

Advancing Eligibility for DACA and Future Deferred Action Initiatives: Expungements Practice Advisory

Introduction

Although immigration law generally does not give effect to a state “expungement” of a conviction, there are some important exceptions. Significantly, an expungement will eliminate a conviction as an absolute bar to eligibility for Deferred Action for Childhood Arrivals (DACA). Expungements should also help with two newer programs that were announced on November 20, 2014, but currently are halted by a federal court.¹ Those programs are an expanded form of DACA and the new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).² The federal lawsuit does not affect the original DACA program established June 15, 2012 and applications still are being accepted for that program.

On November 20, 2014 the Administration also announced its new “enforcement priority” criteria.³ A person who is an enforcement priority is at greatest risk of being arrested and put in removal proceedings and the government is very unlikely to grant “prosecutorial discretion” and decline to start removal proceedings against such a person. Now, DHS has stated that on a case by case basis, it may accept an expungement as eliminating a conviction that causes an individual to become an enforcement priority and thus make it more likely that the person would be granted prosecutorial discretion.⁴

This Advisory discusses strategies for immigration practitioners to help advance the eligibility of undocumented immigrants, who would qualify for one of the programs but for a disqualifying conviction, through expungements. This Advisory provides:

- Background on how USCIS treats expungements for DACA purposes and how expungements may help applicants qualify for prosecutorial discretion and future DAPA;
- A working definition for what should count as an expungement for these programs;
- Resources for states where expungements are available; and
- Practice tips for referring potential applicants to seek expungements.

Disclaimer: This advisory is for immigration advocates and practitioners who are already familiar with the eligibility criteria for DACA and DAPA, especially the criminal bars. For a comprehensive review as well as a comparison of the bars, see [Admin Relief Overview](#), [NIPNLG/ILRC DACA/DAPA chart](#), [AIC/NIPNLG DACA Practice Advisory](#), and [ILRC/NIPNLG Practice Advisory for Criminal Defenders on the](#)

¹ See *State of Texas, et al v. United States et al.*; Memorandum Opinion and Order, Feb. 16, 2015, (Civil No. B-14-254/Case No. 1:14-cv-00254), available at <http://www.lrl.state.tx.us/scanned/archive/2015/26572.pdf> (“Injunction”).

² See Jeh Johnson, DHS Memorandum, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” Nov. 20, 2014, available at: www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (“Expanded DACA/DAPA Memo”).

³ See Jeh Johnson, DHS Memorandum, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum,” Nov. 20, 2014, available at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (“Enforcement Memo”).

⁴ See Frequently Asked Questions Relating to Executive Action on Immigration, updated June 17, 2015, at www.ice.gov/ImmigrationAction/FAQs.

[Criminal Bars to DAPA](#). Our organizations strongly recommend that potential applicants interested in seeking expungements consult an attorney who is experienced in post-conviction relief.

What are the criminal bars to DACA and DAPA?

The criminal bars to DACA include conviction of a felony, a significant misdemeanor, or three or more non-significant misdemeanors that arise from different incidents.⁵ Under U.S. Citizenship and Immigration Services (USCIS)'s totality of the circumstances approach, to approve a DACA request, a requestor also must not pose a threat to public safety or national security.

The criminal bars to DAPA are similar but not identical to DACA's. The DAPA crimes bars are taken from the list of criminal convictions and conduct that constitute enforcement priorities, in the November 20, 2014, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants" DHS memorandum ("Enforcement Memo"). Like the bars to DACA, the enforcement priorities/bars to DAPA include conviction of a felony, a significant misdemeanor, or three misdemeanors arising from different incidents – although all of these terms are defined slightly differently in DAPA.⁶ The enforcement priorities/bars to DAPA also include conviction of an aggravated felony as defined under INA 101(a)(43), or of an offense that has participation in a criminal street gang as an element. Both of these terms have technical definitions. The enforcement priorities/bars to DAPA also include factors that don't require a criminal conviction, such as participation in street gangs, history of immigration misconduct, and conduct related to national security and public safety concerns. Because this Advisory describes the effect of an expungement on a conviction, it will focus only on convictions and not conduct.

What is a conviction for DACA and DAPA purposes?

