [DHS Enforcement Priorities Memo](#), and therefore ineligible for DAPA.*
- **Q. We have a client who arrived with her young son on a fiancée petition this summer. Upon arrival, the fiancé stopped the relationship. The fiancée is now here, with her young son, and there is no way she can fulfill her fiancée petition. Mom has an adult USC son living here. Is mom eligible for DAPA, and what relief, if any, is the young son eligible for?**
 - *A. It sounds like this fiancée will not be able to meet the DAPA eligibility requirement of showing that she has resided in the U.S. continuously since January 1, 2010. Her fiancée status ends 90 days after entry and she will then start accumulating unlawful presence. If she departs before accruing more than 180 days of unlawful presence, she can avoid triggering the three-year unlawful presence bar when she departs. While her adult U.S. citizen son can petition for her and she can immigrate through that petition at a U.S. Consulate abroad, that won’t include her young son. In addition, if she triggers the three- or ten-year bar, she cannot qualify for a waiver of*

inadmissibility based on hardship to her USC son— the statute specifies that only hardship towards spouses and parents can be considered.

- **Q. I have a client who overstayed his tourist visa and lived in the U.S. from 2000 to 2011. He has a son who was born in the U.S. in 2006. In 2011 he and his child moved to Costa Rica while his fiancée and mother of the child remained in U.S. They didn't marry yet because faith belief differences but they still are in a relationship. Last year, he applied for a tourist visa in Costa Rica and without any question the U.S. Embassy granted him a tourist visa for 10 years. During his time abroad they paid joint taxes and had joint bank accounts. He returned to the U.S. with a tourist visa in March 2014 and his permit stay expired last October. His son is in the U.S., too. This person is a community leader, he always contributes to our community volunteering his time. Can he apply and ask for a waiver documenting his contributions to our community?**
 - *A. Unfortunately, this person will not be eligible for DAPA. He will not be able to show continuous residence in the U.S. since January 1, 2010. There is no waiver for this eligibility requirement.*

Crimes

- **Q. I want to know what criminal convictions/charges will preclude applicants from the new program, and the difference between DACA and DAPA in terms of criminal convictions.**
 - *A. We recommend you carefully review the [DHS Enforcement Priorities Memo](#). The DAPA crime bars are listed in priorities 1 and 2 of the DHS Enforcement Priorities Memo. Remember that there are bars to DAPA (and DACA) that do not require a criminal conviction. For example, a person is barred from DAPA if he or she is suspected of having “engaged in...terrorism or espionage” or is deemed to have “significantly abused the visa or visa waiver program.” The criminal bars to DAPA include: felonies, significant misdemeanors and three or more non-significant misdemeanors. A person is also barred from DAPA if he or she has been convicted of an aggravated felony or an offense for which an element is active participation in a criminal street gang [as defined in 18 USC § 521(a)]. At this point USCIS has not clarified whether expunged convictions will be treated as they are in the DACA context (i.e. not automatic bars to demonstrating eligibility for the program).*
- **Q. I note that the new PD memo states that it will come into force on 1/5/2015. Given the new treatment for DUIs, I am concerned about DUI-convicted clients' PD requests - would it make a difference to send them before 1/5/2015 in practice, or is it now too late?**
 - *A. The new administrative relief program does not create any new policy for DUIs. For both DAPA and DACA, a DUI is a “significant misdemeanor,” and therefore a disqualifying offense.*
- **Q. What about equities for historical or explainable misdemeanors. For example, a 40 year old who got one DUI when 19, or a kid who got a DUI a week after his sister was**

abused by his dad and has been clean since? What if you dismiss/expunge a DUI conviction? Still not eligible?

- A. A DUI is a significant misdemeanor under the DHS Enforcement Priorities Memo, and therefore prevents eligibility for DAPA. It is possible, however, that an expunged DUI will not be an automatic bar to eligibility; we will have to wait until DHS clarifies whether it will recognize expungements as a way to overcome DAPA crime bars. A charge that has been dismissed is not a conviction and therefore does not create a crime-bar to eligibility. It is also unclear how USCIS and ICE will interpret the following language in the DHS Enforcement Priorities Memo, which provides that the removal of Priority 1 individuals must be prioritized unless “there are compelling and exceptional factors that clearly indicate the [individual] is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.”

