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Executive Action on Immigration Announced by President Obama on November 20, 2014: What it Means For Noncitizen Criminal Defendants in Massachusetts

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On Nov. 20, 2014, President Obama announced significant changes to current immigration enforcement priorities and new policies which will allow millions of undocumented individuals to avoid deportation and work legally in the U.S. These changes are created through executive action taken by the Obama administration and they are outlined in a series of memos issued by the White House and the Department of Homeland Security (DHS). Since the new policies are instituted through executive action, not by legislation passed by Congress, they could be rescinded under a future president. Some of the new policies are effective immediately, while others will not go into effect for up to six months.

The executive action taken by President Obama impacts numerous aspects of the federal immigration system. However, three memos in particular issued by DHS most significantly affect noncitizens involved in the criminal justice system. The memos, which will be discussed in detail below, are:

- *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* (Deferred Action Memo), which expands “deferred action” by allowing certain undocumented noncitizens to temporarily live and work in the U.S. without fear of deportation, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf;
- *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Priorities Memo), which establishes new priorities for immigration enforcement, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf, and

- *Secure Communities* (Secure Communities/Detainers Memo), which significantly curtails the use of immigration detainers, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf;

This advisory describes how the above memos impact noncitizen criminal defendants, and how they impact the advice criminal defense attorneys are required to provide their clients regarding immigration consequences of criminal conduct pursuant to *Padilla v. Kentucky*. For additional information regarding the policy changes announced on November 20, 2014, go to <http://www.dhs.gov/immigration-action> or <http://www.adminrelief.org>.

I. Deferred Action

Deferred action is a discretionary decision to temporarily suspend the removal from the U.S. of certain individuals who meet established criteria. A person who is granted deferred action is permitted to remain in the U.S. for a specified period of time and is eligible to apply for work authorization. However, deferred action is not a form of legal status and is not a pathway to a green card or citizenship. Because deferred action is a form of prosecutorial discretion, it can be withdrawn at any time without any procedural protections for the individuals who benefitted from it.

As part of the executive action taken by President Obama last month, the Department of Homeland Security (DHS) announced an expansion of the 2012 program known as Deferred Action for Childhood Arrivals (DACA) and the creation of a second deferred action program for the undocumented parents of U.S. citizens and legal permanent residents. The second program is referred to as “Deferred Action for Parental Accountability” (DAPA). While DACA and DAPA have some similarities, they are distinctly different programs. This advisory will review the eligibility requirements and the criminal bars for each form of deferred action.

As of the date of this advisory, the U.S. Citizenship and Immigration Services (USCIS) has not established a method to accept applications for expanded DACA or DAPA. While defense attorneys should immediately begin to consider how pending criminal charges will impact a defendant’s eligibility for DACA or DAPA, noncitizens should be advised that applications are not available yet and they should be warned against working with people who claim they can begin the process for them. The memo outlining these programs, discussed below, instructs USCIS to begin accepting applications for expanded DACA no later than February 20, 2015 and to begin accepting applications for DAPA no later than May 20, 2015. Clients should consult with a licensed immigration attorney or Board of Immigration Appeals (BIA) accredited representative before applying. Once applications are available, immigration legal service providers in Massachusetts plan to host clinics to screen indigent noncitizens for eligibility and assist them with their applications. For a schedule of free clinics and additional information for clients, see <http://www.masslegalservices.org/library-directory/immigration>.

A. Deferred Action for Childhood Arrivals (DACA)

The DACA program was created in 2012 for undocumented individuals who were brought to the U.S. as children in response to the failure of Congress to pass the “DREAM Act.” For a detailed discussion of DACA eligibility criteria and criminal bars, see the attached CPCS Practice Advisory and the U.S. Citizenship and Immigration Services (USCIS) FAQs, found at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

The November 20, 2014 executive action memo on deferred action made three significant changes to DACA:

- Removal of the age cap – when DACA was first announced, only people who were under 31 on June 15, 2012 were eligible. The 2014 executive action removes the age cap and allows any otherwise eligible individual to apply, regardless of the person’s current age.
- Date of entry requirement – initially, only those individuals who were present in the U.S. and under 16 years old on June 15, 2007 were eligible for DACA. The 2014 executive action expands eligibility and allows individuals who were present in the U.S. and under 16 years old on January 1, 2010 to apply for DACA.

