



**Crimes-Related Bars to
DAPA (Deferred Action for Parents of Americans and
Lawful Permanent Residents) and
DACA (Deferred Action for Childhood Arrivals)**

Bar	USCIS FAQ Webpage¹ (DACA) and Enforcement Memo² (DAPA) Text	Comments
<p>Any Three Misdemeanor Convictions</p> <p>Exceptions for:</p> <ul style="list-style-type: none"> --Multiple convictions from same incident (DAPA) or occurring on the same date or "arising out of the same act, omission, or scheme of misconduct" (DACA) --Minor traffic offenses --State immigration offenses -- Possibly Infractions 	<p>DACA refers to these convictions as "non-significant misdemeanors."</p> <p>DAPA: "...aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents"</p>	<p><i>Definition of misdemeanor:</i> In sum, DACA defines a misdemeanor based on potential sentence, while DAPA relies upon state classification of misdemeanor versus a felony.</p> <p>DACA defines a non-significant misdemeanor as an offense that does not meet the definition of significant misdemeanor and that is punishable by imprisonment of more than five days but not more than one year.</p> <p>DAPA does not explicitly define misdemeanor. This may result in two differences between DAPA and DACA. First, DAPA should treat a state offense that has a potential sentence of more than a year (e.g., 18 months) as a misdemeanor if the <i>state</i> classifies it as a misdemeanor. This is because DAPA's definition of felony is limited to an offense that the state classifies as a felony. (See definition of felony, below.) Second, DAPA does not explicitly define a misdemeanor as an offense punishable by imprisonment for more than five days. Therefore an offense punishable by five days or less still might be considered a misdemeanor for DAPA. Advocates are requesting clarification on this.</p> <p><i>Other offenses.</i> For both DACA and DAPA, see exceptions for state immigration offenses and traffic offenses, below.</p>

		<p><i>Definition of conviction.</i> For both programs, a disposition <i>might</i> not count as a criminal conviction at all, if the proceeding did not provide for a jury trial, require guilt “beyond a reasonable doubt,” or have other key legal protections.³ For example, some DACA applications were approved despite alcohol-related driving infractions where (a) the infraction carried a potential sentence of more than five days, and so could have been held to be a significant misdemeanor as a DUI, but (b) the disposition did not meet the definition of “conviction” due to lack of the constitutional protections cited above.</p>
<p>Conviction of a Significant Misdemeanor: 90-Day Sentence</p>	<p>DACA: “...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. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE.”</p> <p>DAPA: “...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).”</p>	<p>Any misdemeanor is a “significant misdemeanor” if the person was sentenced to custody for 90 days or more (DAPA) OR 91 days or more (DACA). This appears to include, for example:</p> <ul style="list-style-type: none"> --Someone sentenced to jail for 100 days who served only 60 days due to good behavior -- Imposition of sentence is suspended, ordered to jail for 100 days as a condition of probation <p>This would NOT include, for example, a one-year sentence that is imposed and suspended. (But see discussion of aggravated felonies and suspended sentence, below).</p> <p>This one-day discrepancy between DAPA and DACA will be addressed by advocates.</p>
<p>Conviction of a Significant Misdemeanor: Domestic Violence</p>	<p>“Offense of domestic violence”</p> <p>DACA does not provide any further information about an “offense of domestic violence.”</p> <p>The Enforcement Memo (governing DAPA) provides: “In evaluating whether the offense is a significant misdemeanor involving ‘domestic violence,’</p>	<p>Conviction of simple battery against a spouse, which in many states is an offense that is a good immigration plea, may not be safe.</p> <p>Where DV was originally charged, even if the plea was to a non-DV offense such as disturbing the peace or disorderly conduct, some DACA cases have been denied either as a matter of discretion or</p>

	careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. ⁴	because the initial charge was interpreted as having triggered the significant misdemeanor bar. This might happen in DAPA as well.
Conviction of a Significant Misdemeanor: Sexual Abuse or Exploitation	“Sexual abuse or exploitation”	ICE will search sex offender registries. In some regions, misdemeanor consensual sex with a minor may be held an “aggravated felony,” which is a bar to DAPA. It is not known if that also would come within this significant misdemeanor category. The DACA application form asks if the applicant has ever participated in “any kind of sexual contact or relations with any person who was being forced or threatened.” This question indicates that simple prostitution (e.g. for having been a one-time sex worker) should not be included within this DACA bar, but may nonetheless be a negative factor in discretion.
Conviction of a Significant Misdemeanor: Firearm	“Unlawful possession or use of a firearm”	
Conviction of a Significant Misdemeanor: Drug sales or distribution	“Drug distribution or trafficking”	Misdemeanor conviction for drug possession is not necessarily a bar to Expanded DACA or DAPA (unless the 90-day bar applies; see above), although it may be a negative factor in discretion. Many DACA applications have been approved despite drug possession convictions. However, misdemeanor drug possession will prevent the person from becoming a lawful permanent resident (having a green card) through family members in the future, with two exceptions. First, in some family visa cases a waiver is available for conviction/s relating to a single incident of possessing 30 grams or less of marijuana. Second, in the Ninth Circuit only, in some cases a single possession conviction from before July

