

Practice Advisory for Criminal Defenders: New “Deferred Action for Parental Accountability” (DAPA) Immigration Program Announced by President Obama

What is Deferred Action for Parental Accountability (DAPA)?

On November 20, 2014, the Obama Administration announced that it would not deport certain undocumented persons who are the parents of U.S. citizens or lawful permanent residents, if they qualify for Deferred Action for Parental Accountability (DAPA). See Department of Homeland Security (DHS) Memorandum, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents” (November 20, 2014)¹ hereafter referred to as the [DAPA/DACA Memo](#).

The Administration also established new priorities for enforcement, many of which are based on criminal conduct or convictions. It stated that *these priorities would serve as the bars to the new DAPA program*. See DHS Memorandum, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum” (November 20, 2014)² hereafter referred to as the [Enforcement Memo](#).

DAPA offers benefits similar to the Deferred Action for Childhood Arrivals (DACA) program that has existed since 2012. It provides “deferred action,” which means that, even though the individual is undocumented and subject to deportation, the government agrees to “defer” any actions to remove him or her. While deferred action does not provide a pathway to lawful permanent resident status (a green card) or citizenship, it will allow recipients to remain in the U.S. and obtain an employment authorization document that will entitle them to work here legally. Deferred Action status will be for three-year periods. Because the program is a change in policy and not in law, it can be withdrawn at any time and without the procedural protections associated with a person’s visa or immigration status. In the DACA context, DHS has indicated that it may, at its discretion, terminate deferred action at any time.³

This advisory outlines (a) basic requirements for DAPA and (b) criminal defense strategies to preserve a defendant’s possible eligibility for DAPA. For more information, see additional materials as they appear at [www.AdminRelief.org](#) and websites such as [www.nipnlg.org](#) and [www.ilrc.org](#).

NOTE: On February 16, 2015, a federal district court issued a temporary injunction in *Texas v. United States* preventing the federal government from implementing any aspect of DAPA and expanded DACA. Neither initiative will begin until the injunction is lifted. The court’s order does not impact the original DACA program announced in 2012; USCIS is still accepting initial and renewal applications.

On June 17, 2015, ICE released [additional guidance](#) regarding the implementation of the enforcement priorities, hereafter referred to as the [ICE FAQs](#). It is not clear whether these FAQs will apply to the DACA or DAPA programs. However, since the FAQs clarify DHS’s interpretation of the enforcement priorities, which also serve as the DAPA bars, it seems likely that these FAQs apply if and when the courts lift the injunction to DAPA. The FAQs should also apply throughout DHS, including in the adjudication of DACA requests, pending future guidance from DHS.

Does This Practice Advisory Also Address Crimes Bars to Deferred Action for Child Arrivals (DACA)?

Not really. DAPA is subject to the above-cited Enforcement Memo, while DACA is not. The most accurate resources on crime bars for DACA are the existing DACA materials, which can be found online.⁴

The DAPA and DACA crimes bars are very similar in some ways. Both DAPA and DACA are barred by conviction of any felony, a “significant” misdemeanor, or three misdemeanors. However, even here there are differences, for example in the definition of what constitutes a felony and misdemeanor. Also, an expungement removes a conviction as an absolute bar to DACA, but DHS has not clarified whether this policy will apply to DAPA.

How are the crimes bars to DAPA and DACA different?

The Enforcement Memo includes bars that apply to DAPA but not to DACA, such as conviction of an aggravated felony and certain convictions and conduct relating to gangs (Of course, while such conduct or convictions are not absolute bars to DACA, they may serve as negative discretionary or public safety factors in cases.).

Note that on November 20, 2014, President Obama expanded the DACA program to enable more people to qualify. While under the 2012 announcement, persons must have entered the U.S. while under age 16 before June 15, 2007 to qualify for DACA, now persons can have entered the U.S. while under age 16 before January 1, 2010. While originally the person must have been under age 31 as of June 15, 2012, there will be no age cap once USCIS implements expanded DACA. For more information on the extension to DACA, see the DAPA/DACA Memo cited above and see materials at www.adminrelief.org.

How Can Criminal Defenders Help Noncitizen Defendants Who Might Be Eligible for DAPA?