Applications under the above criteria will be available by February 18, 2015.

- DACA renewal extension – instead of needing to apply for renewal every two years, DACA recipients will be granted deferred action for three year periods. This applies to any new or renewal applications filed as of November 20, 2014.

When representing undocumented individuals who have lived in the U.S. since childhood, defense attorneys should consider how pending criminal cases may impact their clients’ eligibility for DACA and try to preserve such eligibility if possible.

B. Deferred Action for Parental Accountability (DAPA)

In addition to expanding DACA, the administration created a similar deferred action policy for the undocumented parents of U.S. citizens and legal permanent residents - DAPA. To be eligible for DAPA, an individual must meet the following criteria:

- Have no lawful immigration status on Nov. 20, 2014;
- Be the parent of a U.S. citizen or legal permanent resident on November 20, 2014 (the child can be any age, married or unmarried);
- Have continuously resided in the U.S. since before January 1, 2010;
- Be physically present in the U.S. on November 20, 2014, and at the time of applying for DAPA;

However, even if an individual meets the criteria above, she may still be excluded from DAPA if she:

- Presents factors that, “in the exercise of discretion, makes the grant of deferred action inappropriate,” OR
- Is an enforcement priority as described in the November 20, 2014 Priorities Memo (linked above).

The Priorities Memo defines the criminal offenses that bar an individual from DAPA as follows:

- One felony – defined as an offense classified as a felony *in the convicting jurisdiction* (i.e. a Massachusetts felony). It is important to note that this is a different definition of “felony” than that used for DACA.¹
- An aggravated felony as defined by 8 U.S.C. 1101(a)(43) and which was an aggravated felony *at the time of conviction*²;
- One “significant misdemeanor” – defined as an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful use or possession of a firearm, drug distribution or trafficking, OUI, or any offense for which a person served 90 days or more of committed time³;
- Three or more misdemeanor⁴ offenses – arising out of three separate incidents. Minor traffic offenses, such as driving without a license, will not be counted.
- Gang offenses – defined as an offense “for which an element was active participation in a criminal street gang, as defined by 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang.”

Individuals granted deferred action under DAPA will be eligible to work legally in the U.S. DAPA and the corresponding work authorization need to be renewed every three years. At each renewal, an individual must continue to meet the eligibility criteria. Therefore, convictions obtained after an initial grant of DAPA can lead to denial of the renewal and ultimately removal from the U.S., since the conviction may also make the individual an enforcement priority.

¹ This distinction is particularly important in Massachusetts, where misdemeanor offenses can carry potential sentences of up to two and a half years in a house of correction, see G.L. ch. 274, §1. In contrast, under DACA and the *federal* misdemeanor definition, any offense which carries a potential sentence of more than one year is considered a felony and thus a bar to DACA.

² The federal statutory definition of “aggravated felony” was first introduced in 1988, expanded in 1990 and significantly expanded again in 1996. Seek expert assistance to determine whether a conviction obtained prior to 4/24/96 constituted an aggravated felony pursuant to the law in effect at the time of conviction.

³ Under DACA, an offense is a significant misdemeanor if a person serves more than 90 days. The criteria under DAPA is 90 days or more. This is a discrepancy that has not yet been explained or corrected.

⁴ Under DACA, the definition of “misdemeanor” is any offense with a maximum possible sentence of one year or less but more than five days. The DAPA memo does not define misdemeanor, so it is unclear at present whether the same definition will apply.

