CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

20 COMMON QUESTIONS ON DACA
September 21, 2012

1. Can a person qualify who first entered the U.S. several years before June 15, 2007, then departed the U.S. for a significant period, and returned to the U.S. by June 15, 2007?

   It is important to keep all the entry, age, and residence requirements in mind when considering this question. An applicant must have entered the U.S. before the age of 16, have resided in the U.S. since June 15, 2007, have been out of status on June 15, 2012, and be under the age of 31 at the time of application. Under a straightforward reading of the eligibility guidelines, as long as you meet these guidelines, you should be eligible, and the absence should not matter.

   It remains to be seen how USCIS will adjudicate cases in which an applicant first entered the U.S. while under the age of 16, left for many years, re-entered before June 15, 2007 while under the age of 26, and is still here and currently in school. Applicants in this situation may decide to wait and see if USCIS clarifies this further, or may decide to apply and see how their cases are decided.

2. What about close calls on eligibility (e.g. entered on June 20, 2007; turned 31 on June 12, 2012)?

   The eligibility requirements regarding age (not over 31) and date of initial entry are firm. USCIS has not indicated that it would consider special circumstances or exceptions where the applicant has come close to meeting the requirements. The only flexibility is the definition of continuous residence during the five-year period, where brief, casual and innocent departures may be considered.

3. Must applicants document residence from the date of initial entry or only during the five-year period (June 15, 2007-2012), plus physical presence on June 15, 2012?

   The residence requirements begin on June 15, 2007, so applicants need not document residence before that date. Applicants must demonstrate residence beginning June 15, 2007, physical presence on June 15, 2012, and no absences from the U.S. after August 15, 2012.

4. How does one document presence on June 15, 2012 for an applicant who finished school before then and has not been working?

The FAQs issued by USCIS note that this requirement may be met by showing credible documentary evidence that the applicant was physically present shortly before and shortly after June 15, 2012. In addition, the I-821D instructions include a list of suggested documents to establish physical presence on June 15, 2012, including documents not related to employment or school. These include rent receipts and utility bills, military records, hospital or medical records, official records from a religious entity confirming the applicant's participation in a religious ceremony, copies of correspondence between the applicant and another individual, money order receipts, dated bank transactions, vehicle registration and "other relevant documents".

It may be also be helpful to review 8 CFR § by 245.10(n), which lists acceptable documents to establish physical presence on December 21, 2000, a requirement for certain applicants for adjustment of status. Under that regulation, an applicant who establishes that a family unit was in existence and cohabiting in the United States can submit documents evidencing the presence of another member of the same family unit. This suggests that similar evidence should be acceptable for DACA applicants to show physical presence on June 15, 2012.

It does not appear that USCIS will accept affidavits as proof of this meeting this eligibility requirement. Current USCIS guidance in the FAQs allows for affidavits as evidence with regard to demonstrating the five-year continuous residence requirement and that any absences during that period were brief, casual and innocent.

5. How does one demonstrate the effectiveness of a CBO-run GED program?

   Consider providing the following types of information for GED/ESL/adult literacy/vocational/other educational programs. Note that this information is merely a suggestion and not the result of specific guidance from USCIS.

   - Name of school/program
   - Sponsoring organization, if any
   - Address
   - Date educational program and sponsoring organization, if applicable, established
   - Accreditation, if any
   - Certificates/diplomas offered
   - Size of student body
   - Size of teaching staff
   - Recipient of any government funding? Sources?
   - Is the educational program supported by other institutional grants or funding? Sources? (Institutional funding means grant support from a foundation, corporation, other non-profit institution, foreign government, etc.)
   - How long would it take a student making normal progress and studying without interruption to complete each of the educational programs you offer?

o What percentage of students complete each program within 150% of the time indicated in your answer to the previous question?

- If program is not accredited and does not receive government funding, attach earned media coverage published in previous 3 years demonstrating program's reputation for effectiveness, and/or letter(s) of recommendation dated within previous 3 years attesting to program's effectiveness from elected/appointed official(s).