First, inform the defendant about DAPA and conduct a quick screening to see if the person might be eligible to seek DAPA. Just giving correct information may provide an enormous service. There may be a lot of misinformation in the community about DAPA, and you may be the defendant’s only source of good information. Be aware that some people may be eligible for a more permanent legal solution and you should also screen for other forms of immigration relief. For a quick checklist for defendants, see the free Relief Toolkit online.⁵

Second, work to resolve the criminal charges to preserve a potential applicant’s eligibility for DAPA. This memo and other resources will provide strategies for that.

Who Qualifies for DAPA?

To qualify, the individual must:

- be without lawful immigration status and be the parent of a U.S. citizen or lawful permanent resident (of any age, married or unmarried) on November 20, 2014;
- have continuously resided in the United States since January 1, 2010;
- be physically present in the U.S. on November 20, 2014, and at the time of applying for DAPA;
- not be an enforcement priority as reflected in the November 20, 2014 **Enforcement Memo** cited above; and
- present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate.

Overview of Criminal Bars to DAPA

The DHS Enforcement Memo cited above sets out factors that make certain removable immigrants a priority target for arrest and removal. These factors also act as bars to eligibility for DAPA.

The bars are discussed in more detail below, but basically they include being a terrorist or national security threat, certain convictions or conduct relating to gangs, conviction of an “aggravated felony” (an immigration law term of art that includes a wide range of offenses, including some misdemeanors), conviction of any felony, convictions of three or more misdemeanors that arise from three separate incidents, or conviction of one “significant misdemeanor.” There are exceptions for convictions of state or local offenses that have immigration status as an element and for minor traffic convictions.

Juvenile dispositions and expungements. Under the ICE FAQs, 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. If a juvenile, however, is tried and convicted as an adult, such conviction will be treated as a “conviction” for purposes of priorities determinations. 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. This new guidance should apply to DAPA, but because the program is currently enjoined, how these FAQs will impact eligibility for DAPA remains unclear.

Criminal Bars: “One Felony, Three Misdemeanors, or a Significant Misdemeanor”

Defenders who are familiar with the Deferred Action for Childhood Arrivals (DACA) criminal bars will find this part familiar, because this part of the DAPA bars is very similar (although not identical).

Felony. For purposes of DAPA, a felony is “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.” Enforcement Memo, p. 3.

Some states, such as Maryland and Massachusetts, define misdemeanors to include certain convictions that have a potential sentence of more than a year, for example 18 months or two years. Under the above definition, these should not be “felonies” for DAPA purposes, because the convicting jurisdiction does not classify them as felonies (The result is different under DACA, which defines a felony as an offense with a potential sentence of more than a year.).

The Enforcement Memo provides that a state conviction for which immigration status is an essential element of the offense is not a disqualifying “felony.”

However, a *federal* felony conviction relating to immigration law—for example, illegal re-entry—is likely to be a bar to DAPA and have additional penalties. Warn any undocumented person with such a conviction not to submit any application to immigration authorities without first getting expert consultation, because he or she might be referred for removal and further federal criminal prosecution.

The ICE FAQs provide possible exceptions for identity theft-related offenses that fall within the enforcement priorities (as a felony, significant misdemeanor, or third non-significant misdemeanor) and do not have immigration status as an explicit element. The FAQs state that immigration officers should review the following factors: whether DHS was the agency that presented the case for prosecution, whether there is a victim in the case, the nature 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. These are the exceptions to the enforcement priorities, but it is unclear

whether this exception will apply to eligibility for DAPA if and when the courts allow DHS to go forward in implementing the program.

Three Misdemeanor Convictions. DAPA can be barred by convictions of “three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element is the alien's immigration status, provided the offenses arise out of three separate incidents.” Enforcement Memo, pp. 3-4. Minor traffic convictions might include driving without a license, speeding, or driving without insurance.

Some offenses, often called “infractions” or “offenses,” are considered to be less than misdemeanors. As of this writing it is not clear whether or not these will constitute one of the three misdemeanors for DAPA. If this is important, get expert assistance to evaluate whether the following will be treated as less than a misdemeanor for DAPA purposes: (1) an offense that is punishable by five days in jail or less (this was not a misdemeanor under DACA rules), or (2) the proceeding lacked key constitutional protections for a criminal case, such as the availability at some point of a jury trial, the requirement that guilt be established beyond a reasonable doubt, or other factors (some state dispositions created without these protections have been held not to be a “conviction” for immigration purposes⁶).