C. Important Distinctions in the Criminal Bars of DACA and DAPA⁵

As discussed above, while the criminal bars to DACA and DAPA are remarkably similar, there are significant distinctions. They are as follows:

	DACA	DAPA
Definition of “felony”	Any federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year – even if the offense is not a felony under state law.	An offense classified as a felony in the convicting jurisdiction.
Definition of “misdemeanor”	An offense for which the maximum term of imprisonment authorized is one year or less, but is greater than five days.	No definition of misdemeanor.
Definition of “Significant Misdemeanor”	Includes any misdemeanor for which the individual was sentenced to <u>more than 90 days</u> imprisonment (does not include suspended sentences).	Includes any misdemeanor for which the applicant was sentenced to <u>90 days or more</u> imprisonment (does not include suspended sentences).
Expunged convictions and Juvenile Adjudications	Do not automatically disqualify a person from DACA. They will be reviewed in the exercise of discretion.	There is presently no guidance on how expunged convictions and juvenile adjudications will be treated.
Gang Involvement	Gang related convictions and conduct are not express bars, though suspected gang membership makes applicants ineligible as a risk to public safety.	There are specific provisions barring DAPA based on certain gang related convictions and/or conduct.

⁵ Some specifics regarding DACA’s criminal bars were articulated in FAQs issued by DHS after the initial DACA memos were released. At present, there are no FAQs for DAPA, but if DAPA FAQs are issued in the future, they may address some of the outstanding questions regarding its criminal bars.

II. Enforcement Priorities

The executive actions announced on November 20, 2014 include the creation of new enforcement priorities. Consistent with the Obama administration's prior emphasis on removing noncitizens with criminal convictions, the new enforcement priorities focus on those with criminal conduct or convictions. This means that criminal defendants will continue to face the most scrutiny by DHS and will be most likely to face removal.

The Priorities Memo, linked above, which also serves as the basis for the criminal bars to DAPA, describes three levels of priority. While the priority levels are far-reaching for those with a history of criminal conduct, each level describes what appears to be an exception. These exceptions seem to allow DHS, in certain limited circumstances, to exercise discretion even if an individual falls within an enforcement priority. It is unclear at present how or how often these exceptions will actually be applied.

It is also important to note that the Priorities Memo refers only to "undocumented immigrants." It does not address whether the new enforcement priorities apply to noncitizens with lawful status (i.e., lawful permanent residents, known as LPRs or green card holders). Defense counsel should assume until further guidance is issued that the memos apply to all noncitizens.

Finally, Immigration and Customs Enforcement (ICE) is instructed in the DACA/DAPA memo to begin screening individuals in ICE custody for deferred action eligibility and to determine whether they meet the new enforcement priorities. Individuals who are in removal proceedings may also ask ICE to review their immigration cases to determine whether they are eligible for deferred action under the new policies. Immigration detainees may call ICE directly at 855-448-6903 if they believe they are eligible. *Note, however, defense counsel should not advise a noncitizen client to contact ICE or apply for deferred action until an immigration attorney has determined that the client is eligible.*

III. Secure Communities and Immigration Detainers

One of the executive actions taken by President Obama on November 20, 2014 was to cancel or rename the "Secure Communities" program. Secure Communities is a data-sharing program begun in 2008 in which all biometric data sent by local law enforcement to the FBI is automatically shared with Immigration and Customs Enforcement (ICE). Because ICE's use of such biometric data allows it to rapidly identify noncitizens who are removable and to issue immigration detainers against them, the program has been highly controversial and its name is associated with the resulting dramatic increase in deportations of noncitizens stopped by police for any type of criminal or civil conduct, including minor traffic offenses.

The Secure Communities/Detainers Memo issued on November 20, 2014, linked above, announced the end of this program. However, fingerprints sent by local law enforcement to the FBI will continue to be shared with ICE, and transfers of potentially removable noncitizens in criminal custody will still be sought under the renamed "Priority Enforcement Program" (PEP). Under PEP, ICE will continue to seek the detention and removal of individuals who fall within the new enforcement priorities, described above.

