

A Review of Legal Issues Arising After a Grant of DACA *by Emily Creighton, Annaluisa Padilla, Marilia Zellner, and Dan Berger*¹

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INTRODUCTION

Deferred Action for Childhood Arrivals (DACA) was implemented in mid-2012, in response to the tireless efforts of undocumented students who have struggled for more than a decade for the opportunity to remain in the United States to pursue an education. As hundreds of thousands of young immigrants receive DACA grants, the benefits of the program are receiving greater scrutiny and in some cases causing confusion. Here, we pause to review six key issues now affecting DACA holders: international travel; renewing DACA; public benefits; driver’s licenses/IDs; funding for higher education; and employment-related concerns.

INTERNATIONAL TRAVEL

Many DACA holders have not left the United States since their first arrival, often at a very young age. They now hope that DACA will allow them to travel internationally to visit family or pursue educational and cultural opportunities, with the confidence that they may easily re-enter the

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United States upon their return. While DACA does provide some new opportunities for travel, DACA holders and their counsel also should be aware of the limitations and risks involved regarding travel outside the United States. The Obama administration has outlined its position regarding travel for DACA holders in the DACA FAQs,² and in proposed changes to the instructions accompanying the Form I-131, Application for Travel Document.³

Advance parole allows an otherwise inadmissible person—in this case a DACA holder—to seek authorization to re-enter, or be paroled, into the United States.⁴ A DACA holder must apply for advance parole *prior* to his or her departure from the United States by submitting a Form I-131 with a \$360 filing fee, and must not leave before U.S. Citizenship and Immigration Services (USCIS) grants the application. To USCIS's credit, the advance parole document now includes a notice titled “Read before you travel” printed at the bottom of the page, explaining that parole into the United States is not guaranteed, parole is not an admission, and the U.S. Department of Homeland Security (DHS) can revoke or terminate an advance parole document; it also includes travel warnings.

The DACA FAQs state that “USCIS will determine whether [the applicant’s] purpose for international travel is justifiable based on the circumstances [] describe[d] in [the] request.” This language appears to allow USCIS to decide applications on a case-by-case basis. However, the FAQs go on to state that advance parole “[g]enerally” only will be granted when the requested travel is for *humanitarian, educational and employment*-related reasons. *Humanitarian purposes* for travel include travel to obtain medical treatment, attend funeral services for a family member, or visit an ailing relative. *Educational purposes* may include a semester-abroad program or academic research. *Employment purposes* may include overseas assignments, interviews, conferences, training, or meetings with clients overseas. The FAQs explicitly exclude travel for vacation as an acceptable reason for travel. We note that the few advance parole applications granted to date have allowed DACA holders to travel for school trips or to visit sick family members. To date, the duration of advance parole has been strictly limited to the time needed to accomplish the purpose of the travel.

Parole is not an admission, and a person who is paroled into the United States is considered a parolee. It is important to explain the legal ramifications of admission vs. parole to DACA holders prior to their decision to travel. In addition, any decisions regarding travel outside of the United States should include an analysis of a DACA holder’s unlawful presence in the United States prior to departure. DACA holders who have reached age 18 may be subject to inadmissibility bars if they have been unlawfully present in the United States for more than 180 days since turning 18. If a DACA holder has been unlawfully present in the United States for more than 180 consecutive days, but less than one year and leaves the United States, he or she will be subject to the three- year bar and will be barred from readmission for three years from the

² “Consideration of Deferred Action for Childhood Arrivals Process,” available at www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD. At the time of publication, these USCIS FAQs were most recently updated on January 18, 2013.

³ At the time of publication, proposed changes to the form and instruction were not yet finalized. For a current version of the form and instructions, please visit USCIS’s website.