Note that any misdemeanor will become a “significant misdemeanor” if it is for certain types of offenses, or if the person was sentenced to 90 days or more (not including suspended sentences) on any single count. See next section.

Conviction of One “Significant Misdemeanor.” A “significant misdemeanor” is a standard that applies to both DACA and DAPA. It appears not to be subject to the categorical approach (the federal standard for comparing elements of a prior conviction to a generic definition), and there is not strict uniformity or court review of the definition of the term.

The Enforcement Memo defines a significant misdemeanor as a federal, state, or local misdemeanor that is an offense of:

- Domestic violence
 - A conviction of simple battery against a spouse, which in many states is a good immigration plea to avoid various removal grounds, may not be a safe plea for DAPA.
 - Warning: Some persons were denied DACA for conviction of a crime that is not domestic violence, for example disturbing the peace or disorderly conduct, where the offense originally was charged as domestic violence. That might happen in DAPA cases as well. Check with experts.
 - The Enforcement Memo states that if the convicted person was also a victim of domestic violence, this should be a mitigating factor. See p. 4, n. 1.
 - The ICE FAQs appear to signal that the government will define an “offense of domestic violence” 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 *de minimis* (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 reference to “no matter how the state characterizes” the 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.

- Sexual abuse or exploitation
 - It is not clear exactly which offenses this covers or if it goes beyond serious crimes. See also “sexual abuse of a minor” at the aggravated felony section below.
 - Note that ICE is likely to seek out any person on a state sex offender registry who may be a noncitizen, whether the person applies for relief or not.
- Unlawful possession or use of a firearm
- Drug sales (distribution or trafficking)
 - A misdemeanor conviction for drug *possession* is not necessarily a bar to DAPA. However, in some DACA cases some more egregious possession cases were used as a basis for discretionary denial, even though it was not a bar.
 - The downside of a single misdemeanor drug possession conviction is that, with some exceptions, it will prevent the person from gaining lawful permanent resident status (a green card) through family members.
- Burglary
 - Even in those states where a “burglary” statute includes conduct as minor as shoplifting (lawful entry with intent to commit larceny), the conviction may serve as a bar. Try to plead to a different misdemeanor, such as theft, trespass, or receipt of stolen property.
- Driving under the influence of alcohol or drugs
 - Because a DUI is an automatic significant misdemeanor, defense counsel should seek a different plea. Reckless driving is not automatically a significant misdemeanor, so is a better plea for purposes of DAPA. Try to keep alcohol out of the factual basis of the plea; however, even reckless driving with alcohol as an element is better than DUI.
 - Note, however, that in some states reckless driving might be a “crime involving moral turpitude” which, depending upon various factors, could hurt the person’s ability to become a legal resident (get a green card) in the future. Get advice on how to structure the plea to avoid this.
 - The ICE FAQs say that a DUI significant misdemeanor must 1) be a misdemeanor as defined by federal law (thus excluding offenses that carry less than a six-day jail sentence); 2) require operation of a motor vehicle, and 3) require either a finding of ‘impairment’ OR a blood alcohol level of 0.08 or higher. Unfortunately, DHS may attempt to categorize lesser offenses that involving some level of intoxication less than .08 as “impairment.” This definition might also apply in DAPA.
 - Even if an individual has a DUI significant misdemeanor conviction, when considering whether to exercise discretion under the Enforcement Memo, DHS will consider the 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 presence of children in the vehicle, or harm to persons or property; mitigating factors for the offense at issue, such as the conviction being for a lesser-included DUI offense under

state law, and other relevant factors demonstrating that the person is or is not a threat to public safety.