A conviction for immigration purposes is defined under INA 101(a)(48). Courts and the Board of Immigration Appeals have interpreted that definition to mean that if the person pled guilty or the judge made some finding of facts that would prove guilt, and the person suffered any kind of punishment or restraint (including just paying court fees or being put on probation), then a conviction occurred.⁷ But if there was no plea or finding of guilt, or absolutely no condition, fine, or punishment was imposed, there is no conviction.⁸

The Standard Operating Procedures (SOP) DACA manual cites to the INA definition and provides examples of dispositions that are not convictions for immigration purposes, such as STET (available in Maryland and West Virginia), dismissals, and set asides. The SOP provides that if charges are "set aside" in exchange for attending self-help programs, it is not a conviction for immigration purposes. We presume this means that the charges were set aside before a plea was taken.

There is an exception. The Board of Immigration Appeals has ruled that a disposition does not amount to a conviction if the criminal proceeding did not provide for a jury trial and the right to appeal, require guilt "beyond a reasonable doubt," or have other key constitutional protections.⁹ This ruling ought to apply to DACA and DAPA as well. U.S. Immigration and Customs Enforcement (ICE)'s [FAQs regarding the enforcement priorities](#) support this interpretation; the FAQ regarding the definition of a driving under

⁵ USCIS DACA FAQs 60-67 at: <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

⁶ For details, see NILNLG, ILRC, *Chart: Crimes-Related Bars to DAPA and DACA* at http://www.adminrelief.org/resources/item.552676-CHART_CrimesRelated_Bars_to_DAPA_and_DACA

⁷ See, e.g., *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

⁸ See, e.g., *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).

⁹ 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.

the influence significant misdemeanor provides that a conviction “require[s] proof beyond a reasonable doubt.”

What is an expungement?

Immigration law makes a distinction between two main ways that a criminal court may eliminate a prior conviction. “Rehabilitative relief” such as expungement refers to a variety of state laws that relieve an individual from some or all of the disabilities of a conviction – not because there was something legally wrong with the conviction, but for rehabilitative or humanitarian reasons. For example, the relief may be granted when the person successfully completes probation, to help first offenders start over with a clean slate. In contrast, the other way to eliminate a conviction, often referred to as a vacation of judgment, is based on the fact that the conviction was legally flawed.¹⁰

Example: Immigration authorities refer to California Penal Code § 1203.4 as an “expungement.”¹¹ Under § 1203.4, if the person completes probation and meets other conditions, he or she may withdraw the guilty plea and enter a plea of not guilty, and the charges will be dropped. Section 1203.4 removes some but not all of the disabilities of the conviction. For example, the conviction no longer exists for purposes of qualifying for licenses or employment, but it will be held to exist for purposes of drivers’ license suspension or ability to possess firearms, or if the person ever is convicted of another crime. In most immigration contexts, the conviction still exists.

In contrast, New York Criminal Procedure Law § 440.10 provides for vacating a judgment of conviction for cause. The person must prove that there was a qualifying legal defect in the case, so that the he or she should not have been convicted in the first place. Once the judgment is vacated under § 440.10, the conviction does not exist for any purpose, including immigration.¹²

States have a variety of laws that provide for rehabilitative relief from a conviction.¹³ These laws may have different names, such as expungement, dismissal, set-aside, vacation, and other terms. The same term might mean something different in different states. What is an “expungement” in one state may be called a “set-aside” in another. The requirements for getting the relief will differ, as will the benefits that the person gains. The benefits may or may not include destroying records, eliminating arrest information from the public record, or permitting the person to deny the arrest occurred.

With respect to federal convictions, expungements are generally not available though there are very limited exceptions.¹⁴ Recently, a New York a district court judge ordered the expungement of a conviction for fraud.¹⁵

¹⁰ For a discussion of the difference between rehabilitative relief and vacation of judgment for cause, see, e.g., *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (rehabilitative relief such as an expungement is a conviction under INA 101(a)(48)(A)); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (vacation of judgment for cause is not a conviction for immigration purposes); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

¹¹ See, for example, *Matter of Luviano*, 21 I&N Dec. 235 (BIA 1996); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970), *Matter of Roldan*, 22 I&N Dec. 512, n. 4, and p 532).

¹² See *Matter of Rodriguez-Ruiz*, above.

¹³ Margaret Colgate Love, National Association of Criminal Defense Lawyers, Chart #4 – Judicial Expungement, Sealing, and Set-aside, March 2015, available at http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf.

¹⁴ See e.g., 18 U.S.C.A. § 3607.