		15, 2011 is eliminated for immigration purposes by expungement or similar relief. ⁵
Conviction of a Significant Misdemeanor: Burglary	“Burglary”	<p>Even in states where misdemeanor burglary includes a lawful entry (i.e., shoplifting), conviction may be a bar. Seek other misdemeanor pleas such as theft, trespass, receipt of stolen property, or accessory after the fact.</p> <p>Depending on state law, some of the above offenses <i>might</i> pose problems for future family immigration as crimes involving moral turpitude.</p>
Conviction of a Significant Misdemeanor: Driving Under the Influence (DUI)	“Driving under the influence”	<p>Defense counsel should seek a different plea (unless the offense is an infraction or not a “conviction,” as discussed in the “Three or more misdemeanors” section above).</p> <p>Reckless driving is not automatically a significant misdemeanor, and is better plea for DAPA. Try to keep alcohol out of the factual basis of the plea; however, even reckless driving with alcohol may be ok for DAPA.</p> <p>Depending on how state law defines the offense, reckless driving might pose problems for future family immigration as a crime involving moral turpitude.</p>
Conviction of Any Felony	<p>DACA defines felony as an offense punishable by imprisonment for more than one year.⁶</p> <p>DAPA defines felony as “aliens convicted of 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”</p>	<p>For both programs, if an offense is punishable as an alternate felony/ misdemeanor and the conviction is designated a misdemeanor (or an offense that has a potential sentence of a year or less), courts have held that it must be treated as a misdemeanor for immigration purposes (or, considered to have the maximum possible sentence a misdemeanor would have under state law).⁷ Check the law in your Circuit.</p>
Exception: State or Local Offenses Relating to	Both DAPA and DACA provide: “Immigration-related offenses characterized as felonies or	This exception can include offenses like those passed in Arizona, Alabama, or other states that penalize immigrants.

<p>Immigration Status</p>	<p>misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors.”⁸</p> <p>The Enforcement Memo exempts “state or local offenses for which an essential element was the alien’s immigration status” as DAPA bars.</p>	<p>Under DACA, USCIS did not treat state convictions for identity theft as an “immigration-related offense.”</p> <p>A federal felony relating to immigration, e.g., illegal re-entry into the U.S., is a bar to DAPA and DACA. Warn anyone with such a conviction not to submit any application to immigration authorities without expert advice; the person might be subject to removal and new federal criminal charges.</p>
<p>Exception: Minor Traffic Offenses (unless alcohol or drug-related for DACA)</p>	<p>DACA: “A minor traffic offense will not be considered a misdemeanor for the purposes of this [DACA] process.”⁹</p> <p>DAPA: See above text barring “aliens convicted of three or more misdemeanor offenses, <i>other than minor traffic offenses</i>”</p>	<p>This exception can include offenses like driving without a license or speeding regardless of how it is classified under state or local law.</p> <p>The DACA application instructs applicants answering the question regarding arrests, charges, or misdemeanor or felony convictions to not include “minor traffic violations unless they were alcohol or drug-related.” Officials warned that several traffic convictions could be a negative factor for discretion, however.</p>
<p>Conviction of Certain Gang-Related Offenses</p>	<p>“Aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a)”</p>	<p>This is a conviction-based bar to DAPA, but not DACA. The conviction might support a denial of DACA on discretionary or public safety grounds, however.</p> <p>18 USC § 521(a) defines “criminal street gang” as an ongoing group, club, organization, or association of 5 or more persons—</p> <p>(A) that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (c);</p> <p>(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</p> <p>(C) the activities of which affect interstate or foreign commerce.</p> <p>The offenses described in 18 USC 521(c)</p>