⁴ 8 CFR §212.5(f).

date that he or she departed.⁵ If unlawfully present in the United States for one year or more consecutively, he or she will be barred for 10 years from the date of his or her departure.⁶ Those who have been unlawfully present for an aggregate period of more than one year *or* who have been ordered removed *and* who enter the United States without inspection (EWI) are permanently barred.⁷ It is also important to note that a person traveling to U.S. territories such as Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico or the United States Virgin Islands also may be subject to grounds of inadmissibility.⁸

When calculating periods of unlawful presence, remember that minors are protected by statutory exceptions under INA §212(a)(9)(B), so no period of time in which a person was under 18 years of age will be taken into account when determining the period of unlawful presence for purposes of the three and ten-year bar. However, this same protection does **not** extend to minors subject to the permanent bar at INA §212(a)(9)(C). It is also important to note that any DACA applicant under 18 will not accrue unlawful presence while the DACA request is pending, even if he or she turns 18 when the application is pending. And once DACA is granted, a DACA holder will not accrue unlawful presence. Above all, if a person has already triggered an inadmissibility bar, travel under advance parole will **not** cure any previously incurred bar.

The Board of Immigration Appeals's (BIA) recent decision in *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), has changed, to a certain extent, the landscape for those subject to the three and ten-year bar who depart the United States and later seek admission. In *Arrabally*, the BIA found that traveling on advance parole does not constitute a "departure" for purposes of INA § 212(a)(9)(B) and thus, does not trigger the three- and ten-year bar. Under *Arrabally*, an argument also could be made that a person who is not currently eligible to adjust (such as an immediate relative of a U.S. citizen who entered without inspection), is not only eligible to apply to adjust after travel on advance parole (because they now are in parole rather than EWI status), but also need not apply for a waiver of the three- or ten-year bar.⁹ In proposed changes to the Form I-131 and accompanying instructions, USCIS has indicated that it will apply the *Arrabally* reasoning to DACA applicants, but until these changes are finalized, attorneys should monitor developments in this area before advising clients on the impact of travel.

DACA Holders with Final Orders of Removal

Individuals who receive Deferred Action but are subject to a final order of removal may apply for advance parole. However, the FAQs caution that before leaving the United States, such individuals should seek to reopen their cases before the immigration courts and obtain administrative closure or termination of their removal proceedings prior to departure. Otherwise, their departures may cause them to be "considered deported or removed, with potentially serious future immigration consequences." Questions about this process may be directed to the U.S.

⁵ See INA §212(a)(9)(B)(i)(I), 8 U.S.C. §1182(a)(9)(B)(i)(I).

⁶ See INA § 212(a)(9)(B)(i)(II), 8 U.S.C. §1182(a)(9)(B)(i)(II).

⁷ See INA § 212(a)(9)(C)(i)(I) & (II); 8 U.S.C. §§ 1182(a)(9)(C)(i)(I) & (II).

⁸ See 8 CFR 235.5.

⁹ The Administrative Appeals Office recently found that an individual who left the United States on advance parole, and subsequently reentered had not made a departure within the meaning of INA §212(a)(9)(B)(i)(II) and that a waiver of inadmissibility was thus unnecessary. See "AAO Issues Revised Decision in *Arrabally/Yerrabelly* TPS Case" (Oct 26, 2012), published on AILA InfoNet at Doc. No. 12102242 (posted Oct. 26, 2012).

Immigration and Customs Enforcement (ICE) Office of Public Advocate at 1-888-351-4024 (from 9 a.m. to 5 p.m.) or by email at EROPublicAdvocate@ice.dhs.gov.

RENEWING DACA

Pursuant to current guidelines, grants of Deferred Action for Childhood Arrivals (DACA) are valid for an initial two-year period. Unless USCIS terminates a grantee's status, individuals may request consideration for an extension of the initial two-year period on a case-by-case basis. To request an extension of deferred action, the applicant must submit a new form I-765 with the appropriate I-765 fee, currently \$380. An applicant who qualified for an initial grant of deferred action may request an extension of their DACA status even if the applicant has turned 31 years of age. Pending further guidance, we assume that the I-765 can be filed at least 120 days in advance of the expiration of the current grant of deferred action, as with other I-765 categories. This usually gives time for the new Employment Authorization Document (EAD) to be received before the old one expires.

