

**CHART: Crimes-Related Bars to  
 DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) and  
 DACA (Deferred Action for Childhood Arrivals)**

<i>Bar</i>	<i>USCIS FAQs Webpage<sup>1</sup> (DACA), Enforcement Memo<sup>2</sup> (DAPA) Text, and ICE FAQs Webpage (Enforcement Priorities)<sup>3</sup></i>	<i>Comments</i>
<p><b>Any Three Misdemeanor Convictions</b></p> <p>Exceptions for:</p> <p>--Multiple convictions from same incident (DAPA) or occurring on the same date or “arising out of the same act, omission, or scheme of misconduct” (DACA)</p> <ul style="list-style-type: none"> <li>• Minor traffic offenses</li> <li>• State immigration offenses</li> <li>• Possibly Infractions</li> </ul>	<p>DACA refers to these convictions as “non-significant misdemeanors.”</p> <p>DAPA: “...aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents”</p>	<p><i>Definition of misdemeanor:</i> In sum, DACA defines a misdemeanor based on potential sentence, while DAPA relies upon state classification of misdemeanor versus a felony.</p> <p>DACA defines a non-significant misdemeanor as an offense that does not meet the definition of significant misdemeanor and that is punishable by imprisonment of more than five days but not more than one year.</p> <p>DAPA does not explicitly define misdemeanor. This may result in two differences between DAPA and DACA. First, DAPA should treat a state offense that has a potential sentence of more than a year (e.g., 18 months) as a misdemeanor if the <i>state</i> classifies it as a misdemeanor. This is because DAPA’s definition of felony is limited to an offense that the state classifies as a felony. (See definition of felony, below.) Second, DAPA does not explicitly define a misdemeanor as an offense punishable by imprisonment for more than five days. Therefore an offense punishable by five days or less still might be considered a misdemeanor for DAPA. Advocates are requesting</p>

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		<p>clarification on this.</p> <p><i>Other offenses.</i> For both DACA and DAPA, see exceptions for state immigration offenses and traffic offenses, below.</p> <p><i>Definition of conviction.</i> For both programs, a disposition <i>might</i> not count as a criminal conviction at all, if the proceeding did not provide for a jury trial, require guilt “beyond a reasonable doubt,” or have other key legal protections.<sup>4</sup> For example, some DACA applications were approved despite alcohol-related driving infractions where (a) the infraction carried a potential sentence of more than five days, and so could have been held to be a significant misdemeanor as a DUI, but (b) the disposition did not meet the definition of “conviction” due to lack of the constitutional protections cited above.</p>
<p><b>Conviction of a Significant Misdemeanor:</b> <b>90-Day Sentence</b></p>	<p>DACA: “...for which the individual was sentenced to time in custody of <b>more than 90 days</b>. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence. 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.”</p> <p>DAPA: “...for which the individual was sentenced to time in custody of <b>90 days or more</b> (the sentence must involve time to be served in custody, and does not include a suspended</p>	<p>Any misdemeanor is a “significant misdemeanor” if the person was sentenced to custody for 90 days or more (DAPA) OR 91 days or more (DACA). This appears to include, for example:</p> <ul style="list-style-type: none"> <li>--Someone sentenced to jail for 100 days who served only 60 days due to good behavior</li> <li>--Imposition of sentence is suspended, ordered to jail for 100 days as a condition of probation</li> </ul> <p>This would NOT include, for example, a one-year sentence that is imposed and suspended. (But see discussion of aggravated felonies and suspended sentence, below).</p> <p>This one-day discrepancy between DAPA and DACA will be</p>

