



# DETERMINING DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) ELIGIBILITY

By Veronica Garcia

Though the Deferred Action for Childhood Arrivals (DACA) policy has been in existence since 2012 and has helped over 700,000 youth get protection, the Trump administrations' disruptions to the program these last four years have left many advocates and potential DACA eligible youth with anxiety and questions about who might be eligible. This has most impacted those who were not able to access DACA due to the attempted termination of the program by the Trump Administration in the fall of 2017. Although the program was brought back in part through litigation, allowing for DACA renewals, few practitioners have put together an initial DACA application packet in the last few years.

This practice advisory will review the general requirements for DACA, as well as issues advocates should look out for when determining eligibility. There has been a lot of interest from community members and advocates about the DACA program since a federal court reinstated initial DACA applications in November of 2020. It is important to note that although DACA has been restored, there are still threats from pending litigation<sup>1</sup> that could end the program entirely. The information that follows is a quick guide to determine eligibility. For a more in-depth dive into each requirement and topic please visit the Immigrant Legal Resource Center's (ILRC) website at <https://www.ilrc.org/daca>.

## I. Background on DACA

DACA is a form of prosecutorial discretion that provides protection from deportation and employment authorization in two-year increments to certain undocumented youth and young adults. The Department of Homeland Security (DHS) first announced the DACA policy on June 15, 2012 and US Citizenship and Immigration Services (USCIS) began accepting DACA applications on August 15, 2012. DACA was created by DHS Secretary Janet Napolitano who issued a policy memorandum<sup>2</sup> that authorized the use of prosecutorial discretion for certain individuals that were brought to this country as children.

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<sup>1</sup> As of this writing, litigation in Texas is still pending around the legality of DACA in the Southern District of Texas before Judge Hanen. *Texas et al. v. United States et al.* Case No. 1:18-cv-00068.

<sup>2</sup> Janet Napolitano's June 15, 2012 policy memorandum announcing the DACA program is available at: [www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf](http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf).

Those who are granted DACA received “deferred action” for a period of two years, with the possibility to renew. Additionally, each DACA applicant is required to also apply for an Employment Authorization Document (EAD), and once granted can apply for a social security number, a driver’s license, or state identification card.<sup>3</sup>

The grant of deferred action defers enforcement action against the individual, for the time they have a valid grant of DACA. It is important to note that DACA does not confer any legal status, a visa, a green card NOR does it bestow eligibility for lawful permanent status, or a pathway to citizenship. And since DACA is based on administrative action rather than on a law passed by Congress, DHS or the President could modify or even eliminate the policy.<sup>4</sup>

## II. Who qualifies for DACA?

DACA is available to people who meet the program requirements. DACA is open to individuals who are in removal proceedings, detained, or already have a final removal or voluntary departure order, as well as to those who have never had any contact with immigration authorities. To qualify for DACA the individual will need to demonstrate how that they meet the seven program requirements listed below.

A person may qualify for DACA if they can show that they:

- 1) Were under 31 years of age as of June 15, 2012, when the DACA program was announced (i.e. the person was born after June 15, 1981);
- 2) Entered the United States before turning 16;
- 3) Have continuously resided in the United States since June 15, 2007 up to the present;
- 4) Were physically present in the United States on June 15, 2012, and at the time of making the request for DACA;
- 5) Were undocumented as of June 15, 2012;
- 6) Are currently enrolled in school, have graduated from high school, have obtained a certificate of completion, or are an honorably discharged veteran of the U.S. Coast Guard or U.S. Armed Forces; and
- 7) Have not been convicted (as an adult) of a felony offense, a significant misdemeanor offense, three or more non-significant misdemeanor offenses, or do not otherwise pose a threat to national security or public safety.

USCIS is strict with regard to applicants meeting program eligibility requirements. There is very little, if any, wiggle room with regard to DACA eligibility. DACA applications can be straightforward but will require thorough documentation demonstrating that an individual meets these requirements. In addition, many

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<sup>3</sup> Note, however, that some states, like California, no longer require proof of legal status in the U.S. to obtain driver’s licenses.