It goes without saying that DACA beneficiaries should not rest on DACA. Instead, they should continue to look for opportunities to gain more permanent status.¹⁰

Additional evidence may be required for an extension of DACA. This evidence may include educational documentation that the applicant is still in school or working towards completing high school or a GED. Furthermore, USCIS will request new biometrics to ensure that the applicant has not committed any disqualifying crimes after the initial grant.

Risks If Client Has Any Criminal Activity After Initial DACA Grant

If an applicant has any criminal activity after the initial grant, be sure to review such activity under the established guidelines for criminal disqualifiers for DACA. Practitioners should question their clients in detail about any criminal activity and take steps to obtain certified copies of all police reports and records of disposition of any criminal charges, including any juvenile adjudications, no matter how seemingly insignificant. If none exist, a copy of the local authorities background check through fingerprints should suffice. If on the other hand, the disposition may not be released to the applicant, include relevant authority to that effect.

Though the guidance is not specific, counsel should assume that a DACA holder who has engaged in criminal activity after the initial grant may be at risk of being placed in removal proceedings or being detained if such criminal activity falls within the criminal disqualifiers. USCIS will apply its policy guidance governing the referral of cases to ICE and the issuance of Notices to Appear (NTA).¹¹ In accordance with the FAQs, for cases that involve a "criminal offense, fraud, or a threat to national security or public safety," USCIS will likely not apply the

¹⁰ See generally "Beyond Deferred Action: Long-Term Immigration Remedies Every DREAMer Should Know About," available at <http://e4fc.org/resources/legalremedies.html>.

¹¹ See USCIS Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," available at [www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20\(Approved%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf).

confidentiality protections set forth under deferred action unless USCIS determines there are exceptional circumstances.¹² In addition, USCIS notes that individuals who knowingly make a misrepresentation or knowingly fail to disclose facts in the DACA request process “will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States.”

Even absent a criminal conviction, individuals are ineligible for DACA if they have engaged in any activity that may be considered to “pose a threat to public safety or national security” including gang membership. USCIS will use a totality of circumstances test to determine continued DACA eligibility, and may consider allegations of participation in criminal activities based on the facts surrounding even dismissed charges, as well as participation in drug/alcohol programs or anger management classes, among other factors. Practitioners are cautioned to review the circumstances of any dismissed charges to see if the applicant could nonetheless be found ineligible for deferred action or even at risk of enforcement action. By the time of extension of current DACA status, we hope to have more experience with how USCIS is applying these general DACA guidelines.

PUBLIC BENEFITS

Obtaining DACA does not make grantees eligible for many additional benefits. However, DACA provides access to an Employment Authorization Document (EAD), which allows DACA holders the opportunity to work legally and may provide access to employer sponsored benefits. As confirmed in the administration's January 18, 2013 FAQ,¹³ DACA-holders are “lawfully present.” This means that individuals granted DACA have access to a few services that are available to work authorized individuals or those who are lawfully present in the U.S. In most states, individuals with an EAD and a Social Security Number have access to a driver's license and/or identification card, however these determinations vary state by state. As discussed below, various nonprofits are tracking states' responses to DACA.

In general, DACA-holders are not eligible for any federal program requiring that he or she be a “qualified immigrant.”¹⁴ So, for example, DACA holders receive emergency medical assistance¹⁵ in the same way an undocumented individual receives these services. Similarly, DACA holders do not qualify for federal benefits such as food stamps or public housing. Those of you working at Legal Services Corporation (LSC)-funded nonprofit organizations also know that DACA holders are ineligible for your services, unless they meet the same exceptions that are

¹² See www.uscis.gov/USCIS/Resources/daca.pdf.

¹³ “Consideration of Deferred Action for Childhood Arrivals Process,” available at www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD. At the time of publication, these USCIS FAQs were most recently updated on January 18, 2013.

¹⁴ For an excellent review of this topic, see *Immigrant Eligibility for Public Benefits* available at www.nilc.org/guideupdate.html which includes a link to a table at: www.nilc.org/table_ovrw_fedprogs.html.

