

Deferred Action for Parents of Americans & Lawful Permanent Residents (DAPA) Frequently Asked Questions

Introduction

On November 20, 2014, President Obama announced executive actions to change immigration policy. One of these reforms, known as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, will provide protection from deportation and a work permit to certain parents of U.S. citizens and lawful permanent residents (LPRs) who have lived in the United States since January 1, 2010. Other reforms fall into three main categories: (i) changes to immigration enforcement policy; (ii) expanding the Deferred Action for Childhood Arrivals (DACA) program; and (iii) changes to certain visa programs. This FAQ focuses exclusively on the DAPA program described in a Memorandum by Department of Homeland Security (DHS) Secretary Jeh Johnson entitled *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* (“Deferred Action Memo”).

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 extended DACA. The Federal Government is appealing the decision and has a significant likelihood of prevailing. The implementation of DAPA and extended DACA has been postponed and neither initiative will begin until the injunction is lifted. For now, we encourage potential DAPA and extended DACA applicants to continue to collect their paperwork and prepare to apply. Please note that the court’s order does not impact the legality of the original DACA program announced in 2012 and USCIS is still accepting original and renewal applications. DACA work permits, however, will no longer be issued for 3 years and USCIS has resumed issuing 2 year employment authorization documents.

Q: What is the DAPA program?

DAPA is a new immigration relief program announced by President Obama on November 20, 2014. DAPA will allow qualified people to apply for protection from deportation and work authorization for a period of three years. DAPA does not grant people permanent immigration status or place people on a path to citizenship.

Q: Who is eligible for DAPA?

Undocumented immigrants in the U.S. who:

1. have a son or daughter of any age who is a U.S. citizen or LPR, and who was born on or before November 20, 2014;
2. have continuously resided in the U.S. since before January 1, 2010;
3. were in the U.S. and out of status on November 20, 2014;
4. are in the US when they apply; and

5. are not an enforcement priority for removal pursuant to the [November 20, 2014 memorandum](#) entitled *Policies for the Apprehension, Detention, and Removal of Undocumented* (Enforcement Memo).

Applicants will be required to undergo background checks (biometrics). Applications will be decided on a case-by-case basis and adjudicators may consider “other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”

Q: Will people have to show that they have paid taxes to be eligible to apply for DAPA?

No. 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.

Q: When can my client apply for DAPA?

Note that there is NO application process yet. It is uncertain when U.S. Citizenship and Immigration Services (USCIS) will begin accepting applications due to the pending litigation described above. DHS originally announced a start date of May 2015, however the actual date will depend on the outcome of *Texas v. US*. Visit www.uscis.gov and <http://www.adminrelief.org/> for updated information.

Q: How much will the DAPA application cost?

The DAPA application fee will be the same as the fee for DACA: \$465. The fee includes the application for work authorization and fingerprinting and will cover the DAPA application.

Q. How is continuous residence defined? Can my client have left the United States for a short period, or must the residency since January 1, 2010 be uninterrupted?

Residency need not have been uninterrupted since January 1, 2010; however it is unclear precisely how DHS will define continuous residence. 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, casual, and innocent.” We will have to see if similar guidance is issued with respect to the DAPA continuous residence requirement.

Q: Is there a maximum or minimum age for my client’s U.S. citizen or LPR son or daughter?

No. The son or daughter can be any age so long as he or she was born on or before November 20, 2014.

Q: Does my client’s son or daughter have to be a LPR or citizen as of November 20, 2014 or only be born on or before November 20, 2014?

Unknown. More information will be provided as it becomes available.

Q: If my client is a step-parent of a U.S. citizen/LPR can she apply?

Right now this is unknown. More information will be provided as it becomes available.

Q: What if my client’s name is not on the U.S. citizen or LPR son or daughter’s birth certificate. Can he still apply?

Your client will have to show some sort of proof that he is the parent of a U.S. citizen or LPR son or daughter. It is unknown how the parent-child relationship will be defined, particularly for fathers where the parents of the son or daughter are not married. If the father is not married to the mother of the son

or daughter and his name is not on the birth certificate, you could advise your client to start the process of establishing parentage which may lead to amending the birth certificate to add his name.