<sup>4</sup> Most recently, the Trump Administration did attempt to terminate DACA, beginning in September of 2017 when a phase out of the program began. The program was restored through various federal lawsuits that ultimately led to a victory at the Supreme Court in June of 2020. For more information on the changes to the program and litigation please see *Deferred Action for Childhood Arrivals (DACA): Practice Update* available at [https://www.ilrc.org/sites/default/files/resources/daca\\_practice\\_update.pdf](https://www.ilrc.org/sites/default/files/resources/daca_practice_update.pdf).

DACA applicants will need help understanding the requirements, which documentation they can use, and should be screened not only for DACA eligibility but also for other forms of immigration relief.

### A. DACA Eligibility Requirements Text

Advocates should note that information about program requirements and eligibility will not be found in the Immigration and Nationality Act (INA) or the regulations. For information on DACA and questions about eligibility, advocates should consult the following resources.

1. The June 15, 2012 Policy Memorandum announcing the program: [www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf](http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf).
2. USCIS', Frequently Asked Questions (FAQs) that answer specific questions about program eligibility: [www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions](http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions).
3. Form I-821D (DACA application form) instructions also offer information on the basic information and documentation needed: <https://www.uscis.gov/i-821d>.
4. National Standard Operating Procedures for Deferred Action for Childhood Arrivals (hereinafter "DACA SOP v.2"), prepared by Service Center Operations Directorate, April 4, 2013: [https://pennstatelaw.psu.edu/file/2013-HQFO-00305\\_Document.pdf](https://pennstatelaw.psu.edu/file/2013-HQFO-00305_Document.pdf).<sup>5</sup>

These documents should help guide and answer many of the questions that arise when working with DACA recipients. Additionally, the ILRC hosts a DACAExperts listserv where practitioners can post questions and receive assistance and strategies from colleagues. To register, visit the ILRC's webpage at <https://www.ilrc.org/legal-listservs>.

### III. How to determine if your client is eligible for DACA?

Though there are seven DACA requirements to meet, it is often easier to think of eligibility in four areas: age, education, criminal history, and continuous residence.

When analyzing the case, you can walk through four sets of questions with the client:

- 1) Have they met the three age requirements for DACA: are they 15 or older now? Did they enter the U.S. before reaching the age of 16? Were they born after June 15, 1981?
- 2) Have they met the educational requirement: have they completed high school by either obtaining their high school diploma, certificate of completion, or GED? Or are they currently enrolled to complete high school/GED/certificate of completion?
- 3) Have they had contact with the criminal system: were they arrested or convicted? If so, for what and was it in juvenile or adult court? What was their sentence?
- 4) Can they meet the continuous residence requirement: Have they lived here continuously since June 15, 2007, undocumented, and have documents to prove it?

<sup>5</sup> Thanks to a FOIA request conducted by Shoba Sivaprasad Wadhia from the Center for Immigrants Rights at Penn State's Dickinson School of Law, advocates now have access to agency documents and instructions on DACA.

We will delve into each of these areas more thoroughly below.

### A. Age

There are three DACA requirements that take the applicant's age into account. To determine if a person meets these requirements, advocates will need to know the applicant's age as of June 15, 2012, at the time of filing their DACA request, and when they initially entered the United States.

When delving into these three requirements, advocates can tackle them in the following manner:

#### ***First, how old is the applicant seeking to apply for DACA for the first time?***

In general, an applicant must be at least fifteen years old to submit a DACA request. There is an exception to this requirement for those who are currently in removal proceedings or have a final removal order or a voluntary departure order. Those young individuals can request DACA even if they are under the age of fifteen.

#### ***Second, what is the applicant's date of birth?***

DACA applicants will need to show that they were under the age of 31 as of June 15, 2012. Another way to think of this, is to ask if they were born after June 15, 1981.

#### ***Third, was the applicant's most recent entry to the United States before the age of 16?***

DACA applicants will have to show they entered the United States before they turned sixteen years old. The entry could have been with or without lawful status (i.e. valid visa). USCIS will require the applicant to submit at least one piece of evidence that will show this. The evidence cannot solely be an affidavit.

