BRINGING CLIENTS INTO ELIGIBILITY FOR DAPA AND DACA

GETTING THE FACTS THROUGH FOIA AND CRIMINAL RECORD REVIEW

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PANELISTS

Alison Kamhi, Staff Attorney
Immigrant Legal Resource Center

Richard Morales, Detention Prevention Coordinator
PICO Network

Rosa Saavedra Vanacore, DACA Fellow
National Immigration Project of the National Lawyers Guild
WHY DO A RECORD REQUEST?

- To know what documents the government has that could affect eligibility for relief
- To assess potential risk of enforcement
- To see a paper trail of previous immigration history to help piece together what happened
CRIMINAL BARS TO DACA

A person must have not been convicted of

• a felony,
• a significant misdemeanor,
• three or more non-significant misdemeanors

OR otherwise pose a threat to national security or public safety.
### BARS TO DAPA/ ENFORCEMENT PRIORITIES

#### Priority 1
- Convicted of:
  - a felony in the convicting jurisdiction
  - an aggravated felony (as defined under immigration law)
  - an offense with an element of participation in a criminal street gang
  - 16 or older and intentionally participated in an organized criminal gang to further the illegal activity of the gang
  - Engaged in or suspected of terrorism or espionage, or otherwise pose a threat to national security
  - Apprehended at a border or port of entry trying to unlawfully enter (after the effective date of the memo, Jan. 5, 2015)

#### Priority 2
- Convicted of:
  - three or more non-significant misdemeanors
  - one significant misdemeanor
  - Apprehended after unlawfully entering or reentering the U.S. and cannot show continuous physical presence since Jan. 1, 2014
  - Significantly abused the visa or visa waiver programs

#### Priority 3
- Issued a final order of removal on or after Jan. 1, 2014
WHO CAN MAKE A FILE REQUEST?

• Citizen or non-citizen may request own file

• Another person, with that person's consent -- can request a copy of the relevant file

Note: for information relating to a child and not represented by an attorney, establish proof of parentage or guardianship by providing a copy of a birth certificate or a court order establishing guardianship.
WHAT CAN YOU REQUEST?

Record requests can be made for all types of information held by the government, such as:

• what is in the Alien File (A File),
• the status of a complaint filed with the DHS Office of the Inspector General,
• tax returns, and
• criminal records
Step One: Identify the Information You Need

For example:

- Entries and exits to and from the US
- Record of any criminal convictions
- Previous immigration applications
- Gang records
INFO GATHERING STRATEGY

Step Two: Identify the Agency that has the Information

- *In general,* most requests for a person’s A file can be made directly to USCIS.

- Manifest of entries and exits to and from US, customs records, charges of removability or deportability, and other documents, are maintained by U.S. Customs and Border Protection (CBP), U.S. Office of Biometrics Identity Management (OBIM / formerly US-VISIT), or U.S. Immigration and Customs Enforcement (ICE).

- The Federal Bureau of Investigation (FBI) has criminal and immigration records.

- If a client was previously in criminal court, that court will have the records.

- If a client was previously in removal proceedings, the Immigration Court will have the records.
INFO GATHERING
STRATEGY

Step Three: How do you get the information you need

- Freedom of Information Act (FOIA)
- FBI Background Check
- State Criminal History Request
- Court Records Request
**TIPS**

- Each agency responds to requests for its own records. Always determine whether the agency is likely to have the records you are seeking.

- Requests must be for access to existing records. The FOIA office will not "create" records in order to respond to a request. What you are requesting must already exist in the agency records.

- Each government agency has its own policies for filing a request, so make sure you are using the appropriate forms and documents.

- If you seek information regarding third parties, either a written authorization signed by that individual permitting disclosure of those records to you, or proof that that individual is deceased (for example, a death certificate or an obituary) will help the processing of your request.
WHAT IS A FOIA REQUEST?

• Request for information from the government

• Each person entitled to request government documents under Freedom of Information Act (“FOIA”)

• Can request documents about yourself or others
WHAT CAN A FOIA REQUEST REVEAL?