- Sentence of 90 Days or More, Excluding Suspended Sentences. A significant misdemeanor includes any misdemeanor not listed above, “for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence).” Enforcement Memo, p. 4.
 - The evaluation of what is a “sentence” is different here than in other immigration law contexts, because a suspended sentence does not count. To the best of our knowledge, the following examples illustrate the rule:
 - Sentenced to a year, execution wholly suspended (so the person never goes to jail) is not a sentence to 90 days or more
 - Sentenced to 100 days, released at 50 days for good behavior, appears to be a sentence of 90 days or more.
 - Imposition of sentence suspended, 90 days jail time ordered as a condition of probation, credit for time served, appears to be a sentence of 90 days or more.
 - Sentencing Practice Tip: If a defendant must take a sentence of 90 days or more for an offense that otherwise is not a significant misdemeanor, it may be possible to preserve DAPA eligibility by pleading to two misdemeanor offenses arising from the same incident, each with a sentence of less than 90 days, to run consecutively. While the person might be denied as a matter of discretion, it is not technically a bar. (Also, for purposes of the DAPA bar based on conviction of any three misdemeanors, multiple offenses arising from the same incident only count as one of the three; see above.)

Criminal bars: Conviction of an Aggravated Felony (Which Includes Some Misdemeanors)

The Enforcement Memo states that a person who is “convicted of an ‘aggravated felony,’ as that term is defined in [INA 101(a)(43), 8 USC 1101(a)(43)] at the time of the conviction” is barred from DAPA.

See online materials and books relating to the definition of aggravated felony.⁷

Any felony conviction is a bar to DAPA, so why do we need to discuss “aggravated” felonies? Unfortunately, an aggravated felony is a much-litigated federal law term of art that includes some misdemeanors – even ones that do not qualify as “significant” misdemeanors!

One reason for this is that “significant” misdemeanors and “aggravated felonies” use different definitions of sentence. Any misdemeanor is a “significant” misdemeanor if a sentence of 90 days or more is imposed, *excluding* suspended sentences. Some misdemeanors are aggravated felonies if a sentence of a year or more is imposed, *including* suspended sentences.

Example: Herman is convicted of misdemeanor theft and receives a suspended one-year sentence. This conviction does not come within the DAPA definition of a “significant” misdemeanor, defined as any misdemeanor where sentence of 90 days or more was imposed, because that definition does not count suspended sentences. For purposes of the 90 days, Herman has no sentence.

However, the definition of aggravated felony includes certain theft convictions if a sentence of a year or more has been imposed, *including* suspended sentences. If the state theft crime of which Herman was convicted meets the federal definition of “theft,” then his conviction is an

aggravated felony due to the one-year suspended sentence. In that case, the aggravated felony conviction will bar Herman from DAPA, plus a lot of other immigration applications.

Here are some common offenses punished as misdemeanors that may be aggravated felonies. (To avoid repetition, we will not list aggravated felony categories here if they also are DAPA significant misdemeanors, e.g. burglary, drug trafficking.)

- If and only if a sentence of a year or more has been imposed, including a suspended sentence, certain misdemeanors that meet the immigration definition of theft, receipt of stolen property, perjury, forgery, obstruction of justice (which may include accessory after the fact), or a “crime of violence” as defined under 18 USC § 16.
- Regardless of sentence imposed, other misdemeanors that meet the immigration definition of “sexual abuse of a minor,” (which is defined differently in different jurisdictions, and in some areas might include consensual sex with a person under the age of 18); any crime involving deceit or fraud where the loss to the victim exceeds \$10,000; or failure to appear to face a felony charge, regardless of how the charge was resolved.

Practice Tip: Whether a specific offense is an aggravated felony usually depends upon the *elements of the offense as defined by state law*. Immigration law uses the *federal* definition of “theft,” “obstruction of justice,” and other terms, and some state laws have slightly different definitions. If the definitions are different enough, the state conviction might not qualify as an aggravated felony. This is another reason that it is important to consult state-specific resources and/or a criminal-immigration law expert, where an important decision must be made. Note that this strict, elements-based analysis, called the “categorical approach,”⁸ applies in determining whether an offense is an aggravated felony, but presumably does not apply to analyzing whether an offense comes within the other DAPA crimes bars.

Practice Tip: If the aggravated felony conviction occurred before September 30, 1996, consult an expert. It is possible that an older, better definition of “aggravated felony” will apply to the conviction.

Criminal Bars: Certain Convictions or Conduct Relating to Organized Gangs

Persons convicted of an offense that includes as an element “active participation in a criminal street gang, as defined in 18 USC § 521(a)” will be barred from DAPA. *See* Enforcement Memo. In 18 USC § 521(a), “criminal street gang” is defined as an ongoing group, club, organization, or association of five or more persons—**(A)** that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (C); **(B)** the members of which engage, or have engaged within the past five years, in a continuing series of offenses described in subsection (C); and **(C)** the activities of which affect interstate or foreign commerce. The continuing series of offenses include felony drug offenses, some felonies involving violence against a person, and a conspiracy of the above.