#### **WHAT IF THE APPLICANT ENTERED BEFORE THE AGE OF 16 BUT LEFT AND DID NOT REENTER THE U.S. UNTIL AFTER 16?**

An applicant who came to the United States before age sixteen, but also left the United States before age sixteen and did not return until after turning sixteen (but before June 15, 2007), can still qualify for DACA, but this applicant—in addition to proving that they entered before the age of sixteen—will also have to prove that they established residence in the United States before age sixteen. They can prove they established residence by showing that they attended school, worked during that time, or that they lived in the United States for multiple years.<sup>6</sup>

<sup>6</sup> USCIS FAQ #30: I first came to the United States before I turned 16 years old and have been continuously residing in the United States since at least June 15, 2007. Before I turned 16 years old, however, I left the United States for some period of time before returning and beginning my current period of continuous residence. May I be considered for deferred action under this process? Yes, but only if you established residence in the United States during the period before you turned 16 years old, as evidenced, for example, by records showing you attended school or worked in the United States during that time, or that you lived in the United States for multiple years during that time. In addition to establishing that you initially resided in the United States before you turned 16 years old, you must also have maintained continuous residence in the United States from June 15, 2007, until the present time to be considered for deferred action under this process. Available at <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions>.

## B. Education

To qualify for DACA, a person must meet the education requirement. There are four different ways someone can meet the education requirement.

- 1) **High School Graduates**: Individuals who have completed high school automatically meet the educational requirement. Applicants who have graduated from high school can submit a copy of their high school diploma, certificate of completion, or a recognized equivalent of a high school diploma under state law.
- 2) **Passing the General Educational Development (GED) exam (or its equivalent)**: Individuals who have taken and passed the GED or its equivalent (another state authorized exam, e.g. HiSet or TASC) meet the education requirement for DACA. These individuals will need to submit a copy of their GED certificate with their DACA application.
- 3) **Currently Enrolled in School or Qualifying Educational Program**: Individuals who are currently enrolled in a qualifying school or educational program at the time of submitting their request, also qualify for DACA. These applicants will need to show they are currently enrolled by submitting a class schedule, transcript, or school letter. Determining if a program meets the educational requirement will be discussed below.
- 4) **Honorably Discharged Veteran of the Coast Guard or Armed Forces of the United States**: This will be rare, but individuals who can show they were honorably discharged may also qualify even if they are not a high school graduate or currently enrolled in school.

For those who have graduated high school or passed the GED, meeting this education requirement will be easy. They will just need to submit documentation of completion (i.e. high school diploma, certificate of completion, GED certificate, etc.). For those who are still in the process of completing school or who need to reenroll in school to meet this requirement, it might be a bit more difficult to document they meet the education requirement. This will be particularly true for those who must reenroll in an adult school program or vocational program.

Here are a few questions advocates can use to determine if an applicant meets the education requirement.

### Is the applicant currently enrolled in school?

To be considered currently enrolled in school, the applicant must be enrolled in school on the date they submit their DACA application. Furthermore, the applicant needs to be enrolled in one of the following programs:

- A public, private, or charter elementary school, junior high or middle school, secondary school, alternative program, or homeschool program that meets state requirements;
- An education, literacy, career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in postsecondary education, job training, or employment and where the individual is working toward such placement, OR

- An education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other state-authorized exam (e.g. HiSet or TASC) in the United States.

### What will USCIS look for when determining if a program meets the education requirement?

For a program to meet the education requirement, and make an applicant eligible for DACA, the program must be one that ***has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and the applicant is working towards such placement.***<sup>7</sup> Most programs will be designed this way, and administrators should be able to write a letter that verifies enrollment and program purpose.

USCIS will want to make sure that applicants are enrolled in a reliable and effective course and not just taking private English lessons from a neighbor. Schools or programs will have to show either 1) they receive public funds (federal, state, county, municipal), 2) they are administered by non-profit organizations, or 3) they are of demonstrated effectiveness. If “such education, literacy, or career training program” is funded, in whole or in part, by public funds, or administered by a non-profit organization, then it is a qualifying program for purposes of DACA.<sup>8</sup>

Programs funded by other sources may qualify even if they are not funded by public funds or administered by a non-profit if the program is of *demonstrated effectiveness*.<sup>9</sup> There are many different factors that USCIS will consider in determining if a privately funded program is of demonstrated effectiveness, including:

- The duration of the program’s existence;
- The program’s track record in placing students in employment, job training, or post-secondary education; and
- Receipt of awards or special achievement or recognition that indicate the program’s overall quality; and/or
- Any other information indicating the program’s overall quality.<sup>10</sup>

For individuals seeking to demonstrate that they are “currently in school” through enrollment in such a program, the burden is on the DACA applicant to show the program’s demonstrated effectiveness.<sup>11</sup>

<sup>7</sup> DACA SOP v.2 p. 58.