¹⁵ <https://img.nyed.uscourts.gov/files/opinions/14mc1412d05212015.pdf>

How can an expunged conviction help an individual qualify for DACA, DAPA, or other exercise of prosecutorial discretion (PD)?

Expunged convictions are not automatic bars to DACA. The DACA Standard Operating Procedures (SOP) Manual explains that for DACA purposes only, expunged convictions will not be treated as disqualifying felonies or misdemeanors. Note, however, that USCIS will consider the conviction and incident when it determines whether the person poses a threat to public safety, and whether, under the particular circumstances, a discretionary grant of deferred action is warranted. According to the SOP, sealed and expunged records will be evaluated according to the nature and severity of the criminal offense. These cases will be elevated for supervisory review.¹⁶ Practitioners have reported that in California and Arizona requestors with expunged DUI convictions—which USCIS otherwise categorically considers as significant misdemeanors—have been granted DACA.

How ICE treats expunged convictions under the Enforcement Memo differs from the policy under DACA. According to the ICE FAQs, DHS will assess expunged convictions on a case-by-case basis to determine whether the conviction makes an individual a priority for removal.¹⁷ It remains unclear how expungements would work for DAPA, but in light of the expungement policies in other contexts, advocates expect expungements to help an individual overcome a DAPA bar. Additionally, regardless of the application of an expungements policy, DHS should consider expungements as indicators of rehabilitation and a positive factor in discretionary decisions.

Do expungements help for other immigration purposes?

No, expungements are still considered convictions for immigration purposes.¹⁸ One exception is that, in the Ninth Circuit only, immigration authorities must accept rehabilitative relief as eliminating a first conviction of certain controlled substance offenses, if the conviction occurred on or before July 14, 2011 and the person meets other requirements.¹⁹ The conviction and expungement can be from any state, but the immigration proceedings must take place in the Ninth Circuit.²⁰

What counts as an expungement for DACA/DAPA?

USCIS has not provided a definition for expungements in the DACA program. Historically, the Attorney General and the Board of Immigration Appeals have treated any rehabilitative relief that purports to eliminate for state purposes the consequences of a conviction as an “expungement.”²¹

In [*Roldan*], the BIA considered whether an expunged narcotics conviction could form the basis for an order of deportation in light of the new definition of conviction in IIRIRA. Although *Roldan* appears to involve a deferred adjudication, the BIA found “it necessary to reconsider . . . the effect to be given to any state action, whether it is called setting aside, annulling, vacating, cancellation, expungement, dismissal, discharge, etc., of the conviction, proceedings, sentence, charge, or plea, that purports to erase the record of guilt of an offense pursuant to a state rehabilitative statute.” The BIA determined that Congress intended to establish a uniform federal rule that precluded the recognition of subsequent state rehabilitative expungements of convictions. More precisely, the BIA

¹⁶ SOP Manual, 86.

¹⁷ ICE FAQs.

¹⁸ See *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005). Prior to the enactment of INA §101(a)(48)(A), *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988) held that an expunged conviction could not uphold an order of deportation.

¹⁹ See *Nunez-Reyes v. Holder*, 646 F.3d 684, (9th Cir. 2011) which eliminated *Lujan-Armendariz v. INS*, 222 F.3d 728, 750 (9th Cir. 2000) prospectively.

²⁰ For more information, see the Immigrant Legal Resource Center’s advisory at:

http://www.ilrc.org/files/documents/practice_advisory_lujan_and_nunez_10.11.pdf, and Norton Tooby’s blog post at: <http://nortontooby.com/blog/first-drug-possession-convictions-occurring-july-14-2011-can-still-be-erased-expungement>.

²¹ See *In re Roldan*, 22 I&N Dec. 512, 520 (Mar. 3, 1999); *Matter of Marroquin*, 23 I&N Dec. 705, 711 (A.G. 2005).

found that because Congress clearly intended that an alien with a deferred adjudication should be considered convicted, Congress also must have intended that an alien with a “technical erasure of the record of conviction” should be considered convicted.²²

As such, an “expungement” for purposes of DACA and the Enforcement Memo is a catch-all term for state actions that lessen the effect of a conviction. DHS should consider all state rehabilitative mechanisms that insulate an individual from the state consequences of her or his conviction—such as amendment, annulment, certificate of employability, certificate of qualification for employment, certificates of rehabilitation, certificates of relief, deferred adjudication, deferred sentencing, destruction of records, dismissal, erasure, exoneration, expungement, nullification, sealing, setting aside, vacating (collectively “expungement mechanisms”)—as “expungements.” Practitioners are encouraged to argue that *any mechanism* that a state uses so that the conviction does not count for state purposes is equally effective for DACA and Enforcement Memo purposes whether it is a certificate of relief from disabilities²³ or any other rehabilitative mechanism that mitigates the consequences of a conviction.