DAPA includes an additional, conduct-based bar relating to gang participation. Persons age 16 or older who intentionally participated in an organized criminal gang to further the illegal activity of the gang will also be barred from DAPA. *See* Enforcement Memo. Convictions and conduct related to gangs were previously not an express bar for DACA applicants, though suspected gang membership did make certain DACA applicants ineligible as a risk to public safety. In the DACA context, USCIS has relied on reports from local police departments, school gang contracts, or arrest records to determine gang membership. The addition of the conduct prongs marginally improves the gang disqualification bar.

Practice Tip: Consider disputing any allegation of gang membership.

Example: Juanita, who is 22, was convicted of misdemeanor vandalism and received a 30-day suspended sentence. Arrest records show that her co-defendants were members of the gang MS-13. Juanita might not be eligible under the conduct-based prong.

Warning: DAPA adjudicators will be instructed to refer “known or suspected street gang members” to ICE, to see if removal proceedings should be started against them. See “If the DACA Application is Denied,” below.

Terrorism and Espionage

A disqualifying bar also exists for noncitizens “engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security.” Little is known about this bar in the DACA context. If an individual encounters this bar, it will be critical to consult with an immigration expert.

Possible Defense Strategies in Light of DAPA and DACA⁹

Informally defer the plea. Ask the prosecution to agree to defer the plea hearing so the defendant can voluntarily meet specified goals, e.g., perform community service, and then make an alternative plea or no plea after the goals are completed.

Seek “pre-plea diversion,” or any deferred adjudication disposition where a plea of guilty is not required. If the offense at issue will—or could—be characterized as a “significant misdemeanor,” or a non-significant misdemeanor offer is not on the table, pursue negotiations to resolve the case through a deferred adjudication process (e.g. stipulated order of continuance, diversion) that does not require the defendant to admit guilt or admit to facts sufficient to warrant a finding of guilt. If a plea of guilty is entered, even if the case is later dismissed, it will not be “immigration safe.”

Avoid the 90 Day Sentence. For example, if the defendant is charged with simple possession of a controlled substance, the strategy to preserve eligibility for deferred action should be (1) if possible, to plead to a lesser (misdemeanor) charge and preferably a non-controlled substance offense and (2) if not, plead to simple possession only if it is a misdemeanor and carries a jail sentence of less than 90 days.¹⁰

Plead to two misdemeanors, if possible from the same incident, with less than 90 days custody each. If a sentence of more than 90 days is required, it may be possible to preserve DAPA eligibility by pleading to two misdemeanor offenses, each with a sentence of less than 90 days, to run consecutively. While this may be a negative discretionary factor, it does not trigger the bar. If possible, plead to two offenses arising from the same incident; multiple misdemeanor convictions arising from the same incident only count as one conviction, for purposes of the bar based on three misdemeanor convictions.

Plead to a misdemeanor that is a routine traffic offense or immigration offense. Routine traffic violations are safe. If a case can be reduced to a minor traffic offense, even as a misdemeanor, this should be pursued. A DUI is a significant misdemeanor, so attempt to plead to another offense. Defense counsel can consider offering, in exchange for a reduced charge, a more severe non-jail sentence such as additional hours of community service, counseling, or work release, or can offer to waive credit for time served, as long as the jail sentence does not exceed 90 days, excluding suspended sentence.

Explore reducing a felony to a misdemeanor, where that is permitted under state law. Some states have alternate felony/misdemeanor offenses. See, e.g. California P.C. § 17.

Expungement or other “rehabilitative” relief that eliminates a conviction based on successful completion of probation or other conditions. In interpreting who is an enforcement priority, DHS will assess expunged convictions 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.” DHS has not yet clarified if this will apply in DAPA (other than these programs, expungements have little effect in immigration proceedings).

Explore vacating a conviction on the basis of legal error. Different states have different legal vehicles for this. Investigate possibilities of vacating the plea based on ineffective assistance of counsel or failure of the court to administer a statutory advisal on the immigration consequences.¹¹

In some states it is easier to vacate a plea that was recently made. For example, in California, under Cal. P.C. § 1018 a court may allow a defendant to withdraw his or her plea “for good cause” before judgment is entered or within six months after the defendant is placed on probation if imposition of sentence is suspended.