<sup>8</sup> USCIS FAQ #34; DACA SOP v.2, p. 64.

<sup>9</sup> USCIS FAQ #34; DACA SOP v.2, p. 64. For more information on how to show that an education program is “of demonstrated effectiveness” and a sample questionnaire that can be given to school administrative staff, visit [www.nilc.org/wp-content/uploads/2015/10/demonstrated-effectiveness-questionnaire-2015-04-24.pdf](http://www.nilc.org/wp-content/uploads/2015/10/demonstrated-effectiveness-questionnaire-2015-04-24.pdf).

<sup>10</sup> DACA SOP v. 2, pp. 64–66.

<sup>11</sup> USCIS FAQ #33.

## How can an advocate analyze if the education requirement has been met or will be met?

Below are a few questions an advocate, in partnership with the applicant, can review to determine if an applicant meets the education requirement.

1. **Does the applicant have a high school diploma, certificate of completion, GED certificate, or other recognized equivalent of a high school diploma under state law?**
  - *If yes, inquiry stops here, applicant meets the DACA educational requirement.*
  - *If no, continue to question 2.*
2. **Is the applicant an honorably discharged veteran of the U.S. Coast Guard or U.S. Armed Forces?**
  - *If yes, inquiry stops here, applicant meets the DACA educational requirement.*
  - *If no, continue to question 3.*
3. **Is applicant currently enrolled in school or an educational program?**
  - *If no, applicant is not eligible for DACA. Applicant will need to enroll in a qualifying program or obtain their diploma, certificate of completion, GED certificate, or another recognized equivalent of a high school diploma under state law to become eligible.*
  - *If yes, continue to question 4.*
4. **Is the applicant enrolled in a public or private or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program that meets the state requirements?**
  - *If yes, inquiry stops here, applicant meets the DACA educational requirement.*
  - *If no, continue to question 5.*
5. **Is the applicant enrolled in any of the following: 1) a program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or 2) a program assisting students in passing a GED exam or other equivalent state-authorized exam, or 3) an education, literacy or career training program that has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in post-secondary education, job training, or employment?**
  - *If no: this program does not qualify for the DACA educational requirement.*
  - *If yes:*
    - a. **Is the applicant's educational program funded, in whole or in part, by public funds?**
      - *If yes, then no further evaluation is required; the applicant meets the DACA educational requirement.*
      - *If no, continue to part b.*
    - b. **Is the applicant's educational program administered by a non-profit organization?**

- *If yes, then no further evaluation is required; the applicant meets the DACA educational requirement.*
- *If no, continue to part c.*
- c. **Is the program of demonstrated effectiveness (using USCIS factors)?**
  - *If yes, then the program qualifies for DACA.*
  - *If no, the applicant probably does not meet the educational requirement at this time.*

### C. Criminal History

Certain criminal behavior can make a person ineligible for DACA. Individuals who have been convicted of (1) a felony offense, (2) a “significant” misdemeanor offense, (3) three or more “non-significant” misdemeanor offenses, or (4) who otherwise pose a threat to national security or public safety, will not be considered for DACA unless DHS determines there are exceptional circumstances.

Note, however, that immigration-status-based offenses, expunged convictions, and juvenile adjudications are not automatic bars to DACA. Every DACA applicant must undergo biographic and biometric background checks before USCIS will decide whether to grant DACA. This means USCIS will take an applicant’s fingerprints and check the applicant’s criminal record against a variety of databases maintained by DHS and other federal government agencies.

Determining if the applicant is barred from DACA will mean understanding if their contact with law enforcement resulted in a conviction of a felony, “significant” misdemeanor, or three “non-significant” misdemeanors.