Determine whether client has anything in the past that could affect **eligibility**:

- Can get “A File” with past immigration applications
- Can get border records on entries/exits
- Can see what criminal documents government has on a person
FOIA REQUESTS TO DHS

USCIS:

• Form G-639 (available at www.uscis.gov)
• Signed under penalty of perjury or notarized
• If prepared by legal worker, must submit a G-28

ICE:

• Form G-639 OR online fillable request form at http://www.ice.gov/exec/forms/foiarequest/request.asp

CBP:

• Online fillable request form at http://www.cbp.gov/site-policy-notices/foia
FOIA REQUESTS TO DHS

OBIM (formerly US-VISIT):

- Form G-639 (available at www.uscis.gov)
- Signed under penalty of perjury or notarized
- If prepared by legal worker, must submit a G-28

DHS FOIA Request Submission Form:

- Online fillable request form at http://www.dhs.gov/dhs-foia-request-submission-form
- Drop-down menu that includes USCIS, ICE, OBIM (but not CBP)
FOIA REQUESTS TO DOJ

EOIR:

• EOIR.FOIARequests@usdoj.gov
• describe the records sought and include identifying information, such as full name, aliases, immigration hearing location, and A number
EXPEDITED FOIA REQUEST

- You may be able to request that the agency expedite the FOIA request
  - Imminent threat to the life or physical safety of an individual
  - Urgency to inform public
  - Impairment of substantial due process rights exists
  - Harm to substantial humanitarian concerns exists

- USCIS may accelerate requests
  - Track 1: simple requests
  - Track 2: complex requests
  - Track 3: “fast track” requests where the requester is in removal proceedings
TIPS FOR FILING A FOIA REQUEST

• Provide as much biographic information about the person as possible
• If don’t remember or don’t know a piece of information, write “unknown”
• Request the entire A File because it’s hard to know what you don’t know!
INFORMATION-GATHERING STRATEGY

Step 1: What information do I want?

Step 2: Who has that information?

Step 3: How do I get it?
Client walks into your office. She wants to start preparing for DAPA. She said that she was placed in removal proceedings in 2013 but never went to a hearing.
What information do I want?

- Immigration records
  - Removal order
    - If she received a removal order after Jan. 1, 2014, she is an enforcement priority!
  - NTA
    - Why she was placed in proceedings? Is it anything that will affect her DAPA eligibility?

Who has that information?

- EOIR

How do I get it?

- EOIR FOIA
Client walks into your office. She says that she was convicted of embezzlement in 2007 in San Diego. She has the complaint, minute orders, and order of probation, but she doesn’t have the guilty plea.
EXAMPLE (CONT)

What information do I want?
  • Conviction
  • Any other related documents

Who has that information?
  • Court in San Diego

How do I get it?
  • Records request from San Diego Court
WHEN IS FOIA NOT THE BEST OPTION?

Criminal convictions
  • FBI background check; state background check; court-specific records request

Status of pending applications
  • Write to the USCIS office where the application was filed or call the National Customer Service Center at 1-800-375-5283

Consular notification of a visa petition approval
  • Use Form I-824

The return of original documents
  • Use Form G-884

Records of naturalization prior to September 27, 1906,
  • Contact the clerk of court where naturalization occurred

Information on records prior to December 1982,
  • Contact the National Archives

Proof of status (i.e., Social Security benefit, Selective Service requirement)
CRIMINAL RECORDS
OVERVIEW

Types of Criminal Records

FBI Identity History Summary
State Criminal History Record
Court Records

Requesting Records

Tips

Examples
The Department of Homeland Security (DHS) will also run this check on all applicants.

