Understanding the Criminal Bars to the Deferred Action Policy for Childhood Arrivals

1. What are the criminal bars for deferred action?

In addition to a number of other requirements, to qualify for deferred action a person must not be convicted of a felony, a significant misdemeanor, or multiple misdemeanors, and not pose a threat to public safety or national security. DHS has enumerated what each of these terms means.

2. What do these criminal bars mean?

A conviction for a **felony.** A felony is a federal, state or local offense that is punishable by imprisonment of more than one year.

> Not all felonies are created equally. An offense in one state might qualify as a felony and therefore, may bar an individual from qualifying for deferred action, but a similar crime in another state might not qualify as a felony because the offense carries a maximum sentence of one year.

A conviction for a **"significant misdemeanor."** A "significant misdemeanor" is a new immigration standard established particularly for this deferred action program. It is a federal, state, or local criminal 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 (distribution or trafficking);
  - Burglary;
  - Driving under the influence of alcohol or drugs; or
  - Any other misdemeanor not listed above for which the person received a jail sentence of more than 90 days. The person must be ordered to spend more than a 90 day sentence in jail, but does not necessarily have to spend all of that time in jail.

Example: Juan is admitted to probation, imposition of sentence is suspended, and as a condition of probation he is ordered to serve 91 days in jail. Juan is ineligible, although with credits he only serves two-thirds of his sentence.

Example: Juan is admitted to probation, is given a one year suspended sentence with no condition to serve any time in jail. Juan is eligible.[1]

Convictions for **"multiple misdemeanors."** This is defined as three or more non-significant misdemeanors. A misdemeanor is punishable by imprisonment of one year or less, but more than five days. Minor traffic offenses, such as driving without a license, will not be considered a non-significant misdemeanor. If someone has three of more non-significant misdemeanors other than traffic offenses, then they must not occur on the same day nor arise from the same act or scheme of misconduct.

This term of "scheme of criminal misconduct" has already existed in immigration law. The term has been defined differently by courts across the country. Generally, the factors to be considered include time, object and purpose, methods and procedures of the acts, and identity of participants and victims. It is possible that a similar definition will be adopted for the multiple misdemeanors.

3. If one falls into one of the criminal bars noted above, does that mean that he will automatically be denied deferred action?

No. Even if a person falls in one of the criminal bars above, he may be able to qualify for deferred action if he can show exceptional circumstances. Exceptional circumstances in immigration law are defined at INA 240(e) as circumstances that are beyond the control of the alien. Examples in the INA include battery or extreme cruelty, serious illness, or death to the alien or any child or parent of the alien. It is not clear whether this same standard will apply for deferred action, but until further guidance is provided advocates should use it as a baseline. Such approvals are likely to be very rare.

4. Are there any other exceptions to these criminal bars?

Offenses that are listed as not leading to automatic disqualification for deferred action are:

- Any state immigration-related felony or misdemeanor conviction;
- Expunged convictions (including an expunged felony or significant misdemeanor, although, as a matter of discretion, a grant may be unlikely); and

[1] This standard is different than the definition of sentence set forth at INA § 101(a)(48)(B) where a suspended sentence counts for the sentence imposed.

- Juvenile convictions. This covers a youth who is adjudicated guilty in the juvenile justice system. This does not include youth who are convicted as adults.

Note, however, that although these offenses do not trigger the "automatic" criminal bars listed above, DHS can consider them under the discretionary **totality of circumstances** and/or **threat to public safety analysis**, described below and deny an application.

5. Will DHS consider criminal history even if it does not fall within the criminal bars and/or falls within one of the exceptions?

Yes. Deferred action is a discretionary program that takes into account the totality of the circumstances of the individual's case. This means that even if one does not fall within the criminal bars described above and is within one of the exceptions, he is not guaranteed a grant of deferred action because it is just one factor to be considered in the person's entire case. This means that DHS could still deny deferred action for a person who has a significant misdemeanor with a jail sentence that is less than 90 days, for a person who has less than three non-significant misdemeanor convictions, or for a person who has an expunged or juvenile conviction.

Finally, all criminal history, even without a conviction, including arrests and dismissed charges, may be taken into consideration by DHS in determining whether a person poses a "public safety" or "national security" threat. Examples that may fall into the category are gang membership (DHS may define this broadly and advocates should assume any gang affiliation/association would be an issue), participation in criminal activities, or participation in activities that threaten the U.S. Even if the person falls into this category, they may be granted deferred action if they can show exceptional circumstances (described above).