#### What is considered a crime bar to DACA?

- **Felony:** Any Federal, state, or local offense that is punishable by imprisonment of more than one year, except state immigration-related offenses, offenses adjudicated in juvenile court and expunged convictions
- **Significant Misdemeanor:** Any federal, state, or local offense that is punishable by imprisonment of one year or less but more than five days and is an offense of:
  - Domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales, burglary, driving under the influence OR
  - Any other misdemeanor not listed above for which the person received a jail sentence of more than 90 days for that specific count or offense. Suspended sentences do not count towards the 90 days.
- **Three Non-Significant Misdemeanors:** three or more non-significant misdemeanors that do not occur on the same day nor arise from the same act or scheme of misconduct (includes only federal, state, or local offenses punishable by imprisonment of one year or less but more than five days).<sup>12</sup> Minor traffic offenses, including driving without a license generally do **not** fall within

<sup>12</sup> See USCIS, *Frequently Asked Questions* (FAQ). Part V, regarding DACA and criminal convictions, available at: [https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal\\_convictions](https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal_convictions); see also ILRC, *Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals*, available at [https://www.ilrc.org/sites/default/files/documents/ilrc-2012-daca\\_chart.pdf](https://www.ilrc.org/sites/default/files/documents/ilrc-2012-daca_chart.pdf)

the criminal bars at all, nor do state immigration-related misdemeanors, offenses adjudicated in juvenile court, or expunged convictions.

The offense listed above will automatically disqualify someone from obtaining DACA. Advocates should note that even if a conviction does not lead to an automatic disqualification, DACA is discretionary and cases are reviewed case-by-case, in the totality of the circumstances, and USCIS can consider non-significant misdemeanors, juvenile delinquency, and expunged convictions when adjudicating the case. There are also certain issues related to crimes, even if the convictions are expunged or reduced to non-significant misdemeanors or infractions, that can still result in a denial. For example, any arrest or conviction that could connect the applicant to gang allegations could be seen as national security threat and result in a denial. Another example involves cases where the original arrest was for domestic violence, even if the person was later not convicted for domestic violence, might result in a denial.

#### ***What to do if the applicant has a criminal history?***

Advocates should make sure to request and obtain a federal and/or state criminal record review, and all criminal court documents to analyze how they might or will impact eligibility for DACA. This can include arrest records, court documents, any expungements that might have occurred or reduced sentencing orders. FBI and state criminal record reviews are essential for persons who have had any contact with law enforcement, as individuals do not always understand whether or not they have been arrested or convicted. For example, a sentence to probation is often mistaken for “no conviction” or a failure of police to actually handcuff may be believed to not have constituted an “arrest,” when an arrest actually did occur.

#### ***What do to if your applicant has a criminal history that does not automatically bar them?***

It is important to offset any negative factors with positive equities. This can include letters from churches, community organizations, jobs, schools, involvement in community services, or enrollment in school projects. Additionally, applicants can get character letters from members of their community or employment, to show that they are an individual that contributes positively to society.

Moreover, applicants will want to show the “3 Rs”—express significant remorse, discuss and prove how they are taking responsibility for what happened, and demonstrate they have rehabilitated. Many times clients do this through a compelling declaration that hits the three points above and explains how they are striving to do better.

### **D. Continuous Residence Since June 2007**

To meet the continuous residence requirement, a DACA applicant must show they have continuously resided in the United States from June 15, 2007 up to the time they submit their initial application for DACA. This means that applicants who file an initial DACA request in 2021 will need to show up to 14 years of continuous residence documentation.

Continuous residence does not require “continuous presence” or that the applicant never has left the United States,<sup>13</sup> it simply requires proof they have been “residing” here during the required periods. When determining if the applicant meets the continuous residence requirement, advocates should analyze any break in residence in the following way:

- 1) Absences (or travel) before June 15, 2007 do not count for DACA eligibility purposes.
- 2) For absences (or travel) that occur between June 15, 2007 and before August 15, 2012—was the absence “brief, casual, and innocent?” If so, the applicant may still qualify for DACA.
- 3) Travel after August 15, 2012—will disrupt the applicant’s continuous residence and eligibility for DACA, UNLESS the travel was with advance parole. USCIS has stated that applicants who traveled after this date, and without advance parole, are not eligible for DACA and advocates should not apply for them, even if they meet all other requirements.<sup>14</sup>

The biggest questions and concerns for DACA advocates and practitioners arise in this area, with regard to whether those who have traveled during the period in which a person is required to show continuous residence is still eligible for DACA.