6. Does an applicant qualify who dropped out of school and is now re-enrolling?

   So long as an applicant meets the educational requirements at the time of application, he or she should be eligible. So an applicant who dropped out of high school and then either re-enrolled in high school, or enrolled in a qualifying GED or other program (see question 2 above) before applying, should be eligible.

   Remember that an applicant may satisfy the educational requirements either by having graduated from or completed high school, or being "currently in school." So an applicant who completed high school in the U.S., enrolled in college and then dropped out of college, would be eligible.

7. Do federal immigration felonies bar eligibility?

   It appears that federal immigration felonies will bar individuals from DACA eligibility. The FAQs issued by USCIS relating to DACA specifically exempt "offenses criminalized as felonies or misdemeanors by state immigration laws" from consideration under DACA. There is, however, no discussion of federal immigration felonies leading us to believe that they will bar applicants from eligibility.

8. Will evidence of gang membership prevent an applicant from being granted deferred action?

   Preliminary reports indicate that this is an issue USCIS will focus on in adjudicating requests for DACA. USCIS's FAQs on DACA state that individuals identified as a threat to national security or public safety will not be eligible for DACA. The guidelines indicate that USCIS views gang membership as a sign that an individual poses a threat to national security or public safety. Advocates screening for eligibility should carefully review criminal records for signs of alleged gang membership. There are certain criminal offenses which include references to gang membership; there are gang "enhancements" in some jurisdictions where an offender can receive increased penalties due to gang membership; and contact with gang members and wearing gang colors or insignia are often prohibited in probation requirements. In addition, some local police departments maintain lists of suspected gang members. It is unclear whether this type of information will be triggered by USCIS' background checks. It is also unclear whether an individual suspected by USCIS of being a gang member will be offered the opportunity to provide evidence to demonstrate that they are not a gang member.

9. How will USCIS treat entry with false documents, such as fraudulent visas, LPR cards, or false claims to USC?

It is unclear how USCIS will treat entry to the United States through fraud or misrepresentation. While the grounds of inadmissibility do not apply, the agency can and certainly will take this into consideration when deciding whether to exercise its discretion favorably and grant deferred action. It is important to consider the different types of fraud separately, since they carry different consequences. Let us examine three possible scenarios and provide some suggestions on how to complete the forms based on what type of fraud was committed: (a) entry with a false nonimmigrant visa or one obtained by fraud; (b) entry with a fake LPR card; and (c) entry with a false claim to US citizenship.

Both the Form I-821D and the I-765 ask similar but slightly different questions on "status" and "manner of last entry." So while the answers to those questions will likely be the same, it will not necessarily be the case. Also, one does not necessarily have to use the drop-down menu on the I-821D for Part 1 question #15. In fact, one of the proposed answers (No Lawful Status) is not even included in the drop-down options. So the applicant is free to write in a response if he or she did not enter with a specified nonimmigrant classification. One of the drop-down options is "suspected document fraud." This option makes no sense. The applicant will almost certainly know whether he or she committed document fraud; it is the government that may harbor suspicions. So we recommend that applicants never select that option.

a) Entry with a false nonimmigrant visa or one obtained by fraud. First, a false statement or the presenting of a false document is only fraud if it is knowing and willful. Children who entered the U.S. when they were quite young (certainly age 10 or under) can make a convincing argument that they were too young to understand the legal significance of their statements or actions. Children between the ages of 10 and 15 may also be able to make those same arguments. Factors that the Service or consulate has looked at include the child's maturity, sophistication, prior criminal activity, and whether the child was being assisted by someone or was entering alone.

If the applicant entered with someone else's nonimmigrant visa or one that was bought (a fraudulent one), we recommend that the applicant answer question #15 on the I-821D by stating "no lawful status." Answer "yes" to question #16a if the applicant received an I-94. List the I-94 number on #16b. Indicate the date the I-94 expired on #17. For question #14 on the I-765, answer "manner of last entry" in the same way. Answer #15, "current immigration status" as "DACA requester" or "no lawful status." Since there is an apparent contradiction with receiving an I-94 when the applicant had no lawful status, we recommend you explain the circumstances in Part 7 of the I-821D, Additional Information.