		<p>include some felony drug offenses, some felonies involving violence against persons, and a conspiracy of the above.</p>
<p>Participation in Certain Gang Activities</p>	<p>DACA: “Indicators that you pose such a threat [to national security or public safety] include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.”</p> <p>DAPA: “aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang”</p>	<p>In DACA cases, gang “membership” is not a bar but qualifies as a national security or public safety threat (FAQ 65) and has been used to support discretionary denial for “risk to public safety.” USCIS relied on reports from local police departments, school gang contacts, or arrest records to determine gang membership. The DACA application question “Are you NOW or have you EVER been a member of a gang?” indicates that any gang membership involvement including the applicant’s self-identification may trigger a bar.</p> <p>The DAPA bar makes actual participation in the illegal activities a bar. Because this is not limited to convictions, it is possible that arrests or school reports can be considered as “actual participation.” Advocates are seeking clarification on this point.</p> <p>Tip: Consider disputing any allegation of gang membership or conduct.</p>
<p>Conviction of an Aggravated Felony</p>	<p>“aliens convicted of an ‘aggravated felony,’ as that term is defined in [8 USC § 1101(a)(43)] at the time of the conviction.”</p>	<p>This is a bar to DAPA, but not DACA. The conviction might support a denial of DACA on discretionary or public safety grounds, however.</p> <p>“Aggravated felony” is a term of art that includes some misdemeanors. See online overview¹⁰ and consult state-specific crim/imm resources or experts.¹¹</p> <p>It includes some non-“significant” misdemeanors, for example theft, forgery, perjury, obstruction of justice (which may include accessory after the fact), or a “crime of violence” where a <i>suspended</i> sentence of a year or more was imposed. (In contrast, the 90-day sentence for significant misdemeanors excludes suspended sentences). Examples of aggravated felonies regardless of sentence are fraud or deceit</p>

		<p>causing a loss exceeding \$10,000, in some regions consensual sex with a person under age 18; and failure to appear to face felony charges (regardless of whether there was a later felony conviction).</p> <p>If the conviction occurred before Sept. 30, 1996, consult an expert. It is possible that a better definition of “aggravated felony” will apply for DAPA purposes.</p>
<p>DACA Exception: Expunged Convictions</p>	<p>“Expunged convictions and juvenile convictions will not automatically disqualify [DACA applicants]. [Requests] will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted.” FAQ 67</p>	<p>This is an exception for DACA, but DAPA materials do not mention it. Stay tuned for new information in this area for DAPA.</p> <p>In many states, DACA requests involving expunged DUI convictions have been approved.</p>
<p>DACA Exception: Juvenile Dispositions</p>	<p>Same text as above.</p> <p>Note that: “[i]f [the DACA applicant was] a juvenile, but tried and convicted as an adult, [s/he] will be treated as an adult for purposes of the DACA process.”</p>	<p>This is an exception for DACA, but DAPA materials do not mention it. However, because the term “conviction” does not include juvenile dispositions, it is unlikely that it would be a bar to DAPA. Stay tuned for developments.</p> <p>Juvenile adjudications are not necessarily bars to DACA, but may be considered in USCIS’ discretionary analysis.</p> <p>Be familiar with state confidentiality laws, some of which prohibit the disclosure of juvenile records, even by the person who is the subject of the record, without a court order. This means that although one must disclose the incident, the applicant or advocate assisting the applicant may be prohibited from disclosing the records without a court order.</p>
<p>Terrorism, National Security</p>	<p>DACA: “... and do not otherwise pose a threat to national security or public safety”</p> <p>DAPA: “... aliens engaged in or suspected of terrorism or espionage, or who otherwise pose</p>	<p>This applies to both. Note that the DAPA bar is more specific.</p> <p>The DACA application form asks about whether the applicant has ever engaged in terrorist activities.</p> <p>Under DACA and DAPA, applicants will be</p>

	a danger to national security”	checked under Controlled Application Review and Resolution Program (CARRP) protocols, a national security profiling program that has caused significant processing delays. ¹² Under DACA, NSEERS violations did not disqualify people from the program.
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¹ Information regarding the Expanded DACA bars is found in the existing DACA program’s guidelines described on the U.S. Citizenship and Immigration Services (USCIS) DACA Webpage in the Criminal Convictions Section (Questions 60-67), last updated October 23, 2014, “Frequently Asked Questions” at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (“USCIS DACA FAQ”).

² The bars to DAPA – but not DACA – are the same as the enforcement priorities set out in DHS, “Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants” (November 20, 2014), at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (“Enforcement Memo”).

³ 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.

⁴ The Memo also cites Morton, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, June 17, 2011.

⁵ The discretionary waiver is found at 8 USC 1182(h), INA 212(h). For information about the Ninth Circuit exception for conviction of possession of any controlled substance, see <http://www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011>

⁶ USCIS DACA FAQ 61.

⁷ See, e.g., *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (*en banc*); *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

⁸ USCIS DACA FAQ 66.

⁹ USCIS DACA FAQ 64.

¹⁰ See Note: Aggravated Felonies at www.ilrc.org/files/documents/n.6-aggravated_felonies.pdf

¹¹ See, e.g., resources for defenders at www.defendingimmigrants.org (free resource, registration required).

¹² See <http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf>