



ALERT: CRIM / IMM PROBLEMS IN THE PROPOSED DACA REGULATION

The proposed DACA regulation presents serious problems and real opportunities. See the regulation at 86 Fed Reg 53736 (Sept. 28, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-09-28/pdf/2021-20898.pdf>.

Comments are due on November 29, 2021. Together we can work to improve these rules. We encourage groups to begin considering their own comments. This is our initial take on the issues presented, and we welcome suggestions and comments.¹ ILRC will publish a more detailed discussion and templates for comments on the below topics in the near future.

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1. Restore Expungements for DACA!

Many states have “rehabilitative relief” laws that permit a criminal court to erase a prior conviction because the person successfully completed probation, counseling, or other requirements.² In immigration law these often are referred to as “expungements.”

From the beginning of the DACA program until today, an expunged conviction has *not* been an absolute bar to DACA, although it may be considered as a matter of discretion. See, e.g., USCIS, *DACA Frequently Asked Questions*, Q68.³

The proposed regulation eliminates the effectiveness of expungements because it provides, for the first time, that a conviction is defined for DACA purposes by INA § 101(a)(48)(A). See proposed 8 CFR § 236.22(b)(6), at p. 53815. That definition of conviction does *not* give effect to expungements.⁴

This would be a disastrous change. The DACA program uses a unique system of strict criminal bars, which do not track the grounds of removal, and uses its own policy on expungements. The availability of expungements made it possible for thousands of young people to qualify for DACA. Expungements were available for similar programs such as the SAW and Legalization programs of the 1980's and are included in the special program bills for farmworkers, essential workers, DACA-type applicants, and others that are before Congress now. This enormous change was not mentioned in the preface to the regulation.

2. Define a Domestic Violence Offense

Conviction of a misdemeanor “domestic violence” offense is a significant misdemeanor (although that term will not be used in the future) and an absolute bar to DACA. However, there is no definition of a domestic violence offense for DACA purposes. This has led to a widespread pattern of inconsistent and irrational bases for denials. Any misdemeanor that has to do with domestic conflict has been deemed a bar to DACA, with no consideration of what is domestic *violence*. In addition, DACA applicants who initially were charged with a domestic offense, but who either were never convicted of any offense at all, or were convicted of a different offense not related to domestic conflict, also are routinely denied DACA. The denials have been based on the grounds that the event is a disqualifying “domestic violence” offense or, if there is pushback by advocates, as a “discretionary” (but actually automatic) basis for denial.

Fair and consistent adjudications are not possible without a definition of a conviction of a domestic violence offense. It also is not possible for defense counsel to provide a qualifying *Padilla* advisal of the immigration effect of a plea.

The regulation should incorporate the definition of a “crime of domestic violence” from the deportation ground, INA 237(a)(2)(E)(i).⁵ This requires (a) a conviction (b) of a crime of violence as defined in 18 USC § 16(a),⁶ in a qualifying domestic situation. This also was the definition of a significant misdemeanor domestic violence conviction that ICE used when it defined significant misdemeanors for purposes of enforcement priorities, in 2015.⁷ It is critical to use the definition at 18 USC § 16(a) because some offenses charged in domestic cases have use of force amounting to violence as an element, while others require only a “rude or offensive” touching, which is not a crime of violence.

3. Define Driving Under the Influence

Conviction of a misdemeanor “driving under the influence” (DUI) is a significant misdemeanor (although that term will not be used in future) and an absolute bar to DACA. But there is no definition of a DUI, and this has led to inconsistent and irrational denials. For example, some state laws punish merely sitting in a vehicle while inebriated, without attempting to operate (drive) it. Some state laws do not require any finding of impairment of the ability to drive safely due to consumption of a substance. Some of these laws have been wrongly counted as “driving under the influence,” an automatic bar to DACA.

Fair and consistent adjudications are not possible without a definition of DUI. The regulation should be based on elements of the offense requiring either a BAC finding of .08 or higher or a finding of actual impairment of the ability to drive safely. For example, in defining a DUI significant misdemeanor for enforcement purposes in 2015,⁸ ICE required:

A conviction (requiring proof beyond a reasonable doubt) for DUI is a significant misdemeanor if the state statute of conviction: (1) constitutes a misdemeanor as defined by federal law (the minimum penalty includes imprisonment for more than 5 days but not more than 1 year); (2) requires the operation of a motor vehicle; and (3) requires, as an element of the offense, either a finding of impairment or a blood alcohol content of .08 or higher.

“Impairment” should be defined as “to a degree that renders the operator incapable of safe operation.” See, e.g., 36 CFR 4.23(a)(1). A problem has been that some states have statutes that are less than a “regular” DUI but still have some element of impairment, or just use the word impairment in the title, and these have been counted as DUI bars to DACA.

Advocates dealing with problematic DUI rulings who want to propose a specific, better definition of DUI for this purpose are welcome to contact ILRC staff.⁹

4. Define Minor Traffic Offenses

USCIS has solicited comments on the definition of minor traffic violations. See p. 53768. ILRC staff have not observed problems with this category, but we encourage advocates working with state offenses that wrongly have been held not to be minor traffic offenses to comment. At a minimum, the regulation should make clear that minor traffic offenses include driving without a license, driving on a suspended license, driving without insurance, and violating traffic regulations such as speeding should be counted as minor traffic offenses, regardless of the level of offense under state law.

5. DACA Status Should Not Be Terminated Automatically upon Filing of a Notice to Appear (NTA)

Proposed 8 CFR 236.23(d)(2) at p. 53816 provides that DACA is “terminated automatically without notice upon: (i) Filing of a Notice to Appear for removal proceedings with EOIR, unless the Notice to Appear is issued by USCIS solely as part of an asylum case referral to EOIR; or (ii) Departure of the noncitizen from the United States without Advance Parole.” The discussion of the rule at p. 53769.

As will be discussed further in future comments, an automatic termination without notice based on filing of an NTA presents serious Administrative Procedures Act (APA) and constitutional concerns. In addition to the reasoning in the *Inland Empire* decision discussed at p. 53769, which looked only at APA standard and avoided the constitutional question, there are serious due process issues as well. This was articulated in the plaintiffs' brief in *Inland Empire*. See Dec 2017 Memorandum of Law by ACLU: <https://www.aclu.org/cases/inland-empire-immigrant-youth-collective-v-mcaleenan>

The automatic termination provision does not make sense, given that a person can apply for DACA while in removal proceedings (*if* they can pay the fee again and find assistance to file papers). Terminating DACA will end the person's employment authorization, lawful presence for purposes of social security, and/or lack of “unlawful presence” for purposes of 3/10 year bar at INA 212(a)(9). Those all are provided “[d]uring the period of forbearance” per proposed 8 CFR 236.21(c)(2-4) at p. 53814.

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² See Advisory (*published in September 2015*) on the availability of state expungements nationally at <https://www.ilrc.org/daca-and-crimes-what-expungements-are-available-nationally> .

³ See USCIS FAQs for DACA at <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions>. The answer to Q68 provides:

A68: Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. If you were a juvenile, but tried and convicted as an adult, you will be treated as an adult for purposes of the DACA process.

⁴ The definition at INA § 101(a)(48) has been interpreted to mean that an expungement (rehabilitative relief) does not eliminate a conviction for immigration purposes. See, e.g., *Matter of Pickering*, 23 I&N Dec. 623 (BIA 2003).

⁵ See also, e.g., *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016), *Matter of Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010), interpreting the removal ground.

⁶ The definition of a crime of violence is 18 USC § 16(a). It does not include 18 USC § 16(b), which was held unconstitutional. See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

⁷ ICE defined the significant misdemeanor in its enforcement FAQs: “The memorandum’s definition of domestic violence applies to convictions that are crimes of violence (as defined in section 16 of title 18) for acts of domestic violence regardless of how the state law categorizes them. Likewise, INA section 237(a)(2)(E)(i) applies to crimes of violence (as defined in section 16 of title 18) against spouses or domestic partners, both current and former, regardless of how the state law categorizes the offense.” See ICE, “*Frequently Asked Questions Relating to Executive Action on Immigration* (June 17, 2015) (question on domestic violence significant misdemeanors), at <https://web.archive.org/web/20151121180343/https://www.ice.gov/ImmigrationAction/FAQs>.

⁸ See ICE, *Frequently Asked Questions Relating to Executive Action on Immigration*, cited above, section on DUIs.

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