While all absences before June 15, 2007 are fine for DACA purpose, absences after June 15, 2007 *but before* August 15, 2012 could be acceptable if such absences were “brief, casual, and innocent.”

#### What is brief, casual, and innocent travel?

An absence will be considered to be “brief, casual, and innocent,” if (1) it was short and reasonably calculated to accomplish the purpose for the absence, (2) was not because of an order of exclusion, deportation, or removal, (3) was not because of an order of voluntary departure, or an administrative grant of voluntary departure before the applicant was placed in exclusion, deportation, or removal proceedings, and (4) the purpose for the travel and/or the applicant’s actions while outside the United States were not contrary to law.<sup>15</sup>

According to USCIS, “the definition of a brief, casual, and innocent absence has its basis in case law and was codified into the regulations [at 8 CFR 244.1] for the [TPS] program. Elements of this definition ... will be used for individuals requesting DACA.”<sup>16</sup> Officers, according to the DACA SOP v.2, will evaluate whether the applicant has satisfied the continuous residence requirement and whether any travel was brief, casual, and innocent by utilizing a totality of the circumstances review.<sup>17</sup>

**Example:** Juana left the United States for 30 days in March 2010 to attend her grandmother’s funeral. She was gone for just enough time to witness the funeral and help her mother clean out her grandmother’s belongings. Then she returned to the United States. Juana’s absence should be considered brief, casual, and innocent and should not interfere with her DACA eligibility.

<sup>13</sup> Note that the requirement is to show “continuous residence,” not “continuous physical presence” means that the person does not have to have been physically present the entire time.

<sup>14</sup> USCIS FAQ #56-59.

<sup>15</sup> *Id.*

<sup>16</sup> DHS, *National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)* (April 4, 2013) v.2, 7.

<sup>17</sup> DACA SOP v.2, p. 11.

In the past, courts considered different factors when determining if an absence was “brief, casual, and innocent.” These factors usually included the length and purpose of the absence, the person’s intent when leaving the United States, and the circumstances surrounding re-entry into the United States.<sup>18</sup>

Other factors used to determine if an absence is brief, casual and innocent in other contexts include whether:

- the absence is for a short period of time;
- the absence is due to an emergency;
- the absence is for a business reason;
- the applicant leaves the United States with the intent to be gone a short period of time and an emergency forces them to stay longer; and
- the applicant moves out of their house or apartment and quits their job before they leave the United States.

**Example:** Simon left the United States only once since June 2007. Simon and his family went on a vacation and were out of the country for three weeks in 2011. Simon’s parents both took vacation time from their jobs. This trip does not break continuous residence because it was short, was not because of an order of deportation or voluntary departure and was not for an illegal purpose. Although the purpose and other aspects of the trip may be relevant, a trip of only a few weeks is unlikely to interrupt a DACA applicant’s continuous residence.

**PRACTICE TIP:** Advocates have been successful obtaining DACA grants for individuals that had absences up to six months where they can establish the factors above. Under rare circumstances, some representatives have demonstrated to USCIS that even longer absences were brief, casual, and innocent. Make sure to discuss the trip in detail with your client so that you are able to document it in the best manner.

**A note on removals, deportations, and voluntary departures.** It is important to distinguish between absences due to removal, deportation, and voluntary departures, which would break presence and make an applicant ineligible for DACA, and those absences for the same reasons that will not trigger ineligibility. If an applicant was removed, deported, or voluntarily departed before June 15, 2007 and then returned before June 15, 2007, they will not be disqualified from applying for DACA. Only removals, deportations, and voluntary departures that occurred after June 15, 2007 will make someone ineligible for DACA. This is different than someone who was ordered removed and never left. These individuals would also still be eligible to apply to for DACA.