¹⁵ See www.nilc.org/table_ovrw_fedprogs.html.

applicable to undocumented survivors of domestic abuse, stalking and/or dating violence. DACA holders are also ineligible for most services provided under the Affordable Care Act.¹⁶

In interesting ways, work authorization does provide some additional benefits. For example, the Workforce Investment Act¹⁷ enables all work-authorized individuals to receive certain job training and employment services. In addition, a DACA holder may be entitled to unemployment insurance. When someone with DACA gets a job, he or she is able to secure any benefits that the employer offers. Once that DACA holder has been connected to the work force for the requisite number of months, he or she may be able to collect unemployment insurance if he or she loses that job. Finally, California, Illinois, Washington, Massachusetts, and a few other states offer some services to immigrants, including those granted deferred action, when federal funds are not available.¹⁸

DRIVER'S LICENSE/AND OR IDENTIFICATION CARD

The DACA FAQs confirm that DACA holders are considered to be 'lawfully present' during the validity period listed on the I-821D Approval Notice. Congress included individuals with deferred action among the immigrants who are eligible for a federally-recognized driver's license pursuant to the Real ID Act.¹⁹ NILC has published an issue brief that lists the states that provide driver's licenses to individuals granted DACA.²⁰ Arizona and Nebraska are the only two states to date that have specifically excluded DACA beneficiaries from being able to obtain driver's licenses.²¹

FUNDING FOR HIGHER EDUCATION

There are four main issues to review when considering how someone with DACA might finance a higher education: federal financial aid; state financial aid; in-state tuition policies; and miscellaneous considerations such as scholarship awards and private loans.²²

Federal Financial Aid

As with most other federal public benefits, all non-citizens participating in federal financial aid must be "qualified immigrants." There is an additional federal statute governing federal financial aid eligibility, which requires that an individual have evidence that he or she is in the United States on more than a temporary basis with the intent to become a lawful permanent resident or

¹⁶ Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. 111-148, 124 Stat. 119 (2010). For information on DACA holders and the Affordable Care Act, *see generally* www.nilc.org/health-publicbens.html.

¹⁷ The Workforce Investment Act of 1998, Pub.L. 105-220, 112 Stat. 936, 29 U.S.C. § 2801, *et seq.* *See generally* www.nilc.org/health-publicbens.html.

¹⁸ *See generally*, www.nilc.org/access-to-bens.html, www.nilc.org/guideupdate.html. *See also* www.nilc.org/health-publicbens.html, and <http://e4fc.org/resources/benefitscomparisonchart.html>.

¹⁹ REAL ID Act of 2005 (REAL ID), Pub. L. No. 109-13, div. B, 119 Stat. 231, 302-23.

²⁰ For updated information, *see* www.nilc.org/dacadriverslicenses.html.

²¹ *See* www.aila.org/content/default.aspx?docid=42986 and more specifically, *see* AILA Doc. No. 12082249 for pending litigation regarding the Arizona policy.

²² *See generally*, www.nasfaa.org/advocacy/perspectives/articles/Deferred_Action_for_Dreamers_Advising_DACA_Students_About_Affording_College.aspx, www.nilc.org/education.html. For California in particular, *see* www.csac.ca.gov.

citizen. DACA holders are not listed among the “eligible non-citizens” for purposes of federal financial aid. Only a short list of “eligible non-citizens” may fill out the Free Application for Federal Student Aid (FAFSA), which is the key to a host of programs, ranging from Subsidized and Unsubsidized Stafford Loans, PLUS Loans, Perkins Loans, Pell grants, and many work study opportunities.

State Financial Aid

A few states allow undocumented individuals who meet certain criteria to receive state financial aid. In those jurisdictions, undocumented immigrants may qualify for special loan repayment programs funded by non-federal monies.