Applicant in Removal Proceedings, With Removal Order, Or Other Immigration Law Violation

- **Q. What is administratively closing a case and terminating a case?**
 - A. When a case is “administratively closed” it is still pending, but inactive, with no set future court date. Either party to the case - the government or the respondent (the person in proceedings) - may ask the court to “reactivate” the case. When a case is “terminated,” the proceedings are over.
- **Q. What happens if a person got expedited removal before January 2010? Is the person eligible for DAPA if she or he fulfills all the other requirements?**
 - A. A prior removal order is generally not a bar to DAPA eligibility. Those individuals, however, who have been issued a final removal order on or after January 1, 2014 are in the priority 3 category of the [DHS Enforcement Priorities Memo](#). We will have to see whether DHS guidance will allow such individuals to apply if they are otherwise eligible for DAPA.
- **Q. What is going to be the effect of one or more turnarounds at the border when the parent first came to this country? What about a deported returnee who has been here for years, maybe decades since then?**
 - A. See above.
- **Q. I have two clients who were ordered removed in 2013 and their appeals to the BIA were dismissed after 1-1-14. Petitions for Review with Circuit Court of Appeals were filed and are currently pending. Are they eligible for DAPA? What about those who did not file a PFR but their appeals were dismissed by the BIA after 1-1-14?**
 - A. Although individuals with final orders of removal are eligible for DAPA, those with final orders on or after January 1, 2014 may not be, because they fall within Priority 3 of the [DHS Enforcement Priorities Memo](#). Nevertheless, the memo makes clear that individuals in this category may not be a priority for removal where:
 - a) they qualify for asylum or another form of relief under our laws;
 - b) they are not a threat to the integrity of the immigration system; and

c) there are factors suggesting that they should not be an enforcement priority.

- **Q. Can someone who has had two removals at the border over ten years ago and has a U.S. citizen child qualify for DAPA?**
 - A. *See above. Prior removal orders are not a bar to DAPA eligibility. Remember, however, that DAPA is a discretionary program and DHS may consider removals and subsequent reentries as negative factors.*
- **Q. What about the permanent bar?**
 - A. *A person subject to the permanent bar to admissibility at INA Sec. 212(a)(9)(C), without more, is not ineligible for DAPA.*
- **Q. What does it mean that the removal order was not "effectuated"?**
 - A. *A removal order that is not effectuated is a removal order that has not been enforced. A removal order is enforced when ICE or CBP (or legacy INS) physically removes the individual from the United States, or when a person departs the U.S. on his or her own while subject to an outstanding removal order.*

Confidentiality

- **Q. Where in the DACA/DAPA memo is the nondisclosure of information discussed?**
 - A. *The DAPA confidentiality policy is not in the [2014 Deferred Action Memo](#). The confidentiality policy is addressed at Question 10 of Key Questions and Answers on the [USCIS webpage on Executive Actions on Immigration](#). Under this policy, information in a DAPA application is protected from disclosure to ICE and CBP for the purposes of enforcement proceedings unless the applicant meets the criteria for issuance of a [Notice to Appear](#) or a referral to ICE as described in the November 2011 USCIS guidance on this issue.*

Advance Parole

- **Q. Will DAPA recipients be eligible for advance parole through the I-131 process?**
 - A. *At this juncture, DHS has not specified in writing that DAPA recipients will be eligible for advance parole. Our best guess is that, given the similarities between DACA and DAPA, DHS will allow DAPA recipients to request and receive advance parole.*
- **Q. Can you review the option for DAPA folks to travel abroad on AP, re-enter on AP, and then immediately adjust through their USC child (via Arably)?**
 - A. *As noted above, we don't yet know if there will be an advance parole option for DAPA grantees. Assuming there is, DAPA grantees traveling on advance parole will not trigger the unlawful presence ground of inadmissibility. Those DAPA grantees who travel and return to the U.S. with advance parole and are immediate relatives of U.S. citizens will likely qualify to adjust status under INA Sec. 245(a).*

DAPA vs. DACA

- **Q. If someone is eligible for expanded DACA and DAPA, is there any potential benefit to one over the other?**
 - A. *Expanded DACA applications will be accepted earlier than DAPA applications. Second, DACA beneficiaries stood to benefit under the Senate Bill (S.744), including a shorter path to legalization. It is possible that future legislation may provide added benefits to DACA beneficiaries.*

