



CRIMES AND DACA RENEWALS

DACA's rescission and filing DACA renewals with a criminal record

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The Trump Administration has announced the “phase-out” of DACA, and within the next few weeks tens of thousands of DACA recipients must decide whether to apply for a last renewal. Other DACA recipients are wondering what may happen to them if they can’t or don’t renew. This is an especially worrisome situation for DACA recipients who have a criminal record.

Acknowledging that we don’t yet have clear answers, this advisory will provide information to help advocates address the following questions with their clients: Is it “safe” for someone with a criminal history to renew their DACA application? What kinds of legal self-defense steps can people take, whether or not they apply to renew? What are the “dangerous crimes” that are bars to DACA and/or listed in the Notice to Appear Memorandum (NTA Memo)¹?

I. Is It “Safe” for Someone with a Criminal History to Renew Their DACA Application?

As many clients consider whether to renew their DACA applications, they may bring the following scenarios.

A. I revealed my prior conviction record and/or removal order in my DACA application and DACA was approved. Since that time, I have had no negative incidents, such as arrests, convictions, or accusations of gang activity.

Should I file for renewal? Up to now, our experience with DACA renewals is that these cases are generally renewed. Further, the person already is in the system and does not face substantial additional risk. The person should educate himself about legal self-defense, however. This is especially true if the past conviction(s) do not bar him from DACA, but do come within an NTA Memo category. See Part III for more information on the NTA Memo categories.

What happens when my DACA grant expires or is terminated? Being charged with or convicted of certain criminal conduct, may bring a person within the enforcement priorities outlined in the NTA Memo. See Part III below. In that case, once DACA ends, it is possible that USCIS will give ICE the person’s DACA file, including his last known address and place of employment. If a person had a criminal record that did *not* come within the NTA Memo, then according to the DACA FAQs,² USCIS should not refer the case to ICE – but we never can be sure. In addition, ICE could use other government databases to locate noncitizens with criminal convictions. All DACA recipients with criminal convictions should consider legal self-defense steps; see Part II.

B. I am being charged with a new criminal offense now.

A person currently charged with a new criminal offense is at risk and needs to take action to protect herself.

First, if at all possible, the person needs to **stay out of jail**, because in many counties ICE is in the jails and they might decide to pick her up and try to have her DACA terminated. As with any undocumented person, she needs to leave jail as

soon as possible if she was arrested and detained, and try to avoid a jail sentence if she is convicted. If she encounters ICE in the jail, she should decline to talk with them.

Second, the person should **tell her criminal defense lawyer that she has DACA and that she needs expert immigration advice on the pending criminal case.** Many public defender offices already have procedures in place to get immigration advice, while others must seek immigration advice. The DACA recipient must insist on this: it is her right under state and federal law to receive immigration advice in her criminal case. She needs criminal defense counsel to work together with a criminal/immigration expert to try to get a disposition that does not bar her from DACA, does not bar her from other immigration applications she may qualify for, and if possible, does not bring her within the NTA Memo (see Part III for more information).

Should I apply to renew? We simply are not sure what will happen with pending charges, because we are in a new phase of DACA. Many currently pending criminal cases will not be resolved before the renewal deadline of October 5, 2017. If conviction of the charge would bar the person from DACA, USCIS hopefully will ask to see how the case is resolved and base the decision on that. (The exception is that if the charge involves domestic violence, where USCIS has a history of denying DACA even if the person pleads to a lesser offense.) USCIS also might deny the case as a matter of discretion even if the conviction is not a bar to DACA. According to DHS' FAQs, as long as the offense does not come within the NTA memo, it appears that all that is at stake in this decision is losing the DACA renewal fee. However, if the offense is a potential DACA bar *and* comes within the NTA memo, this is a far greater risk. Note that a category in the NTA Memo is someone who is charged, although not yet convicted, with certain serious offenses, including a crime of violence. See Part III.

If I don't renew, am I at risk? Again, we are not sure. If the person was booked into jail on the new charge, her fingerprints are in the system for ICE to discover, and ICE could follow up. If the person was not booked into jail, her fingerprints may not reach ICE. The risk is greatest if the offense is a DACA disqualifier or is listed in the NTA Memo.

Keep in mind that the DACA recipient must apply to renew her DACA before October 5, 2017. Therefore, she should get legal advice about whether to file on time if she wants to move forward, otherwise DACA renewal will not be an option after that date anyway.

C. I was convicted of a criminal offense after receiving the initial grant of DACA.

Should I apply to renew? An expert analysis of the conviction is required to answer this question. Is the criminal offense a DACA disqualifier, or an offense listed in the NTA Memo? Does the criminal offense disqualify the person from other relief for which she may be eligible, such as family immigration or non-LPR cancellation? If the offense comes within any of these categories, is post-conviction relief a possibility to eliminate the conviction? Some new California laws offer ways to erase a prior conviction if the person did not understand the immigration consequences. See information at www.ilrc.org/immigrant-post-conviction-relief.

First, if the offense is a DACA disqualifier, the person should not apply. Second, if the offense is not a bar to DACA, but does bring the person within the NTA Memo, then the person faces the risk that if the renewal is denied as a matter of discretion, USCIS may turn the person's file over to ICE. Third, even if the offense is neither a DACA bar nor in the NTA Memo, we cannot be sure that it is safe to renew. In the past, persons with new, minor criminal convictions were granted DACA. The person must decide whether the potential protections of DACA outweigh the risk of discretionary denial which – hopefully – will not lead to her file being transferred to ICE, as long as she does not come within the NTA Memo.

If I don't renew, am I at risk? Once the person's DACA status ends, and if she comes within the NTA Memo, the DACA FAQs state that his case can be referred to ICE from the DACA database.³ USCIS may or may not become aware of his conviction, and this policy may or may not be carried out, but that is their current stated position. Additionally, the current Administration has stated that any undocumented person who is suspected of committing any crime is a "priority" for enforcement, so a person who encounters ICE through some other means will be at risk, especially if she no longer has DACA.

II. What Issues Might Trigger ICE's Attention, and Legal Self-Defense Steps

A. ICE Attention: Crimes and Prior Removal Orders

Use of DACA Database. Some people have feared that the government will use the DACA database to refer DACA recipients with criminal records to ICE. The DACA FAQs⁴ provide that USCIS may do this, *if* (a) the person's grant of DACA ran out or was terminated, and (b) the person comes within the NTA Memo. If we decide to trust the FAQs, the main people who would worry about their names being given to ICE through DACA would be those who no longer have DACA, and who also come within the NTA Memo categories. However, we do not know how strictly agents will follow the FAQs, and the FAQs also allow for a lot of discretion. At the least, people who currently have DACA and also come within the NTA Memo should understand that there is some risk, and should know legal self-defense.

The categories listed in the NTA memo include: people who are charged with or convicted of certain dangerous or violent crimes or drug trafficking, who are suspected of being gang members, or who are inadmissible or deportable under the crimes grounds. See Part III, below. Some people granted DACA do come within the NTA Memo, because the memo and the criminal bars to DACA are different. For example, a misdemeanor drug possession conviction, whether or not it's expunged, is not necessarily a bar to DACA but is listed in the NTA Memo because it is a ground for removal. After their DACA status ends, people who come within the NTA memo may be at risk of having their DACA file transferred to ICE.

Use of Regular ICE Tools. ICE has access to many government databases. Once a person's DACA status ends, ICE may be able to locate her even if they do not use the DACA database. This is especially true for persons with criminal convictions or prior removal orders.

Criminal Convictions. Famously, the current Administration stated that any noncitizen who may have committed any crime is a priority.⁵ This may be the case for persons after their DACA status ends. We will assume that the NTA memo – which includes anyone who is inadmissible or deportable under the crimes grounds, as well as people being investigated for serious offenses – will be the highest standard, but other persons, for example those with DUI convictions, also are a high priority.

Prior Orders of Removal. In general, detaining and deporting persons with prior orders of removal is a high priority for ICE. Many people with older removal orders, or who re-entered the United States illegally after removal, were able to qualify for DACA. With DACA, they are protected now, but once their DACA status ends ICE may well target them. Along with the other legal self-defense steps below, people who may have a prior removal order should seek help now – before losing DACA status – from an advocate who is expert in removal proceedings. They will want to review their court record, understand exactly what happened earlier, and see if there is any way to reopen removal proceedings. Absent such expert advice, they must *not* communicate with USCIS for any reason other than DACA (e.g., they should not apply for adjustment on a family visa, even if they are eligible). If DREAM Act-type legislation passes, hopefully it will include a waiver of prior removals to cure this problem.