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	sentence).”	addressed by advocates.
<p><b>Conviction of a Significant Misdemeanor:</b></p> <p><b>Domestic Violence</b></p>	<p>“Offense of domestic violence”</p> <p>DACA does not provide any further information about an “offense of domestic violence.”</p> <p>The ICE FAQs clarify how DHS may approach this enforcement priority classification: “Perpetrators of domestic violence, depending on state law, are prosecuted either under generally applicable criminal statutes prohibiting assault and battery or under statutes specifically addressing domestic violence. Many states do not have specific domestic violence laws, but INA section 237(a)(2)(E)(i) applies if there was a domestic relationship between the perpetrator and victim. The memorandum’s definition of domestic violence applies to convictions that are crimes of violence (as defined in section 16 of title 18) for acts of domestic violence regardless of how the state law categorizes them. Likewise, INA section 237(a)(2)(E)(i) applies to crimes of violence (as defined in section 16 of title 18) against spouses or domestic partners, both current and former, regardless of how the state law categorizes the offense.”</p> <p>The Enforcement Memo provides: “In evaluating whether the offense is a significant misdemeanor involving ‘domestic violence,’ careful</p>	<p>Conviction of simple battery against a spouse, which in many states is an offense that is a good immigration plea, may not be safe.</p> <p>For DACA, authorities have defined a DV offense very broadly. They did not use the “categorical approach,” which focuses on the minimum conduct necessary for guilt. In fact, where DV was originally charged, even if the plea was to a non-DV offense such as disturbing the peace or disorderly conduct, some DACA cases have been denied either as a matter of discretion or because the initial charge was interpreted as having triggered the significant misdemeanor bar.</p> <p>The ICE FAQs appear to signal that the government will define an “offense of DV” more precisely in the context of the enforcement priorities. This might happen in DAPA as well. The FAQ links the significant misdemeanor offense of DV to the definition of a deportable “crime of domestic violence” at INA 237(a)(2)(E)(i), 8 USC 1227(a)(2)(E)(i). Only an offense that meets the federal definition of a “crime of violence” at 18 USC 16 will qualify. Assault and battery offenses that can be committed by a <i>de minimis</i> (sometimes called “mere offensive”) touching are not crimes of violence under 18 USC 16, so they should not be DV offenses even if a spouse is the victim. The phrase “regardless of how the state law categorizes [the</p>

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	consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor.” <sup>5</sup>	offense]” appears to refer to the fact that even if a crime of violence is not specifically a DV offense, if it is a crime of violence and the victim is a current or former spouse or domestic partner, it will be a DV offense.
<b>Conviction of a Significant Misdemeanor:</b> <b>Sexual Abuse or Exploitation</b>	“Sexual abuse or exploitation”	<p>ICE will search sex offender registries.</p> <p>In some regions, misdemeanor consensual sex with a minor may be held an “aggravated felony,” which is a bar to DAPA. It is not known if that also would come within this significant misdemeanor category.</p> <p>The DACA application form asks if the applicant has ever participated in “any kind of sexual contact or relations with any person who was being forced or threatened.” This question indicates that simple prostitution (e.g. for having been a one-time sex worker) should not be included within this DACA bar, but may nonetheless be a negative factor in discretion.</p>
<b>Conviction of a Significant Misdemeanor: Firearm</b>	“Unlawful possession or use of a firearm”	
<b>Conviction of a Significant Misdemeanor:</b> <b>Drug sales or distribution</b>	“Drug distribution or trafficking”	Misdemeanor conviction for drug possession is not necessarily a bar to Expanded DACA or DAPA (unless the 90-day bar applies; see above), although it may be a negative factor in discretion. Many DACA applications have been approved despite drug possession convictions.

Chart: Crimes-Related Bars to DAPA

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		<p>However, misdemeanor drug possession will prevent the person from becoming a lawful permanent resident (having a green card) through family members in the future, with two exceptions. First, in some family visa cases a waiver is available for conviction/s relating to a single incident of possessing 30 grams or less of marijuana. Second, in the Ninth Circuit only, in some cases a single possession conviction from before July 15, 2011 is eliminated for immigration purposes by expungement or similar relief.<sup>6</sup></p>
<p><b>Conviction of a Significant Misdemeanor:</b> <b>Burglary</b></p>	<p>“Burglary”</p>	<p>Even in states where misdemeanor burglary includes a lawful entry (i.e., shoplifting), conviction may be a bar. Seek other misdemeanor pleas such as theft, trespass, receipt of stolen property, or accessory after the fact.</p> <p>Depending on state law, some of the above offenses <i>might</i> pose problems for future family immigration as crimes involving moral turpitude.</p>
<p><b>Conviction of a Significant Misdemeanor:</b> <b>Driving Under the Influence (DUI)</b></p>	<p>“Driving under the influence”</p> <p>The ICE FAQs provide: “When determining whether a conviction for driving under the influence is a significant misdemeanor, DHS will consider the elements of the applicable state law. Specifically, a conviction for DUI is a significant misdemeanor only if the state statute of conviction: (1) constitutes a misdemeanor as defined by federal law (the minimum penalty includes imprisonment for more than 5 days but</p>	<p>For DACA, many driving offenses that require an alcohol level of less than .08 have been held significant misdemeanors as DUIs.</p> <p>The ICE FAQs, which should also apply to DAPA, defines DUI more carefully. See column to the left. This standard might or might not be applied to DACA. It states that a DUI is the “operation” (which should mean driving, not just sitting in, the vehicle) of a “motor vehicle” (which may not include boats), where the offense requires either .08 alcohol <i>or</i> a finding of impairment. Under this standard,</p>

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	<p>not more than 1 year); (2) requires the operation of a motor vehicle; and (3) requires, as an element of the offense, either a finding of impairment or a blood alcohol content of .08 or higher.</p> <p>Even if an individual has a DUI conviction, when determining whether to exercise discretion, DHS will also consider level of intoxication, whether the individual was operating a commercial vehicle, any additional convictions for alcohol or drug-related DUI offenses, circumstances surrounding the arrest, including the presence of children in the vehicle, or harm to persons or property, and other mitigating factors for the offense at issue, such as the conviction being for a lesser-included DUI offense under state law.”</p>	<p>“wet reckless offenses” (offenses with reckless driving, some alcohol involvement, but no finding of impairment) should not be DUI’s. For other types of offenses, analyze the state statute and see further discussion see various practice advisories at adminrelief.org.</p> <p>The ICE FAQs provide that a person might be considered not to be an enforcement priority despite having a DUI conviction, based on various factors; see column to the left. This does not apply to DAPA or DACA applications yet as a DUI significant misdemeanor is a bar to eligibility. This may change based on future DACA guidance.</p> <p>Reckless driving (without alcohol) is not automatically a significant misdemeanor, and is better plea for DAPA and DACA than DUI. Try to keep alcohol out of the factual basis of the plea, and of course avoid 90/91 days.</p> <p>Depending on how state law defines the offense, reckless driving might pose problems for future family immigration as a crime involving moral turpitude.</p>
<b>Conviction of Any Felony</b>	<p>DACA defines felony as an offense punishable by imprisonment for more than one year.<sup>7</sup></p> <p>DAPA defines felony as “aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status”</p>	<p>For both programs, if an offense is punishable as an alternate felony/misdemeanor and the conviction is designated a misdemeanor (or an offense that has a potential sentence of a year or less), courts have held that it must be treated as a misdemeanor for immigration purposes (or, considered to have the maximum possible sentence a misdemeanor would have under state law).<sup>8</sup> Check the law in your Circuit.</p>

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<p><b>Exception:</b> <b>State or Local Offenses Relating to Immigration Status</b></p>	<p>Both DAPA and DACA provide: “Immigration-related offenses characterized as felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors.”<sup>9</sup></p> <p>The Enforcement Memo exempts “state or local offenses for which an essential element was the alien's immigration status” as DAPA bars.</p>	<p>This exception can include offenses like those passed in Arizona, Alabama, or other states that penalize immigrants. Under DACA, USCIS did not treat state convictions for identity theft as an “immigration-related offense.”</p> <p>A <b>federal felony</b> relating to immigration, e.g., illegal re-entry into the U.S., is a bar to DAPA and DACA. Warn anyone with such a conviction not to submit any application to immigration authorities without expert advice; the person might be subject to removal and new federal criminal charges.</p>
<p><b>Related Basis for Prosecutorial Discretion in Enforcement:</b> <b>Identity Theft-Related Offenses</b></p>	<p>Some undocumented persons are convicted of identity theft simply for, e.g., using a borrowed or invented social security number to get a job. Advocates argue that this should come within the “immigration offense exception” described above, even though it does not technically have immigration status as an element.</p> <p>The ICE FAQ states: “DHS may “presumptively regard such cases as falling within Priority 1(d), Priority 2(a), or Priority 2(b), as applicable, but an immigration officer should be sensitive to the overall circumstances of the arrest and conviction in such cases. Circumstances that may be relevant in such cases include whether DHS was the agency that presented the case for prosecution, whether there is a victim in the case, the nature</p>	<p>The ICE FAQs clarify that in some cases an officer should find that an identity theft-type conviction (such as use of false documents, forgery and criminal impersonation), does not make the person an enforcement priority, even if it is a felony, a third misdemeanor, or a significant misdemeanor. The FAQ lists factors to consider.</p> <p>This flexible approach does not necessarily apply in applications for DAPA or DACA. An identity-theft offense that is a felony, third misdemeanor, or significant misdemeanor will be a bar.</p>

