DACA Update: New FAQs from USCIS

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On January 18, 2013, USCIS amended the Frequently Asked Questions (FAQ) that create the eligibility and filing requirements for the Deferred Action for Childhood Arrivals (DACA) program. The updated FAQ can be found at www.uscis.gov, on the Deferred Action for Childhood Arrivals page. The following is a summary of the changes that appear in the updated FAQ; the FAQ is broken into topic areas.

There are 11 new questions and explanations in the FAQ. This article will look closely at each of them, in the order they appear in the FAQ.

1. **Deferred Action**

The first section of the FAQ deals with the meaning and effect generally of deferred action. There is now more explanation of what deferred action means and its effect, how it differs from lawful immigration status, how it affects the accrual of "unlawful presence," and how DACA compares to other forms of deferred action.

What is Deferred Action?

The FAQ now opens with an explanation of the concept of deferred action, and explains that while deferred action stops the accrual of "unlawful presence," it does not confer "lawful status." Because of the way our immigration laws were written, "unlawful presence" is not the same as "unlawful status." For example, a person who is not accumulating "unlawful presence" may not necessarily be in "lawful status."

This strange situation arises from the fact of the "unlawful presence" bars, known often as the "three- and ten-year bars," block re-admission for three or ten years for a non-citizen who has accrued a certain amount of "unlawful presence" and who then departs the United States. Many people who are not in a lawful immigration status accumulate "unlawful presence" for purposes of these bars – but quite a few do not. It is very possible to be out of lawful status, but not be accruing "unlawful presence" for the three- and ten-year bars. For instance, anyone under age 18 does not accrue "unlawful presence" for the three- and ten-year bars, even if he or she has spent years in the United States with no lawful status.

There are numerous other exceptions to the accrual of "unlawful presence," including non-citizens granted deferred action, who do not accrue "unlawful presence" for the three- and ten-year bars while their deferred action is in effect. Deferred action does not erase any "unlawful presence" accrued before the deferred action went into effect.

Non-citizens granted deferred action do not accrue "unlawful presence" while their deferred action is in effect, but they are still not in a lawful immigration status. Only Congress can create

lawful immigration statuses, and deferred action is an act of administrative convenience for the executive branch that carries out U.S. immigration laws – a decision not to concentrate immigration law enforcement on certain groups of people. It is not a "lawful status," but a way for DHS to best focus its limited enforcement efforts.

Do I accrue unlawful presence if I have a pending request for consideration of deferred action for childhood arrivals?

The next new question in the FAQ also deals with "unlawful presence" and explains that anyone who is 18 or over at the time of submitting a DACA request will continue to accrue "unlawful presence" until a decision is made on the request. Anyone whose request is approved will not accrue "unlawful presence" while the deferred action application was pending.

A non-citizen who is under 18 at the time of submitting a DACA request, however, will not accrue "unlawful presence" during the pendency of the request, even if he or she turns 18 while the request is pending. The FAQ does not specifically limit this non-accrual of unlawful presence to applicants whose applications are ultimately approved. It is not clear from the FAQ whether or not a non-citizen who filed a DACA application when he or she was under 18, and whose application was ultimately denied, would have accrued unlawful presence while the application was pending.

If my case is deferred, am I in lawful status for the period of deferral?

Here again, USCIS explains the distinction between "lawful presence" and "lawful status." Deferred action does not confer "lawful status," but does protect non-citizens from accruing "unlawful presence."

Is there any difference between "deferred action" and "deferred action for childhood arrivals" under this process?

In answering this question, USCIS explains that deferred action for childhood arrivals is one form of deferred action, and that it is no different for immigration law purposes from any other form of deferred action.

While Deferred Action for Childhood Arrivals has different eligibility and filing requirements from other forms of deferred action (for instance, the deferred action often granted in VAWA self-petitioning cases), once it is granted, its effect is the same as any other form of deferred action.

2. **Travel**

Advocates working on DACA cases have dealt with many questions from applicants who traveled in and out of the United States before and/or during the DACA eligibility period that

began on June 15, 2007, as well as questions from applicants who want to travel after their DACA applications are approved.

Do brief departures from the United States interrupt the continuous residence requirement?

USCIS explains that a "brief, casual, and innocent" absence from the United States does not interrupt continuous residence. The criteria that USCIS will use to examine absences between June 15, 2007 and August 15, 2012 are:

1. Absence was short and reasonably calculated to accomplish the purpose of the absence
2. Absence not due to an exclusion, deportation, or removal order
3. Absence not because of an order of voluntary departure by an Immigration Judge, or an administrative grant of voluntary departure by DHS before the applicant was put into exclusion, deportation, or removal proceedings, and
4. The reasons for absence, and applicant's actions during the absence, were not contrary to law.

May I travel outside of the U.S. before USCIS has determined whether to defer action in my case?