B. What legal self-defense actions should people take right now?

All DACA recipients, but particularly those who have criminal issues or prior removal orders, should take some steps now to protect themselves. We don't want people to panic, but we do want them to prepare in case they encounter ICE, and to know what legal possibilities they may have. Being prepared may help reduce some of the fear and stress people are experiencing. DACA recipients should be reminded that they still have rights and responsibilities if they encounter ICE on the street or at their home.

Their rights include the right to:

- ✓ **Remain silent.** They do not have to answer ICE's questions. They should talk to their criminal defense attorney for individual advice about what information they need to provide if stopped by the police (not ICE).
- ✓ **Not open the door.** If ICE comes to their house, ICE almost certainly will not have a warrant *signed by a judge*. While ICE may make threats, state they will hound you 24/7, or commit other harassment, they cannot force folks to answer questions or open the door. DACA recipients and their housemates and family members should be prepared to refuse

to answer any questions and to refuse to open the door. They should have red cards or know the text on the red cards. See www.ilrc.org/red-cards.

- ✓ **Speak with an attorney.** If ICE stops them, comes to their home, or detains them, they should immediately speak with an attorney to identify what their options are. They should not answer any questions or sign any documents without first talking to an attorney.
- ✓ **Not sign anything.** If they sign something they don't understand, they might be signing away their right to go before a judge, fight their case, or get bond. Once they sign a document, it is very difficult to undo. ICE may use coercive tactics to get them to sign something, but they should not sign anything without speaking to an attorney first.

Their responsibilities include the responsibility to:

- ✓ **Not show or carry false documents.** Showing false documents is a criminal offense and will only make their situation worse.
- ✓ **Not run.** If people get nervous and decide to run when stopped by ICE, it will give ICE a reason to arrest them. Instead they should be reminded of their rights and practice asserting those rights so they feel ready if they encounter ICE.
- ✓ **Make their own decisions.** They should be encouraged to be prepared and be informed. It is their decision whether they want to answer questions, allow ICE into their home, or sign any documents.

Other legal defense strategies DACA recipients can pursue include the following.

- **Get a legal screening to check for eligibility for other immigration options.** Laws change and so might their personal circumstances. They may not have been eligible for relief in the past but that may have changed. For a national list of nonprofit agencies who may be able to help, see the National Immigration Legal Services Directory at <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>. To find a private immigration attorney, search for referrals through the American Immigration Lawyers Association (AILA) at www.aila.org or the National Immigration Project of the National Lawyers Guild at www.nipnlg.org.
- **Explore the availability of post-conviction relief.** Under DACA, an expunged conviction would no longer be a per se bar. If a conviction is not a ground of removability, a simple expungement could restore eligibility for DACA (though not for most other forms of immigration relief). Vacating a conviction for cause is the only way to eliminate the conviction as a ground of inadmissibility or deportability. However, an undocumented person may be removable and without any other grounds of legal relief even if there are no criminal convictions on their record. For more information, see <https://www.ilrc.org/immigrant-post-conviction-relief>.
- **Develop a family preparedness plan.** A family preparedness plan is a good idea for all families in case of any emergency, big or small. They can use the ILRC's Family Preparedness Plan as a starting point, using it as a resource to build a plan that matches their family's needs. ILRC's Family Preparedness Plan is available at <https://www.ilrc.org/family-preparedness-plan>.

III. Dangerous Crimes: NTA Memo Categories and Crimes that are Bars to DACA

If a person is convicted of a crime that is a bar to DACA, then the person's DACA will not be renewed and the person will lose protection against removal. If a person comes within one of the categories in the NTA Memo, he is at risk of being apprehended by ICE and removed. If the person no longer has DACA status and comes within the NTA Memo, it is possible that USCIS will refer his DACA file to ICE.

A. The NTA (Notice to Appear) Memo, www.uscis.gov/nta

1. Investigated, Charged, or Convicted of Certain Serious Offenses; Gangs

The NTA Memo includes the following people as "egregious public safety" cases:

People who are investigated for, charged with, or convicted of any of a number of aggravated felonies that are directed at persons rather than property. These include murder, rape, sexual abuse of a minor, trafficking or other serious offenses

relating to firearms or bombs, human trafficking, smuggling, child pornography, ransom, or a “crime of violence” for which a sentence of a year or more was or might be imposed.

People suspected of being gang members. The list includes persons suspected of being street gang members. It also includes human rights violators and people with Interpol hits.