Q: What will happen to my client's status after three years?

DAPA applicants will be able to apply for renewal of their deferred action and work authorization before it expires. Because DAPA is an administratively created program, however, a new president could change or end DAPA. However, applicants should always be informed of the risks as well as benefits of applying for any immigration benefit.

Q: Will my client be able to apply for a social security number?

People who receive work authorization will be able to obtain a social security number.

Q: What can my clients do to prepare for their DAPA applications?

You can advise clients to begin saving money for the application fee now. Clients can also begin gathering documents to prove identity, demonstrate that they have an eligible USC or LPR child, and satisfy the date of entry and continuous residence requirements. People who have had prior encounters with law enforcement and/or immigration authorities should obtain their criminal records and information regarding their immigration history. You should advise clients not to travel abroad before they have obtained deferred action and advance parole.

Examples of documents that may be used to show presence in the US:

- Union membership records
- Bank statements, cancelled checks, and money order receipts
- Billing statements or receipts (phone, electricity, water, rent, insurance, car insurance)
- Leases, rental agreements, property titles (house, car)
- Medical records: for yourself or your child if it lists your name on it
- Driver's license or picture ID (the date issued on the card can be used)
- School records or other attendance certificates (if it is your child's record, it should have your name on it)
- Proof of employment: W-2, tax returns, pay stubs or other pay receipts; photocopies of checks for individuals paid by personal check (past and present); letter from current or past employer on their letterhead stating the dates of employment (note: unless further guidance suggesting otherwise is provided, clients should not submit work-related documents that show a false name or false social security number)

Q: What kinds of criminal offenses or other conduct will disqualify people from DAPA?

People who are enforcement priorities according to the Enforcement Memo. The ICE FAQs (<http://www.ice.gov/immigrationAction/faqs>) provide additional guidance regarding how DHS will interpret the enforcement priorities and exercise prosecutorial discretion. The Enforcement Memo includes the following enforcement priorities, each of which is subject to a balancing test (see next question):

Enforcement Priority 1

- **Threat to National Security:** People engaged in or suspected of terrorism or espionage or who otherwise pose a danger to national security. The [ICE FAQs](#) clarify that INA sections 212(a)(3)

and 237(a)(4) will provide guidance to ICE in determining whether an individual poses a danger to national security.

- **People Apprehended at the Border or Ports of Entry While Attempting to Unlawfully Enter the U.S.** (after the effective date of the Enforcement Memo, January 5, 2015)
- **Participation in a Criminal Street Gang:**
 - People convicted of an offense for which an element was active participation in a criminal street gang; or
 - People 16 years or older, who intentionally participated in an organized criminal street gang to further the illegal activity of the gang.
 - *Note:* Criminal street gang is defined at 18 USC 521(a) as an ongoing group, club, organization or association of 5 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.
- **Felonies:** Immigrants convicted of an offense considered a felony in the jurisdiction where they were convicted, except for state and local offenses for which immigration status is an essential element of the crime.
- **Aggravated Felonies:** Immigrants convicted of aggravated felonies defined at INA § 101(a)(43).

Enforcement Priority 2

- **Three Misdemeanors:** Immigrants convicted of three or more misdemeanor offenses, other than minor traffic offenses or state and local offenses for which immigration status is an essential element of the crime, provided the offenses arise out of three separate incidents.
- **One Significant Misdemeanor:** Immigrants convicted of a “significant misdemeanor,” defined as an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or one for which an individual was sentenced to time in custody of 90 days or more (the time must have been served and does not include suspended sentences). The ICE FAQs define the significant misdemeanor offenses of driving under the influence and domestic violence.
- **Immigration Violators:**
 - People who entered or re-entered the U.S. since January 1, 2014 or are apprehended at the border or ports of entry while attempting to unlawfully enter the U.S
 - People who have significantly abused the visa or visa waiver program. The ICE FAQs state that “significant abuse” is a totality of the circumstances determination that “should be interpreted to include intentional violations of the immigration laws that distinguish the alien as a priority because of the noteworthy or substantial nature of the violations or their frequency.” Overstay of a visa, by itself, is not significant abuse, but commission of fraud is a significant factor.

