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PRACTICE ADVISORY¹ FOR VIRGINIA CRIMINAL DEFENDERS: IMMIGRATION EXECUTIVE ACTION

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On November 20, 2014, President Obama announced a series of executive actions for noncitizens. These new policies will have a significant impact on your noncitizen clients' immigration-related case goals. Although a subset of these programs are temporarily enjoined pending the outcome of litigation now before the Supreme Court, they remain an important consideration for noncitizens, particularly those who are in the United States without documentation. This advisory provides an overview of the relevant programs and a toolkit for understanding the impact these programs will have on immigration-related goals for your noncitizen clients.

WHAT NEW PROGRAMS DID THE PRESIDENT ANNOUNCE AND FOR WHOM DO THEY MATTER?

New Deferred Action programs – DAPA and expanded DACA

The President announced the new “Deferred Action for Parental Accountability” (DAPA) program to provide temporary protection from deportation to certain undocumented parents of U.S. Citizen or Lawful Permanent Resident children. He also announced the expansion of the Deferred Action for Childhood Arrivals (DACA) program that was first launched in 2012, now referred to as “expanded DACA.” Both programs have expansive criminal bars with no statute of limitations. The implementation of DAPA and expanded DACA are enjoined pending the outcome of *United States v. Texas* (Case 15-674), a case brought by 26 states seeking to block the programs, now before the United States Supreme Court.

These programs matter for undocumented clients seeking to preserve future eligibility for deferred action. Although DAPA and expanded DACA remain under injunction pending the outcome in *United States v. Texas*, the original DACA program remains intact and non-citizens otherwise eligible for DAPA and expanded DACA should still seek to preserve that eligibility in hopes the injunction will be lifted.

¹ This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.

New enforcement priorities

The Department of Homeland Security (DHS) has clarified its enforcement priorities through a new program called the Priorities Enforcement Program and announced an overhaul of the way Immigration and Customs Enforcement (ICE) interacts with local jails. ICE officials are now instructed to focus enforcement resources on individuals who fall into three newly announced priority categories.

These changes matter for all noncitizen clients, because the new priorities will determine which convictions and jail sentences are most likely to trigger ICE to apprehend a removable client, leading to immigration detention and removal proceedings. **Additionally, the offenses included in the priorities mirror the criminal bars to DAPA** (but differ slightly from the bars to DACA, see chart below). **The enforcement priorities program remains in place and is untouched by the issues presented in *United States v. Texas*.**

HOW WILL THESE PROGRAMS IMPACT MY NONCITIZEN CLIENTS' IMMIGRATION-RELATED CASE GOALS?

For undocumented clients, seek to preserve DAPA or DACA eligibility

Undocumented clients who are otherwise eligible for DAPA or DACA should seek to avoid a conviction that would constitute a bar to the relevant program. Eligibility requirements for DAPA and DACA are as follows:

DAPA eligibility requirements:

- 1) Without lawful status as of 11/20/14
- 2) Continuously resided in U.S. since 1/1/10² and physically present in U.S. on 11/20/14
- 3) Has U.S. Citizen or Lawful Permanent Resident child born on or before 11/20/14
- 4) Not otherwise barred (see chart below)

*Expanded DACA eligibility requirements:*³

- 1) Without lawful status as of 6/15/12 and physically present in U.S. on that date
- 2) Continuously resided in U.S. since 1/1/10 and came before 16th birthday
- 3) In school, graduated from high school or has GED
- 4) Not otherwise barred (see chart below)

For all noncitizen clients, seek to avoid a conviction that falls within one of the enforcement priority categories

Under the new Priorities Enforcement Program, ICE officers will focus enforcement resources on those who fall within the newly defined enforcement priorities (see chart below).

² There is contradictory guidance in the existing memos issued by DHS with regard to whether individuals must have been in the United States since December 31, 2009 *or* January 1, 2010. However, this ambiguity only matters for noncitizens who arrived in the United States on January 1, 2010, thereby potentially missing the cut-off by one day.

³ Eligibility requirements for the original DACA program, not subject to injunction, are slightly different. Applicants must have continuously resided in the U.S. since 6/15/07 and must have been under the age of 31 as of 6/15/12.

These categories include some relatively minor offenses, including even one DUI. All removable noncitizen clients who fall within these categories – including those lawfully present – face likely apprehension by ICE. This risk is at its greatest while the individual is incarcerated, but also exists in the community. Apprehension by ICE leads to immigration detention and removal proceedings. Noncitizen clients who are not already subject to the enforcement priorities should, therefore, seek to avoid a conviction for an offense included in the priorities.

In order to determine how the priorities will impact your noncitizen client:

- 1) Determine if your client is *already* an enforcement priority (see chart below); and
- 2) If s/he is not, seek a case outcome that does not fall within one of the priority categories.

IS THE ANALYSIS FOR THESE NEW PROGRAMS DISTINCT FROM THE ANALYSIS PERTAINING TO REMOVABILITY AND ELIGIBILITY FOR RELIEF?

