Practice Advisory for Criminal Defenders:[1]
Certain Criminal Offenses May Bar Persons from Applying for the New Deferred Action Status Program Announced by President Obama

On June 15, 2012, the Obama Administration announced that it would not deport certain undocumented persons who entered the U.S. as children. The Department of Homeland Security (DHS) has offered guidance on the type of criminal offenses that will make a person ineligible for this program called **Deferred Action for Childhood Arrivals (DACA)**. Deferred action means that, even though the individual is undocumented and subject to deportation, the government agrees to "defer" any actions to remove them. So, in essence, even though deferred action does not provide a pathway to getting lawful permanent resident status (a green card) or citizenship, it will allow young people to remain in the U.S. and apply for a work authorization document from the government that entitles them to legally work in the U.S.

This advisory for criminal defense counsel outlines defense strategies to preserve a client's possible eligibility for deferred action.

Identifying Eligible Clients: Basic Eligibility Requirements & Crime-Related Bars

Under *Padilla v. Kentucky*, the U.S. Supreme Court made clear that it is part of defense counsel's Sixth Amendment duties to advise a client of the consequences that a criminal disposition can have on the client's eligibility to maintain or obtain lawful immigration status and/or seek relief from deportation. As such, defenders should screen any client who is 30 years old or younger to determine if she is eligible to seek deferred action. Where she is, it is important to let her know this (you may be her only source of this information) and to attempt to resolve her criminal proceedings to preserve her eligibility to apply.

To qualify for deferred action, the individual must:
(1) be 30 years old or younger as of June 15, 2012;
(2) have entered the U.S. when she or he was under age 16;
(3) have been physically present in the U.S. on June 15, 2012 and continuously resided in the U.S. during the preceding five years (except for brief, casual, and innocent absences);

[1] The Immigrant Legal Resource Center (www.ilrc.org) is a partner organization of the Defending Immigrants Partnership, a national collaborative to assist criminal defense counsel effectively represent noncitizen defendants (www.defendingimmigrants.org). Thanks to Ann Benson, Dan Kesselbrenner, Mike Mehr, Graciela Martinez, Raha Jorjani, and Sejal Zota for their insightful comments.

(4) be currently in school or have graduated from high school or obtained a GED, or are honorably discharged from coast guard or armed forces; and
(5) **have not been *convicted of* a felony, a significant misdemeanor, or three or more non-significant misdemeanors**, and **not pose a threat to public safety or national security**.

A broad array of criminal offenses will bar eligibility unless a person can show "exceptional circumstances" including:

- A conviction for a **felony.** A felony is a federal, state or local offense that carries a potential sentence of more than one year.
- A conviction for a "**significant misdemeanor**." A "significant misdemeanor" is a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days and is an offense of:
    - Domestic violence;
    - Sexual abuse or exploitation;
    - Unlawful possession or use of a firearm;
    - Drug sales (distribution or trafficking);
    - Burglary;
    - Driving under the influence of alcohol or drugs; or
    - Any other misdemeanor not listed above for which the person received a jail sentence of more than 90 days. The person must be ordered to spend more than a 90 day sentence in jail, but does not necessarily have to spend all of that time in jail.[2]
- Convictions for "**multiple misdemeanors**." This is defined as three or more non-significant misdemeanors not occurring on the same day and not arising from the same act or scheme of misconduct. A misdemeanor for this purpose is a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days. Minor traffic offenses, such as driving without a license, will not be considered a non-significant misdemeanor for purposes of deferred action.

Defenders should be aware that the definition of felony and misdemeanor for purposes of DACA ignore a state's classification scheme. This means that an offense that is a misdemeanor for state purposes may be a felony under DACA or vice versa.

- **Offenses that Do Not Lead to Automatic Disqualification:**
    - Juvenile adjudications are not considered disqualifying misdemeanors or felonies. Juvenile defenders, however, should also screen youth clients for eligibility for other forms of relief as youth may be eligible to obtain lawful status in a number of ways. See *Summary Checklist for Defense of Noncitizen Juveniles* available at www.defendingimmigrants.org.
    - Expunged convictions are not considered disqualifying misdemeanors or felonies.