2. Inadmissible or Deportable under the Crimes Grounds

The NTA Memo designates another group of persons as “non-egregious public safety cases.” Despite the fact that this is a less serious category, it still may be used as a basis for referring people to ICE. These categories include people who are inadmissible or deportable under the crimes grounds. A full discussion of crimes removal grounds is beyond the scope of this advisory, but basic immigration texts, and state or regional resources, may give more in-depth information about individual offenses.

Common grounds of inadmissibility based on crimes reach people who were convicted of or admit to committing an offense relating to a controlled substance, or a “crime involving moral turpitude” that does not come within certain exceptions; people whom the government has “reason to believe” have participated in trafficking; people who were convicted of two or more offenses with total sentences imposed of at least five years; and people who engaged in the business of prostitution.⁶ People who qualified for DACA might still be inadmissible and come within this list. For example, a single misdemeanor conviction for possessing an illegal drug, or two misdemeanor convictions for theft, might not bar DACA but still make the person inadmissible and therefore a priority under the NTA Memo.

Common grounds of deportation based on crimes reach people who were convicted of a crime of domestic violence, stalking, or child abuse, or who were found in criminal or civil court to have violated certain types of domestic violence protective and stay-away orders; who were convicted of a controlled substance offense other than a single incident involving possession of no more than 30 grams of marijuana; who were convicted of an offense relating to firearms or bombs; or who were convicted of one or more crimes involving moral turpitude, under certain circumstances.⁷ It also includes convictions of an aggravated felony, a category that includes a wide range of offenses such as those listed in Part III(A)(1) of this practice advisory, any drug trafficking, and many property offenses where either a sentence of a year or more was imposed or the loss to the victim(s) exceeded \$10,000.⁸ Get expert help to carefully check any conviction, including a misdemeanor, to make sure it is not an “aggravated felony” or ground of inadmissibility or deportability.

B. Crimes That Are Bars to DACA

This section provides a brief summary of the crime bars to DACA. For more information on the crime bars to DACA, see www.ilrc.org/daca, and in particular the annotated chart at <https://www.ilrc.org/crimes-related-bars-dapa-daca>. DACA is barred by conviction of:

- Any felony, which is defined as an offense with a potential sentence of more than a year.
- Three misdemeanors that do not arise on the same date. A misdemeanor is defined as an offense with a potential sentence of more than five days but not more than one year. The term does not include minor traffic offenses such as driving on a suspended license or driving without a license.
- A significant misdemeanor, which is defined as a misdemeanor (see above) where either
 - a sentence of more than 90 days (not including suspended sentences) was imposed, or
 - the crime involves drug trafficking, firearms, domestic violence, driving under the influence, burglary, or sexual abuse or exploitation. In many cases, DACA has been denied if a domestic violence offense was charged – even if the person was convicted of a non-domestic-violence offense such as disturbing the peace.

There are exceptions to these rules for convictions:

- A juvenile delinquency disposition, and an adult conviction that has been “expunged” under applicable law, will not serve as absolute bars to DACA, although they can be considered in a discretionary denial. “Expungement”

refers to the many forms of state rehabilitative relief, regardless of what they are called, where typically the person is permitted to withdraw the guilty plea or have charges dropped because he successfully completed probation or met other requirements.

- A state conviction that has immigration status as an element will not serve as a felony or misdemeanor bar to DACA.

DACA also is barred (or, the application will be denied as a matter of discretion) if the person is believed to be a gang member or convicted of a gang offense. If you believe your name has been added to a gang list since you received DACA, it may be dangerous to apply for renewal. Suspected gang membership is both a bar to DACA and an NTA Memo category.⁹

End Notes

¹ The NTA Memo is found at www.uscis.gov/nta. This memo lays out what USCIS uses as its guidelines for referring people for removal.

² Rescission of DACA FAQs can be found at <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>.

³ *Id.*

⁴ *Id.*

⁵ January 2017 DHS memo on current immigration enforcement priorities which can be found at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

⁶ See generally INA § 212(a)(2), 8 USC § 1182(a)(2).

⁷ See generally INA § 237(a)(2), 8 USC § 1227(a)(2).

⁸ See INA § 101(a)(43), 8 USC § 1101(a)(43) and see §N.6 *Aggravated Felonies* at www.ilrc.org/chart.

⁹ For more information on allegations of gang membership, see ILRC's *Understanding Allegations of Gang Membership/Affiliation in Immigration Cases*, available at <https://www.ilrc.org/understanding-allegations-gang-membershipaffiliation-immigration-cases>.



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