#### IV. Documenting the DACA filing

All DACA recipients will need to document their eligibility in order to prove they meet the DACA requirements. The following is a short list of the documentation that will be needed to request DACA for the first time. Please note that the list is not exhaustive and should be used as a guiding post.

<sup>18</sup> See *Rosenberg v. Fleuti*, 374 U.S. 449, 461-62 (1963).

- **Proof of age and identity**—a copy of a passport, birth certificate with photo identification, national identity document with photo, a school ID, or a past expired U.S. Government issued document with photo.
- **Proof of entry before the age of 16**—documentation should show date it was issued, name of applicant, and where it was issued. Applicants who entered with a passport or valid visa can use that to show they entered before the age of 16; others can use school records, medical records, or vaccination records, or anything that tends to show presence in the U.S. prior to turning 16 years of age.
- **Proof of being physically present in the United States on June 15, 2012**—this can be shown with school records, rent receipts, utility bills, etc. If no documentation exists on the exact date, which is common, you can include a document from close to before this date and one from not long after this date (at least during the same year, if possible). Note that some USCIS adjudicators may be concerned that an applicant left the U.S. for “summer vacation” around this time, so be prepared to respond to requests of evidence in that regard.
- **Proof of No lawful Status on June 15, 2012**—applicants who entered without permission to the United States and never received status previously, do not need to submit any documentation with respect to this eligibility requirement. *BUT* applicants who entered with a valid visa that expired before this date or previously had another form of status, must submit documentation to show the status expired before June 15, 2012. This can be documented by submitting a copy of an expired visa in the passport, any arrival/departure document (white I-94 card), or if the person was in immigration court, in removal proceedings, a record from that case.
- **Proof of Education Requirement**—applicants can submit transcripts, high school diploma, GED certificate of completion, or other enrollment documentation.

### A. Tips for DACA Filing

Below are some tips on documentation to consider when working with clients on initial DACA filings.

- Documents should contain at least the applicant’s name, date of issue, and indication that the document was issued in the United States, such as the address and/or location of the business, organization, or individual that created the document.
- For more efficient processing, applicants should include an index of the documents submitted with the DACA application and categorize them by the eligibility requirement they meet.
- For proof of continuous residence, applicants should organize documents in chronological order, beginning with those dated 2007 (or date of document used to prove entry to the United States before their sixteenth birthday) and ending with those dated closest to the filing time (as of this writing that would be April 2021).
- USCIS has stated in their FAQs that if applicants do not have proof to show that they were physically present on June 15, 2012, they can still satisfy the guideline by submitting evidence that they were present in the United States shortly before and shortly after June 15, 2012. Some practitioners suggest submitting documents dated up to 30 days before and 30 days after June 15, 2012. Practitioners and their clients will have to do what they can to show presence in the United States; even if it means submitting proofs from more than 30 days on either side of June 15, 2012.
- Any document, including envelopes with postmarks and the name and U.S. address of the applicant may be used to document presence and continuous residence. Secondary evidence

such as very detailed declarations or affidavits from many other persons who knew the applicant in the U.S. during the relevant time period(s) may also suffice to cover gaps in documentation of residence but will not be accepted for proof of presence on June 15, 2012. It is critical for any declaration to be dated and signed, the address of the declarant provided, and for the person to state how they know the applicant, their relationship, and specifically how and why they know the applicant was present in the U.S. during the specified period. Such statements could include that the person was a neighbor and observed the applicant coming and going to their residence, walking or driving a specific car; an employer who paid the applicant to complete certain tasks such as yard work, babysitting, elder care, etc.; soccer teammates who played with the applicant; former coaches; friends and relatives. While relatives may and should provide sworn declarations in such situations, those from others outside the family will often carry more weight and credibility.

## V. Conclusion

As noted, this practice advisory reviewed general requirements for DACA, as well as issues advocates should look out for when determining eligibility. This practice advisory is an introduction on DACA eligibility and reviews how someone can potentially screen for eligibility. For a more in-depth dive into each requirement advocates should review the ILRC's DACA manual, *DACA: The Essential Legal Guide*, available at <https://www.ilrc.org/daca-manual>.

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**About the Immigrant Legal Resource Center**

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.