USCIS says no. Applicants who leave the United States after August 15, 2012 and before their DACA applications are adjudicated will not be granted DACA. Applicants whose DACA applications are approved may only travel if they apply for and are granted advance parole.

If my case is deferred pursuant to [DACA], will I be able to travel outside the United States?

USCIS had previously stated that it would in some cases grant advance parole to non-citizens with DACA, and that DACA applicants who want to leave the United States should do so only after their advance parole requests have been approved. USCIS stated previously that it would approve advance parole for humanitarian purposes, educational purposes, and employment purposes.

USCIS has now further clarified (and narrowed) these standards, providing more specific examples of what constitute valid travel reasons for which the agency will generally approve advance parole. These are:

1. Humanitarian purposes, which include travel for medical treatment, to attend the funeral services of a family member, or to visit a sick relative
2. Educational purposes, which include semester-abroad programs and academic research, and
3. Employment purposes, which include overseas work assignments, interviews, conferences, trainings, or meetings overseas with clients.

USCIS states in the amended FAQ that "travel for vacation is not a valid basis for advance parole." The agency does not indicate what types or how much documentation it expects in support of an advance parole request.

Remember that anyone with a final order of removal must have that removal order reopened and either terminated or administratively closed before he or she leaves the United States. Failure to do so means that any departure will effectuate the removal order. Inadmissibility grounds attach to having an executed order of removal that would then be triggered, with potentially serious immigration consequences.

3. **Filing Process**

The final new material in the amended FAQ is a minor update to the fee exemption guidelines.

Can I obtain a fee waiver or fee exemption for this process?

USCIS had previously laid out its criteria for fee exemptions in DACA cases: it will not grant fee waivers. There are four situations in which USCIS will consider granting fee exemptions. Each must be submitted and approved in advance of the actual DACA application:

1. Applicant is under 18, living in foster care or otherwise lacking parental or familial support, and applicant's income is less than 150% of the federal poverty level
2. Applicant is under 18 and homeless (note that there are no income restrictions in this situation)
3. Applicant is unable to care for her or himself because of a serious, chronic disability, and applicant's income is less than 150% of the federal poverty level, or
4. At the time of the application, applicant has in the 12 months before applying accrued more than $25,000 in unreimbursed medical expenses for her or himself, or for an immediate family member, and applicant's income is less than 150% of the federal poverty level.

4. **Miscellaneous**

Several of the new FAQ questions deal with departures from the United States before the DACA eligibility period, and with a person's status on June 15, 2012.

I first came to the U.S. before I turned 16 and have been continuously residing in the U.S. since at least June 15, 2007. Before I turned 16, however, I left the U.S. 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?

Numerous advocates have encountered clients whose stories fit this scenario: clients who first entered the United States before the age of 16 and before June 15, 2007, but who left the United States after that first entry, and were over 16 on June 15, 2007.

USCIS now explains that such applicants may be considered for DACA *if* they can show that they established residence in the United States before they turned 16 – for instance, if they can provide records showing that they attended school, or worked in the United States, or lived for more than one year in the United States. Such applicants must also that they maintained continuous residence in the United States from June 15, 2007 until the present.

This explanation rules out applicants whose first trip or trips to the United States prior to June 15, 2007 and prior to turning 16 were brief. Applicants who merely visited the United States (as opposed to residing here) before June 15, 2007, while they were under 16, and who then left, and returned before June 15, 2007, but when they had already turned 16 will not be eligible for DACA.

I was admitted for "duration of status" or for a period of time that extended past June 15, 2012, but violated my immigration status before June 15, 2012. May I be considered for deferred action under this process?

This question deals with the requirement that a non-citizen must not have been in a lawful immigration status on June 15, 2012. In certain immigration statuses, like "F" status for students, nonimmigrants are not given a specific end date for their status, but are admitted for "duration of status" (usually indicated on the I-94 card as D/S). The question here is whether violating that status before June 15, 2012 – by working without authorization, failing to report to an employer, or failing to follow a full course of school study – renders a non-citizen out of lawful status for DACA eligibility purposes.

USCIS now states that violating a "duration of status" status, or any other lawful status that was granted to extend after June 15, 2012, does *not* make a non-citizen eligible for DACA. Only the decision of an Immigration Judge terminating that lawful status, prior to June 15, 2012, would make such a person eligible for DACA.

Can I request consideration for deferred action under this process if I live in the Commonwealth of the Northern Mariana Islands?

The Commonwealth of the Northern Mariana Islands became part of the United States for immigration purposes on November 28, 2009, and so entry into, and residence in, the CNMI before that date is not entry into or residence in the United States for DACA eligibility purposes.

USCIS is, however, willing to consider on a case-by-case basis, DACA requests from non-citizens who otherwise qualify for DACA, and who entered into and resided in the CNMI before November 28, 2009. USCIS instructs that anyone in this situation should "make an appointment through INFOPASS with the USCIS Application Support Center in Saipan to discuss your case with an immigration officer."