Priority 3

- People who have been issued a final order of removal on or after January 1, 2014. The ICE FAQs provide that DHS will review on a case-by-case basis the following cases to determine whether an individual's removal would serve an important federal interest: individuals with reinstated removal orders on or after January 1 2014; individuals who received voluntary departure before January 1, 2014, but whose voluntary departure expired on or after January 1, 2014 without having departed; and individuals who were ordered removed before January 1, 2014, but whose timely appeals were dismissed on or after that date.

For more information regarding the enforcement priorities, see the practice advisories at: adminrelief.org.

Q: Are there any exceptions to the criminal bars to eligibility for DAPA?

Yes. The Enforcement Memo allows for certain DHS personnel to consider the totality of the circumstances in determining whether a person is an enforcement priority even where the person falls into one of the priorities outlined in the preceding question.

For each priority level 1 – 3, the Enforcement Memo identifies a different standard of review. The Enforcement Memo and the ICE FAQs also contain a nonexclusive list of factors to be considered in the totality of the circumstances. They are:

- Extenuating circumstances involving the offense of conviction
- Extended length of time since the offense of conviction
- Length of time in the U.S.
- Military Service
- Family or community ties in the U.S.
- Status as a victim, witness or plaintiff in civil or criminal proceedings
- Compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative
- Age at the time the offense was committed
- Sentence and/or fine imposed
- Whether the conviction has been expunged
- Evidence of rehabilitation

For driving under the influence offenses, 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.

For identity theft offenses that fall within the enforcement priorities (e.g. as a felony or a significant misdemeanor based on a custodial sentence of 90 days or more) and do not have immigration status as an explicit element of the offense, DHS will presume these offenses fall within the applicable enforcement priority. But the FAQs provide that immigration officers should also consider 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.

Therefore, according to currently available information, it is possible that an applicant with a relatively minor criminal background or a final order of removal and strong positive equities or other extenuating circumstances may not be an enforcement priority and may still be able to obtain DAPA. However, people should be aware that if they fall into an enforcement priority category, they may place themselves at risk for deportation if they submit an application.

Q: My client is in detention or removal proceedings. What should I do?

Even though the deferred action memo is enjoined, the Enforcement Memo is currently in effect. If your client does not fall into one of the enforcement priorities listed in the memo, your client qualifies for an exercise of prosecutorial discretion (such as administrative closure), and you should advocate that he or she be released. You may also request that the ICE attorney assigned to the case administratively close your client's case. If your client is in ICE custody, you or your client may call the ICE Community and Detainee Helpline at 1-888-351-4024. Individuals in proceedings before EOIR may submit a request to the ICE Office of the Principal Legal Advisor via the mailbox of the [OPLA field office](#) that is handling your case. If your client is scheduled for removal and is not in ICE custody, you may call the ICE Community and Detainee Helpline, your local OPLA field office, or the USCIS National Customer Service Center at 1-800-375-5283. Additionally, you should also send an email to eroprosecutorialdiscretioninquiries@ice.dhs.gov. For more information regarding elevation process, see [ICE's guidance on requesting prosecutorial discretion](#).

See the "Preventing the Removal of Individuals Who Are Not Enforcement Priorities or Who Are Eligible for Expanded DACA and DAPA" Practice Advisory at adminrelief.org and the NIPNLG Advisory, ["Requesting Prosecutorial Discretion for Individuals in Removal Proceedings or Detention While the Injunction in Texas, et al. v. United States Remains in Effect."](#)

Q: If my client receives DAPA will she be able to travel outside of the United States?

Unknown. At this time, DHS has not specified in writing that DAPA recipients will be eligible for advance parole to travel outside of the United States. Information on whether DAPA participants may apply for advance parole will be provided when available. Note that your client should not leave the United States before receiving DAPA and without advance parole.

Q: If my client appears to be eligible for DAPA, should I still screen for eligibility for other benefits?

Yes. You should screen your client for eligibility for other benefits because they may provide your client with permanent immigration relief. You should discuss all the available options with your client.