Consider taking the case to trial. If deferred action is the only way your client will have security against deportation, she may want to take her case to trial if a plea will clearly make her ineligible for deferred action. The biggest risk of losing at trial would be an increased likelihood of actually spending time in jail (as opposed to a plea that would avoid this). If she spends time in jail, she may be apprehended by ICE.

Defenders should note that some of the strategies described above will only protect a noncitizen defendant’s potential eligibility for DAPA and DACA, and not for other immigration benefits. In particular, Defenders should continue to flag other forms of relief for clients and defend the case accordingly. To identify other possible immigration application for your clients, use the quick checklist from the *Immigration Relief Toolkit*.¹²

If the DAPA Application is Denied, Will the Applicant Be Put in Removal (Deportation) Proceedings?

DAPA applications generally are confidential, so that a denial should not result in removal proceedings -- with exceptions for certain arrests and convictions. This section will describe the exceptions.

The bottom line is that defenders should advise immigrant defendants who come within the below categories—and ideally, any immigrant with a criminal record—to get competent immigration counseling before applying for DAPA or DACA. Even if the applicant is not placed in removal proceedings, he or she could encounter extensive delays in processing, a wrongfully issued Notice of Intent to Deny, or other problems. Many DAPA and DACA applicants will not require counsel, but applicants with criminal record should get help.

Confidentiality is discussed in the DHS Executive Actions on Immigration FAQs.¹³ This indicates that information from DAPA applications can be referred to law enforcement agencies for use in investigating or prosecuting a criminal case. Moreover, the DAPA/DACA memo provides that the programs will be implemented in accordance with existing DHS policy on Notices to Appear (similar to a criminal complaint). Under the DHS Notice to Appear memo,¹⁴ if the applicant is an “Egregious Public Safety” (EPS) case who meets certain criteria, the DAPA information will be sent to the United States Immigration and Customs Enforcement (or “ICE”, which is the immigration police and prosecutor). ICE then will decide whether to issue an NTA and/or to detain the person.

The EPS category includes individuals who are under investigation for or have been arrested for (including without disposition) murder; rape; sexual abuse of a minor; Illicit trafficking in firearms or destructive devices; offenses relating to explosive materials or firearms; crimes of violence for which the term of imprisonment imposed, or where the penalty for a pending case, is at least one year; offense relating to ransom, child pornography, peonage, slavery, involuntary servitude, trafficking in persons; and human rights violators, or known or suspected street gang members.

Finally, if the applicant is inadmissible or deportable for crimes, USCIS could refer the person to ICE for consideration of removal proceedings even if the person is not in the EPS category. This depends upon whether USCIS will apply a different part of the government memo on Notices to Appear.¹⁵ Advocates will seek clarification on this point.

Immigration Enforcement & Advising Your Client of His or Her Rights

Qualifying persons in criminal custody with ICE detainees/holds may contact ICE directly at the ICE Law Enforcement Support Center at the following toll-free number (855) 448-6903.

For undocumented persons who are ineligible for the program, the defense priority may be to try to avoid contact with ICE by staying out of jail. However, counsel should be careful to advise this group of clients not to hastily accept a plea that would eliminate their options for lawful status without understanding the long-term consequences. Although a person may not be eligible for deferred action, try to plead to an offense that would not bar him/her from getting legal status in the future and is a low enforcement priority to preserve his/her eligibility for prosecutorial discretion.

Note that the enforcement priorities apply to convictions and not to arrests. As a result, a defendant who has no prior convictions generally would not be a DHS enforcement priority, which may be a useful bond argument if the judge is concerned about whether the defendant is a flight risk or apt to be deported out from under the criminal judge's jurisdiction.

Generally, warn your client not to apply for deferred action without getting his or her complete criminal history (including any juvenile history) reviewed first by an immigration lawyer.