Although the Secure Communities/Detainers Memo did not create meaningful changes to data-sharing between the FBI and ICE, it did announce significant changes to immigration detainer policy. This was likely in response to numerous recent state and federal court decisions which have held that: 1) immigration detainers are merely requests for assistance, not mandatory upon state and local officials; and 2) if a state or local official holds an individual on a detainer that is not based on probable cause beyond the expiration of her state or local sentence or custody order, such detention is a violation of the Fourth Amendment. In recognition of this recent case law, the Secure Communities/Detainers Memo stated that ICE will no longer request state or local officials to detain an individual beyond when he would otherwise be released, unless such individual has a final order of removal or there is sufficient probable cause to believe the person is removable.⁶

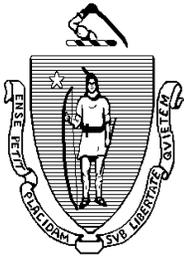
The Secure Communities/Detainers Memo further states that in lieu of detainers in most cases, ICE will issue “requests for notification,” in which ICE will request that local authorities notify ICE of the pending release of noncitizens from custody. These requests for notification should only be issued, and ICE should only seek the transfers of individuals in state and local custody, if the individuals fall within Priorities 1 or 2 from the Priorities Memo (linked above). Priorities 1 and 2 include all categories of criminal conduct and convictions that bar individuals from DAPA, which are described in detail above.

Unlike other executive actions announced on November 20, 2014, changes announced in the Secure Communities/Detainers Memo are effective immediately. Many questions exist, however, concerning how immigration enforcement against individuals in criminal custody will occur under the new policies. At present, it is unclear whether ICE will rescind detainers issued prior to November 20, 2014 for those do not meet the new criteria for issuance of detainers, how often ICE will issue new detainers and/or notification requests, and how ICE will effectuate transfers of individuals from criminal to immigration custody without local law enforcement facilitating the transfers by holding such individuals beyond the time they would normally be released.

The IIU plans to issue another practice advisory in the next few weeks with additional information and guidance regarding the new detainer policies and how to challenge both new and previously-issued immigration detainers. In the meantime, feel free to contact us with any questions and/or any experiences with detainers in pending cases, especially those issued after November 20, 2014.

Many questions remain concerning how the executive action on immigration recently taken by President Obama will actually impact noncitizen criminal defendants. The IIU will provide updates when additional information becomes available. As always, please contact us with any questions regarding how the changes discussed in this memo apply to individual clients.

⁶ Who determines whether there is sufficient probable cause and how that determination can be challenged has not been addressed at present by DHS.



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**Practice Advisory UPDATE August 2012:
Deferred Action for Childhood Arrivals (DACA)**

In 2010 the U.S. Congress failed to pass the “DREAM Act” which would have created a pathway to citizenship for approximately one million undocumented individuals, known as “DREAMers,” who were brought to the U.S. as children but who are currently undocumented. On June 15, 2012, the Obama Administration announced a change in enforcement priorities with respect to “DREAMers.” President Obama announced that his administration will suspend deportation (“deferred action”) and grant work authorization to some DREAM Act-eligible youth. This policy is known as *deferred action for childhood arrivals* (DACA). This update will describe what DACA entails, who is eligible for DACA, and some practical issues surrounding this change. **This memo includes updated information since the June 2012 advisory.**

1. What is DACA?

DACA is a discretionary decision to temporarily suspend the removal from the U.S. of certain non-citizens who came to the U.S. as children. A person who is granted DACA is permitted to stay in the U.S. and is eligible to apply for work authorization. While DACA allows certain removable non-citizens to remain in the U.S., DACA is not a form of legal status and is not a pathway to a green card or citizenship.

2. Who is eligible for DACA?

To be eligible for DACA, a person must meet the following criteria:

- a. Must have come to the U.S. when s/he was under the age of 16.
- b. Was over 15 years old and under the age of 31 on June 15, 2012. (Children under 15 who are in removal proceedings are also eligible for DACA).
- c. Must have been physically present in the U.S. on June 15, 2012.
- d. Must have resided in the U.S. continuously for at least five years prior to June 15, 2012.
- e. Must be undocumented or out of status on June 15, 2012.