If the applicant obtained a nonimmigrant visa or border crossing card from the consulate, although based on a misrepresentation, answer question #15 on the I-821D by stating "B-1/B-2" or whatever their nonimmigrant visa classification was. The same would be true if the applicant entered on a

border crossing card knowing they planned to overstay and/or work. That was their immigration status at the time of entry, even though the admission was obtained through fraud. If they received an I-94, complete questions #16-17 on the I-821D and #15 of the I-765 in the same manner as above. The possible fraud issue does not come up because the forms do not inquire as to whether the nonimmigrant visa or admission was obtained through a misrepresentation.

If the applicant entered on a fraudulent visa and their I-94 had not expired before June 15, 2012, we believe there is an argument that they still qualify for DACA. Since they had no lawful status at the time of entry, they had no lawful status on June 15, 2012. The eligibility requirement is that the lawful status must have expired by that date, so it is unclear whether USCIS will agree with this interpretation. If the applicant left the United States after June 15, 2007, it may be that a return with a fraudulent visa will defeat the absence being considered "innocent." The age of the applicant at the time and whether he or she was an active participant in procuring the fraudulent visa would likely be considered.

b) Entry with a fake LPR card. This scenario is probably less common, but it could arise. Since question #15 on the I-821D asks for status at entry, we believe the proper answer is "no lawful status." Leave #16a, 16b and 17 blank. We do not believe it is necessary to admit to entry with a false LPR card. If you do not agree or are uncomfortable with this interpretation, then in Part 7, explain any ameliorative circumstances at the time of admission, such as age, ignorance or lack of participation in the fraud, or flight from violence or persecution. For question #14 on the I-765, manner of last entry, put the same. For question #15, current status, put "DACA requester" or "no lawful status."

c) Entry with a false claim to U.S. citizenship. This type of fraud is more serious. False claims of citizenship, if made after September 30, 1996, trigger a non-waivable ground of inadmissibility that could make the client permanently inadmissible. If the applicant gained entry to the U.S. through a false claim of citizenship, analyze the facts to see if an argument could be made that the claim was not knowing and willful (child's age, maturity, and participation in the fraud). If the applicant wishes to proceed, for question #15 on the I-821D write "no lawful status" or "entry without inspection" False claims of citizenship are treated as entries without admission under a Supreme Court case.

Some practitioners might take the position that one does not need to explain anything further. Others believe it would be necessary to explain in Part 7 how the applicant entered and why it should not be considered a false claim to citizenship. If there were no ameliorative circumstances and it was clearly a false claim of citizenship, it would not automatically bar the applicant from receiving deferred action, since the grounds of inadmissibility do not apply. However, this admission of false claim would be on the applicant's record and could preclude him or her from receiving any future immigration benefit where the grounds apply. The answer to question #14 of the I-765, manner of last entry, should be consistent with question #15 on the I-821D. For #15 of the I-765, current status, put "DACA requester" or "no lawful status."

10. How will USCIS treat use of fraudulent documents for purposes of gaining employment?

    See below for use of false social security numbers. Neither the I-821D nor the I-765 asks whether the applicant used a false document when applying for employment. Therefore, we do not recommend that the applicant volunteer this information.

11. Must applicants disclose fake Social Security numbers?

    No. USCIS recently answered this question in an FAQ posted on their website. Question #9 on the I-765 asks for "Social Security Number (include all numbers you have ever used) (if any)." USCIS said "list those Social Security numbers that were officially issued to you by the Social Security Administration." Part 1 question #5 on the I-821D asks for "U.S. Social Security Number (if any)." The applicant should answer this in a similar manner. In other words, if he or she was not issued a valid SSN from the SSA, leave that question blank on the I-821D; put "none" on the I-765.