- Shows arrests from all states, D.C., and US territories, as well as federal arrests and immigration violations.
- Not always accurate or complete.
- U.S. Department of Justice Order 556-73 establishes rules for individuals to obtain their records.
REQUESTING FBI HISTORY SUMMARY

Step 1: Complete Applicant Form

Step 2: Get fingerprints taken

Step 3: Prepare fee payment

Step 4: Review checklist

Step 5: Mail required documents

Step 6: Receive FBI record or “no record” response

• The Criminal Justice Information Services (CJIS) Division of the FBI processes these requests

• Processing Time: 12-14 weeks
STATE CRIMINAL HISTORY RECORD

• Provides criminal history in a particular state
• Some requests require fingerprint submission, others only identifying information (name check)
• Request process varies by state
REQUESTING STATE RAP SHEETS

Step 1: Find the State’s Criminal Record Repository

  After clicking on the state, scroll down to “Criminal Record Repository”
- e.g. TX Department of Public Safety, MA Dept. of Criminal Justice Information Services, CA Dept. of Justice

Step 2: Review Process and Cost for Requesting Record

- Fee waivers may be available

Step 3: Request the State Record

Step 4: Receive the State Record or “No Record” Letter
STATE EXAMPLES

Texas
https://www.txdps.state.tx.us/internetforms/Forms/CR-63.pdf

Massachusetts

California
https://oag.ca.gov/fingerprints/security
COURT RECORDS

- Provide the details of the case
- Necessary to clear up errors in other records
- USCIS will review certified court dispositions
REQUESTING COURT RECORDS

Find the Court and Review the Process for Requesting Records

Request the Complete Court Record or at least the Certified Disposition

- Records may be available online
- Search relevant county court website for information on how to request the record
- If the person was arrested, but no charges were filed, request a document from the court clerk stating there is no record.
- If the courts has destroyed the records, obtain a letter from the court clerk stating so.
OTHER WAYS OF OBTAINING RECORDS

- Contact:
  - the defense lawyer who worked on the case
  - the parole officer (if the person is on probation or parole)
  - the arresting agency or law enforcement agency
  - the jail

- Some courts will destroy the file but keep a "docket sheet" or "minute entries/orders" (either hard copy or electronic record) that show the nature and disposition of the case.

NOTE: DACA provides that if the requestor is unable to provide criminal history documentation, s/he should submit an explanation including description of efforts to obtain such evidence.
WHAT ABOUT SEALED OR EXPUNGED RECORDS?

If any arrest or conviction has been vacated, set aside, sealed, expunged, or otherwise removed from the person’s record, DACA provides the person submit:

1. An original or court-certified copy of the order OR
2. An original statement from the court that no record exists

If unable to provide such documentation, provide description of efforts to obtain such evidence.

It is unclear what the policy will be for DAPA. Stay tuned.
WHAT ABOUT JUVENILE RECORDS?

Make sure you are complying with confidentiality laws before asking for juvenile records.

Ways to obtain records:

- Juvenile/ Family Court
- Police or Probation Department
- Public or Private Defender in Case
- District or State Attorney

USCIS does not require juvenile records protected from disclosure under state law.
TIPS

• Some states require going in person to submit fingerprints to obtain the record
  • Undocumented immigrants and others who may have an outstanding warrants should *not* go to a law enforcement agency (e.g., Police or Sheriff’s Department) to have their fingerprints taken
  • Submitting fingerprints through a private agency or business

• Indicate that the records are for personal review not for immigration purposes

• Review identification requirements for records requests
EXAMPLES

A potential DAPA applicant says he has lived in Miami, Florida since arriving in the United States, and that he has been arrested three times in Miami for alcohol-related driving offenses.

A potential expanded DACA applicant from Los Angeles, California says he does not believe he has any criminal convictions, but that he has been stopped by the police often because his brother was a gang member.
RESOURCES

FBI
• Applicant Form: https://forms.fbi.gov/identity-history-summary-checks-review
• FAQs: http://www.fbi.gov/about-us/cjis/identity-history-summary-checks/faqs

Juvenile Records
• Reporter’s Committee for Freedom of the Press “Juvenile Access Chart,” at www.rcfp.org/secret-justice-access-juvenile-justice/juvenile-access-chart
• American Bar Association’s Resource, “Think Before You Plead: Juvenile Collateral Consequences in the United States” at www.beforeyouplea.com
• Applying for DACA with a Juvenile Record IAN Webinar: http://www.immigrationadvocates.org/nonprofit/webinars/item.4361-Applying_for_DACA_with_a_Juvenile_Record
QUESTIONS?

Submit questions via the “chat” box.
www.adminrelief.org