- f. On the date of DACA application must be in school, have graduated from high school, obtained a GED, or have been honorably discharged from coast guard or armed services of U.S.
- g. Is not barred by certain criminal conduct (see below).

An individual must be able to provide documentation proving each of the criteria set forth above. Such documentation includes, but is not limited to, medical records, financial records, school records, and employment records.

3. What are the criminal bars to DACA?

Even if a person meets the eligibility criteria above, s/he will be denied DACA if convicted of any of the following:

- a. One felony - In Massachusetts, this means either a state felony or a state misdemeanor for which the *maximum possible penalty* under the criminal statute is more than one year.

One significant misdemeanor - This category includes a Massachusetts misdemeanor for which the *maximum possible penalty* is one year or less, but more than five days and involves, domestic violence, sexual abuse or exploitation, burglary, OUI, or unlawful possession or use of a firearm, drug distribution/trafficking. It may also include any other misdemeanor for which the applicant was sentenced to more than 90 days imprisonment, NOT including suspended sentences, pre-trial detention, or time held on an ICE detainer.

- b. Three or more non-significant misdemeanors - This means three or more misdemeanor convictions not covered above, not occurring on the same day and not arising out of the same act, omission or scheme of misconduct. As above, a misdemeanor is defined as a criminal offense for which the maximum possible penalty is one year or less. Minor traffic offenses, like driving without a license, will not be considered towards this category.

NB: As in all other situations, a CWOFF is considered a conviction for immigration purposes.

4. Will juvenile delinquency adjudications be considered convictions for DACA?

DHS has indicated that delinquency adjudications will not automatically bar an applicant from a DACA grant. However, delinquency findings will be reviewed on a case-by-case basis to determine whether the “particular circumstances” of the case warrant a positive exercise of discretion. Individuals with delinquency findings should consult with an immigration attorney *prior* to filing a DACA application in order for an attorney to assess the strength of the application.

5. How long does DACA last?

Currently, DACA will be granted for two years, but it is subject to renewal.

6. How does a person apply for DACA? Is there a deadline to apply?

On August 15, 2012 the United States Citizenship and Immigration Services began accepting DACA applications. There is currently no deadline for applications. The application can be found at www.uscis.gov/childhoodarrivals

7. If my client is in custody with a detainer, does the deferred action order apply?

If you have a person who you think qualifies for DACA, but is held by an ICE detainer, contact the Law Enforcement Support Center hotline 1-855-448-6903 or the ICE Office of the Public Advocate 1-888-351-4024. If eligible for DACA, the detainer should be lifted.

Conclusion

It is imperative that criminal defense attorneys understand the impact that convictions can have on DREAMers otherwise eligible for DACA. A conviction for an offense that makes a non-citizen ineligible for DACA may preclude that person's only opportunity to remain lawfully in the U.S. If you have an undocumented client who you think meets the DACA criteria, contact the IIU to review the case.

In addition, before applying for DACA, clients should strongly consider consulting an immigration attorney to confirm eligibility. DHS will review cases under a "totality of the circumstances" test and will review all arrests, dismissed charges, and rehabilitative programs. An attorney will be able to review the facts surrounding all interactions with the criminal justice system and assist an individual in deciding whether it is a wise choice to apply.

Finally, because this is a major development for undocumented individuals, there may be those trying to take financial advantage of DREAMers looking for immigration advice. Clients should be advised to beware of fraudulent services and should only consult reputable attorneys. *If clients apply for DACA but don't meet the criteria, they could be placed in removal proceedings.*

For additional information or questions about deferred action or the criminal bars, see www.uscis.gov/childhoodarrivals or please contact the CPCS Immigration Impact Unit at 617-623-0591.

August, 2012