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**DACA, VAWA and U visa Applications:
FAQ, DACA Basics & Resource List¹**

This practice advisory discusses the intersection of the Deferred Action for Childhood Arrivals (DACA) program with applications for U visa and VAWA self-petitions, including the availability of DACA relief for derivative U applicants.

Q. What is DACA?

A. On June 15, 2012, the Department of Homeland Security announced the Deferred Action for Childhood Arrival program, which allows people who came to the United States as children to request Deferred Action (DA) and attendant work authorization for a period of two years, if they meet specific eligibility requirements described below and in the many resources listed at the end of this advisory.

People who apply for DACA must prove that they:²

- Came to the US **under age 16** and were **under 31 on June 15, 2012**;
- Continuously resided in the US since **June 15, 2007**;³
- **Entered without inspection** before June 15, 2012 or otherwise **had no legal status** on June 15, 2012;
- Are in school, graduated from high school, have earned a GED, or have been honorably discharged from the Coast Guard or the US armed forces;
- Have not committed felonies, "significant" or multiple misdemeanors, or pose a "public safety" or "national security" threat.

Applicants must submit documentation that they meet these requirements. There is internal review but no appeal of denials.

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² USCIS, *Consideration of Deferred Action for Childhood Arrivals Process*, at www.uscis.gov/childhoodarrivals ("CIS Memo")

³ "Brief, casual and innocent" departures before August 15, 2012 do not disrupt continuous presence, *see* FAQ section of CIS memo above.

Q: Can someone who filed a VAWA self-petition or U visa also file for DACA?

A: Yes, as long as they are **not yet in legal status**, *or have lost legal status* (see below for which U and VAWA applicants may qualify).

Q: What benefits does DACA provide?

A: Deferred Action (DA) and work authorization for two years, with possible renewal. It does NOT provide a route to permanent status, and remember that DA is not in the statute; it is based solely on agency discretion. For those who qualify for VAWA self-petitioning or U visas, it is a temporary measure until USCIS catches up with its backlog and issues guidance fixing problems for U derivatives.

Q: Do I give up my VAWA or U petitions if I get DACA?

A: No, you can pursue both at the same time. If you are granted VAWA or U visa status, however, you no longer qualify for or need DACA because approved VAWA self-petitioners and U visa applicants get work authorization, are not a high priority for removal, and are on a path to lawful permanent residence.

Q: Which VAWA self-petitioners and U visa applicants might want to file for DACA?

A: The most common cases will be:

- Those who filed a VAWA self-petition or U visa but have not gotten status yet and therefore lack work authorization and Deferred Action;
- U derivatives whose cases are on hold because CIS hasn't issued age-out guidance yet. Only those who have not received Deferred Action or work authorization through an Extension of Status request would qualify or need it, obviously;
- U derivatives whose U status CIS terminated when they turned 21, so they no longer have work authorization or Deferred Action. A request for Extension of Status *does not extend status by itself*. The key question is whether your client has work authorization. If not, then he or she probably does not have VAWA-based DA or approved U or VAWA self-petitioner legal status.
- VAWA self-petitioners and U applicants, including derivatives, who are at imminent risk of removal or are in removal proceedings. DACA's provisions for those in removal may be faster than existing systems for preventing victim

removal.⁴ This will depend on your jurisdiction and your case. Although we expect USCIS to fix the problems with the U visa system eventually, many victims of crimes and their family members are suffering while they wait. DACA may help some of them.

Q: Who should NOT apply?

A: **Any criminal history may be a problem!** Unlike VAWAs and U visas, there are no waivers. Instead, felonies, "significant misdemeanors" and three or more "non-significant" misdemeanors are **bars** to DACA. Moreover, expunged convictions and juvenile dispositions may be considered. According to CIS:⁵

For the purposes of this process, a significant misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Regardless of the sentence imposed, is 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
2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

. . . [T]he decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, **the absence of the criminal history outlined above, or its presence, is not necessarily determinative**, but is a factor to be considered in the **unreviewable exercise of discretion**. DHS retains the discretion to determine that an individual **does not warrant deferred action on the basis of a single criminal offense for which the individual was sentenced to time in custody of 90 days or less**.

(emphasis supplied)

⁴ Existing mechanisms for victims include a special prima facie decision process for VAWA and U applicants in proceedings and case closure under ICE's prosecutorial discretion memoranda. If you are unfamiliar with these options, please check our website for more information = www.asistahelp.org

⁵ See CIS memo at footnote 2.

ASISTA opposed including domestic violence (with no waiver) in this list because we know many survivors are convicted of this crime; CIS has taken a blanket approach, however, so be very careful.

The CIS guidance says that background checks will be the basis for determining "public safety" and "national security" threats, but it specifically mentions gang membership and "activities that threaten" the US. Experience teaches that such determinations are often idiosyncratic, reflecting the political or social bias of the decision-maker.

Keep in mind that a client may not be aware that they have a criminal record, so you must discuss this thoroughly and carefully with potential DACA applicants and do your own records check if possible (the resources at the end include materials to help with this. Make sure you discover any juvenile offenses, since clients may not understand what happened, or think that they will have no immigration status impact since they may have been told the offense was "erased" from their record.

Applicants may be referred to ICE if they meet the criteria for placement in proceedings and family member information of those referred may be shared with federal law enforcement agencies for purposes other than removal⁶. You cannot, therefore, promise that people who apply for DACA are safe from removal.

Q. Are there any deadlines to apply for DACA?

A. There are no deadlines to apply for DACA.

Q. How do I file?

A. The CIS memo⁷ explains how to file. ⁸ Note that (a) **the evidentiary standard is NOT the "any credible evidence" standard** that applies to VAWA and U visas, but is generally the more stringent "primary evidence" standard with some limited exceptions. Similarly, although there are fee "exemptions" there are no fee waivers.

⁶ CIS Memo at footnote 2, FAQ section.

⁷ *Id.*

Resources

For non-profits and pro bono attorneys, the best compilation of resources is at the Immigration Advocates Network (IAN) website. IAN is a network of the primary immigration organizations (including ASISTA); their website includes materials from all of us. You must be a member, but membership is free for non-profits and pro bono attorneys, and we encourage you to join.

www.immigrationadvocates.org/nonprofit/library/folder.434886-Deferred_Action_for_Childhood_Arrivals

Interactive website for noncitizens who may be DACA eligible, a collaborative project between IAN, United We Dream and a national consortium of immigrants' rights organizations, including many IAN partners

<http://www.weownthedream.org/#>

For private attorneys and those who can't access IAN resources, you may wish to check:

DHS links

CIS guidance

<http://1.usa.gov/LhQrYl>

Announcement

www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low

Memorandum

www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf

AILA members: www.aila.org/dream

Other organizations' resources (not exhaustive, sorry if we missed you)

American Immigration Counsel's Legal Action Center

<http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-and-executive-action-resource-page>

National Immigration Law Center (NILC)

www.nilc.org/FAQdeferredactionyouth.html

Catholic Legal Immigration Network (CLINIC)

<http://cliniclegal.org/front-announcement>

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