Under what circumstances may a person seek an expungement?

It depends on the jurisdiction of the case among other factors. The National Association of Criminal Defense Lawyers (NACDL) has done extensive research on this topic. Refer to this chart for more information about states where expungements, set asides, and sealing is available:

http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf

What states allow “expungements”?

For a comprehensive review of expungement mechanism refer to NACDL’s chart above. Below are some highlights from states with high numbers of potentially eligible DACA/DAPA individuals.

- **California** – Set-asides (also known as “expungements”) is one of several rehabilitative state relief mechanisms available for certain misdemeanors and minor felonies. This relief mechanism to a great extent restores a person’s rights and removes disabilities.²⁴
- **Texas** – The state expungement statute does not apply to criminal convictions. However, certain dispositions, such as deferred adjudication, are available for certain offenses (excluding DUIs and violent offenses). It results in dismissal of charges, no conviction, and sealing of records.²⁵
- **New York** – Convictions cannot be expunged in New York, but record sealing may be available for some offenses, as well as Certificates of Relief from Disabilities and Certificates of Good Conduct.²⁶
- **Illinois** – Deferred adjudication may be available to first time offenders. A disposition of supervision should count as an expungement because it results in discharge and dismissal upon a successful conclusion, and is shall not considered a conviction for purposes of disqualification

²² *Treatment of Expunged State Convictions Under the Immigration and Nationality Act*, 29 Op. O.L.C. 6-7 (2005).

²³ See e.g., *Rehman v INS*, 544 F.2d 71 (2d Cir. 1976) (the Second Circuit held that a NY certificate of relief from disabilities could expunge a drug conviction.).

²⁴ NACDL California State Profile at:

https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ca.pdf.

²⁵ TEX. GOV’T CODE § 411.081(d); TEX. CODE CRIM. PROC. art. 42.12; NACDL Texas State Profile:

https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_tx.pdf.

²⁶ https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ny.pdf.

or disabilities imposed by law upon conviction of a crime.²⁷ Certificates of good conduct remove employment and licensing bars.²⁸

- **Florida** – Expungements are not available for convictions, but are available for a “Withholding Adjudication of Guilt” disposition.²⁹
- **New Jersey** – Courts may issue a certificate evidencing rehabilitation that “suspends certain disabilities, forfeitures or bars to employment or professional licensure.”³⁰
- **Georgia** – Sealing and expungements are not available for adult convictions. A discharge without adjudication after completion of probation disposition “completely exonerate[s] the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties.”³¹
- **North Carolina** – Minor non-violent felonies and misdemeanors may be expunged after 15 years. Deferred adjudication for first-time minor drug offenders; expungement only if under age 21. First offender felonies, misdemeanors, and certain juvenile offenses committed under age 18 or 21 may be expunged following a waiting period.³²
- **Arizona** – “Set-aside” is available upon discharge for all but violent and sex offenses.³³
- **Washington** – Some offenses may be “vacated” after a 5–10 year waiting period; most misdemeanors are eligible after a 3–5 year waiting period. For example, a first time negligent driving offense can be expunged after 3 years (a DUI cannot) from the completion of the terms of the sentence under RCW 9.96.060.³⁴

What are some states where “expungements” are available for Driving under the Influence convictions?

Below is a review of some states where expungements may be available for adult DUI convictions.

State	"Expungement" for DUI?
Arizona	Yes, as long as not classified as “dangerous offense.” Ariz. Rev. Stat. Ann. § 13-907 (2015)
Arkansas	Yes, after 5 years of the date of conviction. Ark. Code Ann. § 16-90-1405 (2014)
California	Yes, after completion of sentence and if no charges are pending against the person. Cal. Penal Code § 1203.4
Connecticut	Yes, “expungement” pardons and “provisional” pardons may be

²⁷ See 730 ILL. COMP. STAT. 5/5-6-3.1(f) (West 2015).