[2] Take, for example, the following: Juan is admitted to probation, imposition of sentence is suspended, and as a condition of probation he is ordered to serve 91 days in jail. Juan is ineligible for DACA, although with credits he only serves two-thirds of his sentence. But if Juan is admitted to probation, is given a one year suspended sentence with no condition to serve any time in jail, Juan is eligible.

- Immigration-related offenses characterized as either felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors for deferred action. An example of an immigration-related offense is an offense that has immigration status as an element as seen in many Arizona copycat anti-immigration state laws.

WARNING! Although these offenses do not trigger the "automatic" criminal bars listed above, DHS can consider them under the discretionary **totality of circumstances** and/or **threat to public safety analysis**, described below and still deny an application.

- **Any Criminal Conviction or Criminal History Will Be Considered in the Totality of Circumstances and as a Public Safety Threat:**
  - Even if a crime does not rise to the level of a "significant misdemeanor," and is an expunged conviction or juvenile adjudication, DHS has said that it retains the discretion to determine that an individual does not warrant a grant of deferred action on the basis of a single criminal offense by considering the "totality of circumstances" of the individual's case.
  - All criminal history, even without a conviction, including arrests and dismissed charges, may be taken into consideration in determining whether a person should be granted deferred action to determine whether the person poses a **"public safety" threat**. Examples that fall into this category are **gang membership** and **participation in criminal activities**.

Defense Strategies in Light of DACA[3]

- **Informally defer the plea.** Ask the prosecution to agree to defer the plea hearing so that the defendant can voluntarily meet specified goals, e.g., perform community service, and then make an alternative plea or no plea after goals are completed.
- **Seek a 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."
- **Plead to a non-identified significant misdemeanor offense category and obtain a jail sentence of less than 90 days.** 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.[4]
- **Plead to a non-significant misdemeanor offense if the person does not already have two misdemeanors on their record**.
- **Plead to an offense that does not constitute a non-significant misdemeanor offense or to an infraction.** 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 case should be pled to another traffic offense,

[3] 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.

[4] But, in this example, if the defendant pled to simple possession or other 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.

if possible, since DUIs constitute significant misdemeanors. 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 as long as the jail sentence does not exceed 90 days.

- **Explore vacating a recent plea on the basis of legal error.** For example, in California, under Calif. 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. Another option is to work with the prosecutor to withdraw the plea and substitute another, safer plea.
- **Explore post-conviction relief.** 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. This is a possibility if at the time of plea the offense already was likely to have adverse immigration consequences. Individuals should seek expungements. Although expungements generally do not eliminate convictions under immigration law, for purposes of deferred action, an expunged conviction **will not** automatically disqualify an applicant; DHS will only consider expunged convictions as a matter of discretion.
- **Consider taking the case to trial.** If deferred action is the only way your client will have security against deportation, she may be 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 DACA and not for other immigration benefits. Defenders should continue to flag other forms of relief for clients and defend the case accordingly. A relief questionnaire is at www.defendingimmigrants.org

Immigration Enforcement & Advising Your Client of His/Her Rights

- Qualifying persons in criminal custody with ICE detainers/holds may contact ICE directly at: the Law Enforcement Support Center's hotline at (855) 448-6903 (24 hrs, 7 days/wk), ICE Public Advocate on its hotline at (888) 351-4024 (M-F, 9am-5pm) or by email at EROPublicAdvocate@ice.dhs.gov.
- For persons already in ICE custody, DHS will conduct a criminal background check and may interview them. If the person qualifies for the program, the person should be released from immigration custody.
- 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 them from getting legal status in the future and is a low enforcement priority to preserve their eligibility for prosecutorial discretion.
- Warn your client not to apply for deferred action without getting their complete criminal history (including any juvenile history) reviewed first by an immigration lawyer.

For more information on defending noncitizens in criminal proceedings visit www.defendingimmigrants.org (membership required).