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	<p>of any loss or harm experienced by the victim as a result of the crime, the sentence imposed as a result of the conviction (including whether the conviction was subsequently reclassified as a misdemeanor), whether there is any indication that the conviction has been collaterally challenged based on allegations of civil rights violations, and the nature and extent of the individual’s criminal history.</p>	
<p><b>Exception:</b> <b>Minor Traffic Offenses (unless alcohol or drug-related for DACA)</b></p>	<p>DACA: “A minor traffic offense will not be considered a misdemeanor for the purposes of this [DACA] process.”<sup>10</sup></p> <p>DAPA: See above text barring “aliens convicted of three or more misdemeanor offenses, <i>other than minor traffic offenses</i>”</p>	<p>This exception can include offenses like driving without a license or speeding regardless of how it is classified under state or local law.</p> <p>The DACA application instructs applicants answering the question regarding arrests, charges, or misdemeanor or felony convictions to not include “minor traffic violations unless they were alcohol or drug-related.” Officials warned that several traffic convictions could be a negative factor for discretion, however.</p>
<p><b>Conviction of Certain Gang-Related Offenses</b></p>	<p>“Aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a)”</p>	<p>This is a conviction-based bar to DAPA, but not DACA. The conviction might support a denial of DACA on discretionary or public safety grounds, however. 18 USC § 521(a) defines “criminal street gang” as an ongoing group, club, organization, or association of 5 or</p>



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		<p>more persons—                      (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);                      (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and                      (C) the activities of which affect interstate or foreign commerce.                      The offenses described in 18 USC 521(c) include some felony drug offenses, some felonies involving violence against persons, and a conspiracy of the above.</p>
<p><b>Participation in Certain Gang Activities</b></p>	<p>DACA: “Indicators that you pose such a threat [to national security or public safety] include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.”</p> <p>DAPA: “aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang”</p>	<p>In DACA cases, gang “membership” is not a bar but qualifies as a national security or public safety threat (FAQ 65) and has been used to support discretionary denial for “risk to public safety.” USCIS relied on reports from local police departments, school gang contacts, or arrest records to determine gang membership. The DACA application question “Are you <b>NOW</b> or have you <b>EVER</b> been a member of a gang?” indicates that any gang membership involvement including the applicant’s self-identification may trigger a bar.</p> <p>The DAPA bar makes actual participation in the illegal activities a bar. Because this is not limited to convictions, it is possible that arrests or school reports can be considered as “actual participation.” Advocates are seeking clarification on this point.</p> <p>Tip: Consider disputing any allegation of gang membership</p>

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		or conduct.
<b>Conviction of an Aggravated Felony</b>	“aliens convicted of an ‘aggravated felony,’ as that term is defined in [8 USC § 1101(a)(43)] at the time of the conviction.”	<p>This is a bar to DAPA, but not DACA. The conviction might support a denial of DACA on discretionary or public safety grounds, however.</p> <p>“Aggravated felony” is a term of art that includes some misdemeanors. See online overview<sup>11</sup> and consult state-specific crim/imm resources or experts.<sup>12</sup></p> <p>It includes some non-“significant” misdemeanors, for example theft, forgery, perjury, obstruction of justice (which may include accessory after the fact), or a “crime of violence” where a <i>suspended</i> sentence of a year or more was imposed. (In contrast, the 90-day sentence for significant misdemeanors excludes suspended sentences). Examples of aggravated felonies regardless of sentence are fraud or deceit causing a loss exceeding \$10,000, in some regions consensual sex with a person under age 18; and failure to appear to face felony charges (regardless of whether there was a later felony conviction).</p> <p>If the conviction occurred before Sept. 30, 1996, consult an expert. It is possible that a better definition of “aggravated felony” will apply for DAPA purposes.</p>
<b>DACA Exception: Expunged Convictions</b>	“Expunged convictions and juvenile convictions will not automatically disqualify [DACA applicants]. [Requests] will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of	In many states, DACA requests involving expunged DUI convictions have been approved.