6. What if someone has a pending or old criminal case? Is there anything they can do to mitigate or clear the conviction?

In 2010, in a landmark case called *Padilla v. Kentucky*, the U.S. Supreme Court made clear that the Sixth Amendment of the Constitution requires criminal defense counsel to affirmatively advise a noncitizen of the immigration consequences of his/her criminal case and to defend against the consequences of the case.

If a person has a pending criminal case, he should tell his defender that he is a noncitizen and wants to mitigate the immigration consequences of their criminal case to preserve eligibility for deferred action. United We Dream and the ILRC on behalf of the Defending Immigrants Partnership (DIP) produced a practice advisory for criminal defenders on defense strategies that they should use to protect potential applicants for deferred action which can be downloaded at:
http://www.ilrc.org/files/documents/practice_advisory_for_criminal_defenders_deferred_action.pdf .

If you already have a conviction and the criminal case is already over, you might want to explore whether you can withdraw your plea (if it was recently entered) or, if the plea was entered some time ago, then whether you can vacate (undo) your plea for a legal error. The rules for being able to legally vacate or withdraw your plea differ by state and can be complex. Also, it is important to note that just because your criminal defense attorney did not advise you of the immigration consequences of your case does not mean that you can successfully vacate your case. There are a number of obstacles, one being that some states foreclose a person from getting back into court because of the passage of time despite legal violations in the criminal process. Courts do not like it when old cases come back to them. Even if someone is able to get back into criminal court, the court might deny your claim for a number of other legal reasons. You should consult with an attorney who has experience in post-conviction relief work and do so as soon as possible because there are strict deadlines. The process also can be costly.

Generally, under immigration law, it is not sufficient to expunge (ask to erase your conviction due to rehabilitation or the passage of time). However, for deferred action an expunged conviction will not automatically disqualify an applicant and therefore, is encouraged. DHS, however, will still consider expunged convictions on a case-by-case basis and therefore this strategy will not absolutely guarantee a grant of deferred action.

7. What precautions do you advise for individuals who may have had contact with the criminal justice system?

No person should affirmatively apply for deferred action without obtaining and getting their entire criminal history reviewed. By applying for deferred action, the person risks being denied and referred to ICE to be detained and deported.

Potential applicants should obtain a copy of their entire criminal record (including juvenile adjudications). It is best to get records from three sources:

- *FBI report.* Then you will know what DHS will see. The procedures for obtaining such records is at: http://www.fbi.gov/about-us/cjis/background-checks/.

- *State Rap Sheet.* Each state has a different procedure to obtain criminal records. We need state rap sheets because FBI reports are often wrong or do not contain enough detail. This document will ensure that you get the entire criminal record in a particular state. Make sure to get rap sheets from every state where you may have been arrested or convicted. Some people have expressed concerns about submitting electronic fingerprints to get the records. Based on information from the federal government, these record checks are not used to identify and apprehend immigrants. However, in the application if there is a line stating the reason for requesting for the state rap sheet, you should write "background check" and not immigration. You may also want to have an attorney or other advocate submit it for you, especially if the state process requires that you go to a law enforcement agency to submit your application and fingerprints.

- *A complete copy of the record from the court where conviction took place.* It is very important that you do not just get a summary of the case, but the entire court file. You may have to call the court clerk first to get the requirements. In some places, these records may be online on a county or state website. If not online, there may be a fee to obtain a copy of the entire file, and it could take some time. If it is too onerous to get all three records, you should prioritize obtaining the records from each local jurisdiction where your arrest or criminal case might have arisen.

Once you obtain the records, it will help to determine the immigration consequences of the conviction(s). In addition, if you or an attorney will try to clear up the criminal record, you will need a copy of the court papers.

Meet with a nonprofit organization, an immigration attorney, or advocate experienced in deportation defense or the immigration consequences of criminal convictions. You should provide them with all of your criminal records so that they can give you complete and accurate advice.

United We DREAM, the National Immigrant Youth Alliance and the National Immigration Project of the National Lawyers Guild have a one-page warning for applicants with possible criminal history in English and Spanish that can be downloaded at www.nationalimmigrationproject.org .

Other resources on deferred action can be found at: http://www.weownthedream.org/ and www.ilrc.org