    The USCIS answer is consistent with the advice of practitioners, who for years have been counseling their clients to put "none" when responding to questions on immigration forms that request a Social Security Number (SSN). The legal rationale has been that the term has been defined in Social Security law to mean a number issued by the Social Security Administration to an applicant. Practitioners have interpreted that question as asking for legitimate numbers issued to the applicant. The language on the I-765 has not changed in ten years, except to add the second parenthetical, "if any." Therefore, the first parenthetical, "include all numbers you have ever used," does not change that interpretation or make it harder to answer "none." One may qualify for more than one legitimate SSN at different times (e.g., victims of domestic violence qualify for a different number), which could explain this parenthetical.

    If the applicant is relying on documentation to establish residence or entry, such as school or employment records, that contain a fake SSN, then they should still not list fake SSNs on the I-765 or I-821D. We do not recommend redacting the SSN on school or employment records as that would only call attention to the issue. Optimally, the applicant should use documentation that does not contain fake SSNs. For example, obtain a separate letter from the employer listing the date of hire and period of employment.

    We should point out that representing a number to be a valid SSN when it is a fictitious number or belongs to another person is a felony under 42 USC § 408(a)(7), punishable by a maximum five years in prison and a $5,000 fine. If such representations are made to a federal agency, that is a separate violation under 18 USC § 1001.

12. Are voluntary departure overstays eligible for deferred action?

    Nothing in the eligibility requirements would automatically bar a DACA applicant who was granted voluntary departure but never left the U.S. Nevertheless, it may be considered as a negative factor.

The voluntary departure could have been granted by USCIS prior to and in lieu of commencement of removal proceedings. Neither the I-821D nor the I-765 specifically asks for this information. If the applicant was caught attempting to enter the country without inspection and was voluntarily returned, we do not interpret this as an "initial entry" that should be listed in answer to questions #13-16 on the I-821D. We interpret that question as asking where, when, and how the applicant successfully entered the United States.

Alternatively, if the applicant was granted voluntary departure by an immigration judge and the applicant never left, the voluntary departure converted to an order of deportation or removal. The applicant is still considered to be in removal proceedings, and this information must be disclosed in answer to questions #3a-c of the I-821D.

Failure to leave after being granted voluntary departure triggers a 10-year bar to certain immigration benefits (e.g., adjustment of status, change of status). INA § 240B(d). Deferred action, however, is not included in this ban.

13. Can one apply for DACA while simultaneously applying for other benefits (e.g. VAWA, U visa, adjustment)?

Yes. So long as an applicant does not yet have legal status, he or she can apply for DACA. Non-citizens may pursue more than one immigration benefit at a time. Once an applicant's VAWA, U status or adjustment is approved, however, he or she will no longer need DACA.

People in the following situations may want to consider applying for DACA:

- Someone with an approved I-130 who is waiting for a priority date to become current, may want to apply for DACA. DACA will confer both deferred action status and work authorization whereas an I-130 approval leads neither to legal status nor work authorization.
- VAWA or U Status applicants who have not yet received approvals might consider applying for DACA depending on VAWA/U versus DACA processing times.
- U derivatives whose cases are on hold awaiting guidance from USCIS HQ due to age-out issues.
- U derivatives whose status was terminated when they turned 21 and whose work authorization has expired.

Asista has prepared a helpful FAQ on the intersection between DACA, VAWA and U Visas that can be found on its website here.