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	prosecutorial discretion is warranted.” FAQ 67	
<b>Enforcement Priority Exception: Expunged Convictions</b>	“Expunged convictions will be assessed on a case-by-case basis to determine whether, under the particular circumstances, including consideration of public safety, the expunged conviction should make an alien a priority for removal.”	See further discussion of expungements at <a href="http://adminrelief.org">adminrelief.org</a> .
<b>DACA Exception: Juvenile Dispositions</b>	See above text on expungements and juvenile dispositions.  Note that: “[i]f [the DACA applicant was] a juvenile, but tried and convicted as an adult, [s/he] will be treated as an adult for purposes of the DACA process.”	Juvenile adjudications are not necessarily bars to DACA, but may be considered in USCIS’ discretionary analysis.  Be familiar with state confidentiality laws, some of which prohibit the disclosure of juvenile records, even by the person who is the subject of the record, without a court order. This means that although you will have to disclose the incident, the applicant or advocate assisting the applicant may be prohibited from disclosing the records without a court order.
<b>Enforcement Priority Exception: Juvenile Dispositions</b>	Appears to be the same policy as DACA. If a juvenile “is tried and convicted as an adult, such conviction will be treated as a “conviction” for purposes of priorities determinations.”	The ICE FAQs stated that an adjudication of juvenile delinquency is not treated as a conviction and will not, on its own, serve to render an alien an enforcement priority under the Enforcement Memo.  See above language regarding state confidentiality laws.
<b>Terrorism, National Security</b>	DACA: “... and do not otherwise pose a threat to national security or public safety”  DAPA: “... aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a	Terrorism and national security bars applies to both DAPA and DACA. Note that the DAPA bar is more specific.  The DACA application form asks about whether the applicant has ever engaged in terrorist activities.

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	<p>danger to national security”</p> <p>Enforcement (and likely DAPA): According to ICE’s FAQs on the enforcement priorities: “in evaluating the range of aliens who pose a danger to national security, ICE is guided by the statutory language found in the INA as described by sections 212(a)(3) and 237(a)(4). These sections of the INA, generally captioned under Security and Related Grounds, encompass: (1) aliens who have engaged in espionage, sabotage, the illegal export of goods, technology, or sensitive information; (2) aliens who have engaged in terrorist activities, including material support of terrorist organizations, solicitation of goods, funds or membership for terrorist acts or terrorist groups and the commission of terrorist activities as defined under the INA; and (3) human rights violators.”</p>	<p>Under DACA and DAPA, applicants will be checked under Controlled Application Review and Resolution Program (CARRP) protocols, a national security profiling program that has caused significant processing delays.<sup>13</sup></p> <p>Under DACA, NSEERS violations did not disqualify people from the program.</p>

<sup>1</sup> Information regarding the Expanded DACA bars is found in the existing DACA program’s guidelines described on the U.S. Citizenship and Immigration Services (USCIS) DACA Webpage in the Criminal Convictions Section (Questions 60-67), last updated June 15, 2015, “Frequently Asked Questions” at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (“USCIS DACA FAQ”).

<sup>2</sup> The bars to DAPA – but not DACA – are the same as the enforcement priorities set out in DHS, “Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants” (November 20, 2014), at [www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) (“Enforcement Memo”).

<sup>3</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, Frequently Asked Questions Relating to Executive Action on Immigration (June 17, 2015), <https://www.ice.gov/immigrationAction/faqs>. It is not clear whether these FAQs will apply to the currently enjoined DAPA program. However,

because the FAQs clarify DHS' interpretation of the enforcement priorities, which are also the DAPA bars, it seems illogical for the FAQs not to apply if and when the courts lift the injunction.

<sup>4</sup> See, e.g., *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012), *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) and Advisory at [www.ilrc.org/files/documents/ilrc-cal\\_infraction\\_not\\_conviction-2012-10\\_15.pdf](http://www.ilrc.org/files/documents/ilrc-cal_infraction_not_conviction-2012-10_15.pdf).

<sup>5</sup> The Memo also cites Morton, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, June 17, 2011.

<sup>6</sup> The discretionary waiver is found at 8 USC 1182(h), INA 212(h). For information about the Ninth Circuit exception for conviction of possession of any controlled substance, see <http://www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011>.

<sup>7</sup> USCIS DACA FAQ 61.

<sup>8</sup> See, e.g., *Ceron v. Holder*, 747 F.3d 773, 778 (9<sup>th</sup> Cir. 2014) (*en banc*); *LaFarga v. INS*, 170 F.3d 1213 (9<sup>th</sup> Cir 1999).

<sup>9</sup> USCIS DACA FAQ 66.

<sup>10</sup> USCIS DACA FAQ 64.

<sup>11</sup> See Note: Aggravated Felonies at [www.ilrc.org/files/documents/n.6-aggravated\\_felonies.pdf](http://www.ilrc.org/files/documents/n.6-aggravated_felonies.pdf).

<sup>12</sup> See, e.g., resources for defenders at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) (free resource, registration required).

<sup>13</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, National Standard Operating Procedures (SOP) – Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765), April 4, 2013, *available* <http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf>.