DACA Questions

- **Q. Can DACA applicants apply now if they entered AFTER they turned 16 years old, so long as they entered before January 2010?**
 - A. *Individuals who entered the United States after turning 16 years old remain ineligible for DACA. The DACA requirement of entry-before-age-16 has **not** changed.*
- **Q. For expanded DACA, what is the "Present on..." date? Does it move to 1/1/2010?**
 - A. *Unlikely. At this time, we assume it remains the date the DACA program was announced (June 15, 2012). The [2014 Deferred Action Memo](#) only mentions three changes to the DACA program: (i) Elimination of the age cap; (ii) Advancement of the continuous residence start date; and (iii) three-year grants of deferred action and employment authorization, instead of two.*
- **Q. Can someone be eligible for DACA if she came as a two year old, left as a nine year old and returned right after turning 16 years old? She has been in the U.S. since she was 16 and has had no police or immigration complications?**
 - A. *Yes, provided the applicant demonstrates that he or she "established residence" in the United States before turning 16. Our best guess is that a person who resided here for seven years before turning 16 will highly likely be considered to have "established residence."*
- **Q. Will the old group of DACA recipients be able to obtain DACA for three years when renewing their DACA applications? Right now I have two of them in the renewal process but the applications have not been sent yet and my question is: Will they receive their employment authorization document for three years not two?**
 - A. *The [2014 Deferred Action Memo](#), states that beginning November 24, 2014, "USCIS should issue all work authorization documents valid for three years," including to those who have applied for and are awaiting two-year work authorization documents for renewal. Therefore, assuming you submit these renewal requests after November 24, 2014, USCIS should issue employment authorization for a three-year period.*
- **Q. I have four Deferred Application requests that have been pending in the district sub-office for between two months to 1.5 years with no action. How do I follow up with or shift these requests to this administrative relief?**
 - A. *If you have a DACA application pending beyond normal processing times, follow the instructions on this webpage: <http://www.weownthedream.org/faq/item.4886-What-can-I-do-if-my-DACA-application-is-taking-too-long>.*

- **Q. In Arizona, some young adults have had B-2 tourist visas since they entered the country as little kids, when their parents brought them here. My question regarding this topic is, if an alien has had a B-2 visitor visa the entire time he's resided in the U.S. and has exited the country on multiple occasions to visit family and has always returned, does he qualify for the DACA extension program? If an alien has been deported and has illegally returned to the country, does he qualify for the DACA extension program?**
 - *A. An applicant for DACA must show that he or she was in the U.S. without lawful status on June 15, 2012. An individual who was in the U.S. within a period of authorized stay as a tourist on June 15, 2012 will not be considered eligible for DACA. In addition, an individual who was deported during the period in which continuous residence must be established will not be eligible for DACA. Under current DACA rules, this means that a deportation on or after June 15, 2007 will break the required continuous residence period. When the expanded DACA rules take effect, we presume that a deportation on or after January 1, 2010 will also break the required continuous residence.*

- **Q. Is there a time frame for those who were apprehended at the border for them to be a priority (i.e. those who were apprehended *after* 11/20/2014 vs. at any time before last Thursday)? Many DACA applicants who have already received DACA are those who have been apprehended at the border and told to turn around, but they successfully entered at a later date.**
 - *A. The new [DHS Enforcement Priorities Memo](#) does not control the bars to DACA.*

Provisional Waivers Questions

- **Q. What can we do with the spouse of a LPR I-601 client who does not yet have an interview scheduled, but whose case is already with the NVC?**
 - *A. The new DHS guidance on provisional waivers states that the regulation will be amended to include all classes of relatives eligible for an immigrant visa. However, we have no information about when this change may take place. If the spouse has a strong waiver case, she or he may want to go forward now rather than wait for an uncertain amount of time for the regulation to be amended.*

- **Q. Will non-citizens with a USC son or daughter (no USC spouse) fall under the 601A expansion?**
 - *A. No. Children do not constitute qualifying relatives for purposes of the "extreme hardship" waiver required to waive application of the three- and ten-year bars. The statute specifies that hardship only to parents and spouses is relevant for purposes of that bar.*

- **Q. If you are out of the country (married to USC) due to 212(a)(9)(B) unlawful presence inadmissibility and have a 10 year bar to reentry are you eligible for the provisional waiver to be available to all family-based immigrants?**
 - *A. Currently, the provisional waiver is available only to spouses, parents, and children of USCs (those immigrating in the immediate relative category) who have a USC qualifying relative (spouse or parent) and are only inadmissible based on the unlawful*

presence ground. An eligible applicant submits the waiver prior to departure so that it can be decided while the applicant is in the U.S.

- **Q. Are all family petition applicants eligible for a provisional waiver (including siblings)?**
 - A. *See above.*
- **Q. I was confused by the statement in the webinar about the provisional waiver. You seemed to imply that the qualifying relative was no longer required, which is not what I understand. But, please correct me.**
 - A. *That is not correct. The new DHS guidance on provisional waivers states that the regulations will be amended to include all classes of relatives eligible for an immigrant visa. Presumably, this expansion means that all family-based immigrants will be eligible to seek a provisional waiver for unlawful presence, and that qualifying relatives will include lawful permanent resident spouse and parents.*

Miscellaneous Questions

- **Q. Can someone who is 52 years old, came to the U.S. 13 years ago, and is now a legal resident apply for his mother who is 69 years old and has been here also for 13 years and has never left the U.S.?**
 - A. *LPRs cannot petition for parents; they can only petition for spouses, children (unmarried and under age 21) and for adult unmarried sons and daughters. An LPR who wants to petition for a parent needs to naturalize. Adult USCs can petition for their parents.*