In-state Tuition Discounts for Residents (Tuition Equity Laws)

In-state tuition policies allow residents to pay a lower tuition rate at public colleges and universities than out-of-state residents. Some states allow their high school graduates who meet certain criteria to pay the in-state rates, regardless of their immigration status. In California, for example, state law AB 540 offers in-state rates to students who meet specific criteria, regardless of status. AB 540 does not merely protect undocumented or DACA students, it also benefits out-of-state residents who meet the criteria of having gone to high school for 3 years in California and having graduated from a California high school (*e.g.*, someone living in Nevada but going to school in a border town in California).²³ Other states leave decisions about awarding in-state tuition up to the various public institutions. For example, in Florida, each state school has a different policy.

In-state tuition rate determinations may differ according to requirements around residency, domicile, lawful presence, or documentation. So, certain tuition rates could be open to someone with DACA but they are nevertheless excluded because, for example, their undocumented parents cannot provide the required proof. In some states, a tuition equity policy varies depending on whether the school is a community college, private four-year college, or public four-year college. There is no comprehensive national in-state tuition guide. As a result, a DACA holder will need to investigate each school's unique policy regarding in-state tuition.

Miscellaneous Considerations

When considering how to finance their higher education, DACA-holders also should look at private scholarships and loans. Some private scholarships requesting a Social Security Number (SSN) may grant awards to undocumented individuals upon inquiry and explanation (with or without prospects of getting a social security number through DACA). Educators for Fair Consideration's (E4FC) annually-updated scholarship guide lists scholarships that will consider undocumented students among its awardee pool.²⁴ Additionally, some private lenders may issue loans to students with DACA, depending on the lender, particularly if a U.S. citizen or lawful permanent resident co-signs on the loan.

²³ For more details on the California policy, *see* www.e4fc.org/resources/californiadreamact.html.

²⁴ *See* www.e4fc.org/resources/scholarshiplists.html.

EMPLOYMENT-RELATED CONCERNS

A common question among DACA holders is whether and how to update their employment-related files with their new, valid SSN. There are a variety of reasons to update your I-9 and W-4 Forms in particular, and it is good practice to update these records as soon as possible. However, there are important issues to consider about the interplay of different areas of law, and also how to present the new SSN to an employer or the Internal Revenue Service.²⁵

USCIS has released a guide for employers of DACA beneficiaries with information on correcting the I-9.²⁶ Please note that while the guide states that your employer must complete a new I-9 when there is a change in your SSN, this does not follow the M-274 Handbook for Employers which gives other options for this situation. AILA is working with USCIS to correct some inconsistencies in the guide.²⁷

The risk associated with presenting a new SSN to an employer is two-fold. On the one hand, telling an employer that an employee has now been granted DACA, from which an employer might reasonably infer that the employee was previously unauthorized to work, can open up an otherwise closed line of questioning that could result in lawful termination. A DACA holder may place him- or herself in a position where an employer will enforce an anti-lying policy and, as long as the employer enforces that policy fairly and consistently, the worker could be legally terminated. On the other hand, working under a false SSN is a violation of federal law, so continuing to work under a false SSN prolongs that violation. And since DACA is intended as an ameliorative program, failure to correct the use of an invalid SSN (or a false name) could lead to a negative discretionary determination on a DACA renewal. Depending on the fact pattern, the student may want to consult a criminal attorney to be aware of state or federal violations resulting from the previous use of invalid documents or ID numbers. The good news is that there are ways to recapture earnings contributed toward social security under a different SSN.²⁸

²⁵ See generally www.nilc.org/dacaworkplacerrights.html and www.justice.gov/crt/about/osc.

²⁶ See www.uscis.gov/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/DACA-Fact-Sheet-I-9_Guidance-for-employers.pdf.

²⁷ “Concerns Regarding the Guidance for Employers Related to the Deferred Action for Childhood Arrivals (DACA) Initiative” (Jan. 11, 2013), *published on* AILA InfoNet at Doc. No. 13011555 (*posted* Jan. 15, 2013).

²⁸ For more information, we recommend that you consult with the National Immigration Law Center at <http://nilc.org/contact2.html>.