Yes! The enforcement priority categories and the bars to DAPA and DACA are distinct from the criminal grounds of deportability and inadmissibility and the criminal bars to relief found in the Immigration and Nationality Act (INA), although in some cases (such as the aggravated felony bars) there is overlap. For noncitizen clients it is important to analyze potential case outcomes under the INA as well as the new executive action programs even though the analyses will intersect in many ways. Avoiding the criminal bars of deportability and inadmissibility, for example, remains a vital goal for noncitizen clients, particularly those lawfully present. For those who are already removable, it is important to both avoid the new enforcement priority categories and preserve eligibility for relief from removal under the INA.

Key conceptual distinctions between the grounds of removability and DAPA/DACA eligibility include:

- 1) Definition of sentence: Although suspended sentences count as sentences pursuant to the definition of “sentence” within the INA, they do not count as sentences for the purpose of determining whether a misdemeanor offense bars DACA or DAPA due to a sentence of 90 days or greater.
- 2) Felony versus misdemeanor: Although it doesn’t matter whether an offense is classified by the sentencing jurisdiction as a felony or misdemeanor for determining whether it constitutes an aggravated felony or triggers other grounds of removal, the distinction is now extremely important in determining whether an individual constitutes an enforcement priority or is eligible for DACA or DAPA.

PRACTICE TIPS

When seeking to avoid the new enforcement priorities or preserve DAPA or DACA eligibility:

- 1) Plead felony charges down to a misdemeanor
- 2) For misdemeanor offenses:
 - a. Avoid misdemeanors defined as “significant” (see chart below)
 - b. Remember that even one DUI is a “significant misdemeanor”

- c. For non-significant misdemeanors, keep sentence to less than 90 days actual jail time
- d. Avoid a noncitizen client's third misdemeanor conviction

You will do your noncitizen clients a great service by screening them for DAPA or DACA eligibility and referring them to a local immigration service provider if they may be eligible. Individuals with any previous involvement in the criminal justice system should speak directly to an immigration attorney. Virginia residents should contact Hogar Immigrant Services (of Catholic Charities) at 703-534-9805. Please encourage noncitizen clients to avoid notarios and other immigration-related scams!

SEE CHART DETAILING THE NEW ENFORCEMENT PRIORITIES AND BARS TO DAPA AND DACA BELOW.

For more details, see <http://www.dhs.gov/immigration-action>.

Questions? Contact Heidi Altman at CAIR Coalition at Heidi@caircoalition.org.

WHAT CONVICTIONS TRIGGER THE ENFORCEMENT PRIORITIES AND CONSTITUTE BARS TO DAPA AND DACA?

	Triggers Enforcement Priority Category?	Bar to DAPA?	Bar to DACA?
Gang-related offenses	Yes – if convicted of offense for which element was active participation in a criminal street gang	Yes – if convicted of offense for which element was active participation in a criminal street gang	No per se bar for gang-related conviction but “gang membership” considered an indicator of threat to public safety
Felony conviction	Yes (felony defined by sentencing jurisdiction)	Yes (felony defined by sentencing jurisdiction)	Yes (felony conviction defined as any offense punishable by > 1 year imprisonment)
Aggravated felony conviction (see 8 U.S.C. § 1101(a)(43))	Yes	Yes	No
3 or more misdemeanor convictions excluding non-DUI traffic offenses	Yes (excluding state offenses for which essential element is immigration status)	Yes (excluding state offenses for which essential element is immigration status)	Yes (misdemeanor defined as any offense punishable by 6 days to 1 year jail time, so Virginia class 3 and 4 misdemeanors are excluded)
“Significant” misdemeanors, including⁴: <ul style="list-style-type: none"> • Domestic violence offense • Sexual abuse or exploitation • Burglary • Unlawful possession or use of firearm • Drug distribution or trafficking • Driving under influence 	Yes	Yes	Yes (misdemeanor defined as any offense punishable by 6 days to 1 year jail time, so Virginia class 3 and 4 misdemeanors are excluded)
Any misdemeanor with > 90 days or ≥ 90 days jail time (not including suspended sentences)	Yes (≥ 90 days)	Yes (≥ 90 days)	Yes (> 90 days) (misdemeanor defined as any offense punishable by 6 days to 1 year jail time, so Virginia class 3 and 4 misdemeanors are excluded)
Juvenile delinquencies and expungements	Unclear – to date, no guidance issued on this point	Unclear – to date, no guidance issued on this point	Not automatic bar

⁴ DHS has issued little guidance regarding how the categories of offenses that constitute “significant misdemeanors” are defined. For example, we do not know with certainty if a conviction under Virginia 18.2-266.1 for driving after illegally consuming alcohol will constitute a “driving under influence” significant misdemeanor. Based on practitioners’ experiences with the DACA application process, however, defense attorneys should assume that the categories will be applied broadly to any related offense and, therefore, a plea to any offense that may be relevant to these categories is unsafe.