14. Are family members of DACA applicants who have final removal orders protected from ICE enforcement?

Yes, but only to a certain extent. USCIS has stated, in its DACA FAQs, that:

"If your case is referred to ICE for purposes of immigration enforcement or you receive an NTA, information related to your family members or guardians that is contained in your request *will not be referred to ICE for purposes of immigration enforcement against family members or guardians*. However, that information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of the deferred action for childhood arrivals request, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense." (emphasis added)

15. Will an applicant whose request is denied be placed in removal proceedings?

Information provided in a DACA application is not protected from disclosure to ICE and CBP for purposes of enforcement if the case meets the criteria for NTA issuance described in the USCIS policy memo of November 2011. Under that memo, criminal offenses that trigger referral to ICE for a decision on NTA issuance include both egregious public safety offenses (EPS) and other crimes. The EPS list of offenses includes crimes that would almost certainly disqualify a DACA applicant in any event, as either a felony or significant misdemeanor, although a person with an expunged offense could nevertheless qualify.

Non-egregious public safety offenses also require referral to ICE for consideration of NTA issuance where the offense triggers inadmissibility or deportability. Under that category, many applicants with non-disqualifying crimes could nevertheless face referral to ICE for consideration of enforcement. For example, a misdemeanor drug possession is not a significant misdemeanor and does not disqualify an applicant from DACA deferred action. But it is a ground of inadmissibility and, other than possession of 30 grams or less of marijuana, a ground of deportability as well. Similarly, applicants with two misdemeanor crimes of moral turpitude that are not per se significant misdemeanors are eligible for DACA as long as neither misdemeanor had a sentence imposed of more than 90 days. But if denied DACA, the applicant would be inadmissible or deportable with that record, and therefore fall within the guidance for referral to ICE for consideration of issuance of an NTA.

In addition to crimes, cases involving substantiated fraud may also trigger referral for enforcement, per the NTA policy guidance. It is unclear whether that is limited to situations involving fraud in the DACA application or whether it may extend to fraud in connection with another application or entry into the U.S. that is revealed in the DACA application. USCIS states in the FAQs, however, that a DACA applicant who knowingly fails to disclose facts or knowingly makes a misrepresentation will be treated as "an enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and /or removal from the United States". Finally, the USCIS FAQs also state that cases involving "exceptional circumstances" – not defined in the text – will trigger referral to ICE.

16. May an applicant who is denied, re-apply?

Yes. An applicant may not file a motion to reopen or reconsider, and cannot appeal a denial by USCIS. There is nothing to indicate, however, that an applicant may not re-apply. It is not clear how much information USCIS will provide about the reasons for their denials, but to the extent that you can ascertain the reason(s) for the denial, you will want to review those and determine if the applicant can overcome those in a new application before re-applying.

17. Can an applicant under 18 sign a retainer agreement?

In most states, the legal age for entering into a contract is 18. Contracts with individuals younger than age 18 may not be enforceable. The model rules of professional conduct for attorneys do not require that a representative enter into a contract with a client. Most states' conduct rules do not require a retainer agreement or contract. They only require that representatives disclose information describing the scope of representation and basis of any fees. The best practice would be to put this information in writing. Both parties may sign that they have received and understand the document. Clients may also be asked to sign to indicate that the information they provide to their representative is true and complete.

18. Where can I find USCIS's statement on the requirements for filing G-28s in connection with group workshops?

The agency's statement can be found on its website here. CLINIC has asked that USCIS link to it from its pages on DACA.

19. Can an agency offer a DACA workshop with another organization? If so, how?

Yes, in fact CLINIC encourages organizations to collaborate with one another when organizing group-processing workshops. Partners have included United We Dream (UWD) affiliates, local chapters of the American Immigration Lawyers Association (AILA), schools (both public and private), labor unions, places of worship, ethnic community-based organizations, congressional representatives, and local governments. Although some partner organizations are not trained to provide immigration legal services, they can assist with outreach, volunteer recruitment, and donations of space or equipment.

20. How does an agency set the fee for assisting a client with a DACA application?

Each agency needs to determine fees based on its particular situation (geographical variances, parent agency subsidies, etc.). The cost of providing a service should determine the fee to be charged to the client. The following is a useful tool in determining the cost to your agency for providing a new service.

Total costs per year	÷	Total caseworker hours per year	=	Cost per caseworker hour
Cost per caseworker hour	X	Hours to perform the service	=	**Cost of the Service**

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