For persons already in ICE custody, DHS will conduct a thorough criminal background check and may interview them.¹⁶ If the falls outside the enforcement priorities, the person should be released from immigration custody and his/her immigration case should be closed or terminated. These individuals should contact the ICE ERO Detention Reporting and Information Line, toll-free, at 1-888-351-4024 to make such as a request. If removal proceedings are pending, one may also contact his/her local ICE attorney office, called the Office of the Principal Legal Advisor (OPLA).¹⁷ Additionally, individuals may elevate their cases by sending an email to eroprosecutorialdiscretioninquiries@ice.dhs.gov. Individuals should also consult ICE's [public guidance on seeking prosecutorial discretion](#) under the Enforcement Memo. For more information about steps an individual can take to be released, please check a detention alert available at www.nipnlg.org and see documents at www.ilrc.org/enforcement. Additionally, if ICE refuses to exercise discretion for individuals who fall outside the priorities or who have strong equities for the exercise of prosecutorial discretion, those individuals may submit their case to the ILRC for potential elevation: <http://www.ilrc.org/ced/Enforcement/>.

For more information on defending noncitizens in criminal proceedings visit www.defendingimmigrants.org (a defender site offered for free, but registration is required), as well as sites such as www.nipnlg.org, www.ilrc.org/crimes, www.immigrantdefenseproject.org, and www.nortontooby.com.

¹ See Memorandum from Jeh Johnson, Secretary, U.S. Department of Home Security, on Exercising Prosecutorial Discretion with Respect to Individual Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents to Leon Rodriguez et. al (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

² See Memorandum from Jeh Johnson, Secretary, U.S. Department of Homeland Security, on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants to Thomas S. Winkowski et. al (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

³ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Frequently Asked Questions Q27 (June 15, 2015), available at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

⁴ See ILRC's DACA resources including:

"DACA Criminal Bars Chart", available at <http://www.ilrc.org/resources/daca-criminal-bars-chart>; "Understanding the Criminal Bars to the Deferred Action Policy for Childhood Arrivals Program", available at: <http://www.ilrc.org/files/documents/ilrc-understanding-criminal-bars-to-deferred-action-5.pdf>; "Practice Advisory for Criminal Defenders on Deferred Action" available at: <http://www.ilrc.org/resources/practice-advisory-for-criminal-defenders-certain-criminal-offenses-may-bar-persons-from-ap>; "DACA and Juvenile Delinquency Adjudications FAQs" available at <http://www.ilrc.org/resources/daca-and-juvenile-delinquency-adjudications-records-faqs>. See generally <http://www.ilrc.org/daca>.

⁵ Go to www.ilrc.org/files/documents/natl_relief_toolkit_jan_2014_final_0.pdf. The Relief Toolkit does not yet include information on DAPA or the extension of DACA.

⁶ 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.

⁷ A basic overview of aggravated felonies is found at www.ilrc.org/files/documents/n.6-aggravated_felonies.pdf. Criminal defenders can see additional resources posted at www.defendingimmigrants.org (free resource, registration required).

⁸ For more information on the categorical approach, see Practice Advisories found at www.ilrc.org/crimes and www.nipnl.org. For an overview, see Brady, "How to Use the Categorical Approach Now," at www.ilrc.org/crimes.

⁹ The criminal bars to deferred action are defined such that the defense strategy of carefully crafting the record of conviction to avoid a deportable or inadmissible offense may not be sufficient to protect your client. Furthermore, it is unclear at this time what kinds of evidence may be considered to determine if the offense falls within one of the criminal bars.

¹⁰ But, in this example, if the defendant pled to simple possession or another controlled substance offense he would be ineligible to obtain a green card in the future through a family or business visa because a controlled substance conviction is a ground of inadmissibility unless it is for possession of 30 grams or less of marijuana and waiver is applied for and received.

¹¹ See D. Wilkes, *State Post-conviction Remedies and Relief Handbook* (2009) for a state-by-state summary of post-conviction vehicles and procedures

¹² The Immigration Relief Toolkit appears at <http://www.ilrc.org/resources/immigration-relief-toolkit-for-criminal-defenders>.

¹³ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Executive Action on Immigration (April 15, 2015), <http://www.uscis.gov/immigrationaction>.

¹⁴ See 2011 USCIS "Policy Memorandum" on issuance of NTA's (November 7, 2011), Part IV.A.1, at: http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

¹⁵ See USCIS NTA Memo, above, at Part IV.A.2.

¹⁶ See 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>.

¹⁷ See OPLA field offices contact information at <http://www.ice.gov/contact/legal>.