²⁸ See 730 ILL. COMP. STAT. ANN. 5/5-5.5-55;

https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_il.pdf.

²⁹ https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_fl.pdf.

³⁰ N.J. Stat. Ann. § 2A:168A-7. See also:

https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_nj.pdf.

³¹ O.C.G.A. § 42-8-62(a); See also:

https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ga.pdf.

³² https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_nc.pdf.

³³ Ariz. Rev. Stat. § 13-907(A); See also:

https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_az.pdf.

³⁴ https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_wa.pdf.

	available. Conn. Gen. Stat. § 54-130a(b). Deferred adjudication is available for pre-trial DUI Programs. C.G.S. Sec. 54-56g
Illinois	No, but a disposition of supervision is available for first-time DUI offenders. 730 Ill. Comp. Stat. 5/5-6-3.1(f) (West 2015)
Kansas	Yes, after 10 years. K.S.A. 21-6614
Kentucky	Yes, after 5 years, if misdemeanor. KRS 431.078.
Louisiana	Yes, Louisiana Code Criminal Procedure 971 et seq.
Maine	No, but a deferred disposition may be available. Me. Rev. Stat. Ann. tit. 17-A, § 1348.
Maryland	No, but a Probation Before Judgment (PBJ) disposition may be available. MD. CRIM. PROC. § 6-220(g)(3).
New Hampshire	Yes, DUI convictions can be annulled after 10 years. RSA 265-A:21(I).
North Carolina	Yes, only for first time offenders, after 15 years
Oklahoma	Yes, for first time offenders.
Pennsylvania	No, but if DUI charge dismissed through accelerated rehabilitative disposition program, the charge can be dismissed.
Rhode Island	Yes, after 5 years for misdemeanors. Rhode Island General Laws Sections §12-1.3, §12-1-12.1 and §12-10-12.
South Dakota	Yes, after 10 year waiting period, misdemeanors only.
Utah	Yes, after 10 years for misdemeanor DUI.
Washington	No, but negligent driving (which USCIS has considered a DUI for DACA) may be vacated after 5 years.

Is there an immigration enforcement risk to the individual seeking an expungement?

Advocates are not aware of ICE (or its predecessor, INS) going after someone seeking rehabilitative relief such as an expungement. Some practitioners generally discourage immigrants from seeking expungements because it may make it more difficult to obtain the criminal records necessary to later seek lawful permanent residence or citizenship, if a person is eligible in the future. Below we include some recommendations to address this issue.

What are some other strategies for bringing individuals with criminal histories into eligibility for DACA/DAPA/PD?

- Obtain and review all criminal records.
- Determine whether the disposition counts as a conviction for immigration and DACA/DAPA/PD purposes.

- Expungements may not be necessary if the disposition would not count as a conviction or if it is already exempted (e.g. minor traffic offense, juvenile adjudication, etc.) for these programs or under the Enforcement Memo.
- Consider the possibility of “fixing” minor criminal records. Prosecutors may be willing to clarify records to make a person DACA-eligible; for example, clarifying a sentence of time in custody.
- If the person has criminal convictions that fall under an enforcement priority, consider whether the person may be eligible for some type of post-conviction relief.
 - Review the law of the jurisdiction regarding rehabilitative relief. Does your client’s offense meet the criteria? (e.g. does the state allow reducing a felony to a misdemeanor? Some states permit prior felony convictions to be changed to a misdemeanor. Requirements vary depending on state law.)
 - Consult an expert. Contact a local public defender or re-entry clinics for advice.
- Note that in some states, once rehabilitative relief is granted, the person may legally be prevented from obtaining other, more valuable kinds of post-conviction relief, like vacation of judgment. In other states, for example California, a conviction still can be vacated for cause after it has been expunged. It is important to review all post-conviction relief and immigration relief options before proceeding to seek expungements. Individuals should keep a record of the expunged and/or sealed conviction; a certified disposition will be required in the future if the person is later eligible for immigration relief. Practitioners are strongly advised to obtain several certified copies of the disposition for their clients and to keep them in a safe place.
- Because DACA and DAPA are discretionary, even if expunged convictions are not considered bars, it will be important to highlight evidence of strong positive equities. In the DACA context it was helpful to include character reference letters, as well as an affidavit by the requestor explaining any mitigating circumstances surrounding his or her conviction.