



Frequently Asked Questions: Deferred Action for Childhood Arrivals (DACA) and Juvenile Delinquency Adjudications and Records¹

Q: What is juvenile delinquency?

A: Juvenile delinquency refers to the process involving alleged violations of law by individuals under a certain age – 18 or under or 16 or under (state laws vary). Under federal law, a disposition of juvenile delinquency is defined as a finding made by a juvenile court of a violation of law committed by a person prior to his or her 18th birthday.² A finding of a violation of law in this process is a juvenile delinquency adjudication, and the sanction or sentence accompanying such an adjudication is a juvenile disposition. A juvenile adjudication is not considered a conviction of a crime, but a determination of the status of the offender.³

Q: If an individual went through a court process for an offense committed when he or she was a minor, does he or she have a juvenile delinquency adjudication?

A: Maybe. Not every youth who commits an offense while he or she is a minor will be tried in juvenile court. Some youth are tried in adult court, which will result in an adult conviction. Some states have hybrid courts and the outcome of the criminal proceeding may not be as clear as in other states. Advocates should inquire about this with their clients and any other relevant person to make sure the case resulted in a juvenile disposition and not an adult conviction.⁴ This distinction is important because unlike adult convictions, juvenile adjudications are not automatic bars to DACA.

¹ For any questions about this advisory contact Angie Junck, Supervising Attorney, Immigrant Legal Resource Center at ajunck@ilrc.org or Kristen Jackson, Senior Staff Attorney, Public Counsel at kjackson@publiccounsel.org.

² See 18 USC § 5031.

³ See the Federal Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, §§ 101-102, 88 Stat. 1109 (1974).

⁴ If the DACA requestor was arrested as a juvenile, but the court case was never filed against the requestor, you will still need to disclose the arrest on the Form. Please see page 6 of this advisory for more information.

Q: Can someone request DACA with a prior juvenile adjudication?

A: Technically yes, because juvenile adjudications will not automatically bar someone from DACA. A juvenile adjudication will not count towards the felony, significant misdemeanor, or three or more non-significant misdemeanors criminal bars to DACA, as long as the juvenile was not convicted as an adult. Juveniles who have been convicted as adults for a felony, significant misdemeanor, or three or more non-significant misdemeanors as defined by the DACA guidelines will not be eligible for DACA unless they can show exceptional circumstances.

Q: Is there any risk in requesting DACA with a juvenile adjudication?

A: Yes, sometimes, but the risk involved depends on many factors. A juvenile adjudication is not an automatic bar to DACA. But U.S. Citizenship and Immigration Services (USCIS) will be reviewing and analyzing ANY past criminal conduct, including juvenile delinquency, in the totality of the circumstances to determine whether the person merits a favorable exercise of discretion. USCIS may deny under this ground. USCIS will also be reviewing any past criminal conduct, including juvenile delinquency, to determine if the DACA requestor poses a threat to public safety or national security. If the requestor is found to be a threat to public safety or national security, he or she will not be granted DACA and may even be placed into removal proceedings. USCIS can also refer the case to other law enforcement agencies for the investigation or prosecution of a criminal offense.

Advocates should not presume that everyone with a juvenile record should not request DACA on the assumption that all juvenile records are serious problems. Advocates should also not presume that juvenile records are harmless and there is no risk in submitting a DACA request for someone with such a record. Be open minded yet cautious and help your client make an informed, wise decision. All clients should be made fully aware of the risks, preferably in writing.

Q: Are there certain offenses or criminal conduct, even if they result in juvenile adjudications rather than adult convictions that will put an individual at a greater risk if he or she requests DACA?

A: Yes, there are certain criminal activities that USCIS has flagged as serious that may put the requestor at a greater risk because he or she may be found to be a threat to public safety or national security. For instance, these include past or current gang membership and acts involving torture, genocide, human trafficking, killing a person, severely injuring another person, and any kind of sexual contact or relations with any person that was being forced or threatened.⁵

⁵ Most of these types of conduct are highlighted in separate questions on the Form I-821D and are likely to be considered public safety threats or factors that weigh heavily as a matter of discretion.

Requestors with any gang affiliation, association, or membership should be particularly cautious. Those with current gang membership should not request DACA. However, those who have past gang membership, but repudiated the gang may want to apply only in rare circumstances.⁶ USCIS is likely to prioritize gang related cases for denial. Advocates and requestors may also want to assume, cautiously, that a juvenile offense that would fall within the felony or significant misdemeanor categories if it had been handled in adult court may be subject to heightened scrutiny by USCIS.

Q: How does USCIS know if someone is or was in a gang or affiliated with one?

A: There are different ways gang issues or affiliation may come up. For example, some high schools, cities, and counties have gang lists or databases with names of people they have identified as possible gang members or associates. These lists may be shared with USCIS. There are also formal gang injunctions, probation conditions that make someone stay away from a gang or gang members, and gang-related convictions and sentence enhancements that may be imposed on the person. Gang issues may come up when USCIS reviews background information as a result of biometrics. USCIS will also find out about previous or current gang membership if the applicant answers “yes” to Question 4 of Part 3 of the Form I-821D.⁷

Q: Since there may be some risk in requesting DACA with a juvenile adjudication, are there any circumstances in which it may be advisable to request DACA?

A: Yes, but it is important to assess the case as a whole. Weigh the severity, length, and recency of the record against the positive equities in the case. Some factors to consider are:

- How long ago the offense occurred;
- Any mitigating circumstances underlying the offense;
- Evidence of rehabilitation;
- Positive school record; and/or
- Community contributions.

Advocates should also consider the timing of the application to minimize risk. If the offense occurred recently it might be wise in some cases for the person to wait a while, possibly a year, to allow time to show rehabilitation. But, there may be no time like the present for some people – since the passage of time could increase the chance that a person picks up another offense,

⁶ These cases would depend on the strength and extensiveness of the evidence demonstrating repudiation of the gang and rehabilitation.

⁷ The form asks, “Are you now or have you ever been a member of a gang?”

perhaps out of hopelessness about their prospects or related to doing unauthorized work or otherwise finding ways to survive in the absence of DACA.

It is also advisable for advocates to request DACA for youth that already have Immigration and Customs Enforcement (ICE) holds or are currently in removal proceedings, since the individual has already been identified by Department of Homeland Security (DHS).

Q: How can a DACA requestor obtain information about his or her juvenile adjudication?

A: If a youth has a juvenile record, it is important that the advocate obtain as much information as possible in order to provide the best advice in regards to his or her DACA eligibility. It is best to get records from three sources:

- The FBI criminal background report;
- The state (or states, if the requestor has offenses in more than one state) rap sheet (in California, it is done through a process called “livescan”); and
- The juvenile court with jurisdiction over the location where the arrest or adjudication took place.

Advocates may also try to obtain records from the youth himself or herself, the police or probation department, the district or state attorney’s office, or the juvenile’s private or public defender. *Advocates should make sure they are complying with their state confidentiality laws when obtaining the records from these individuals, offices, or departments.* Certain juvenile records may be sealed and some, depending on the state, may be confidential. For example, in California, there is no exception allowing immigration attorneys to obtain juvenile court records – even from their own client – without a court order.

Q: If a person’s juvenile case is sealed or confidential under state law, what does that mean for purposes of DACA?

A: Sealing and confidentiality laws are in place to protect youth from the stigma of criminality and help with their rehabilitation and treatment. Advocates should look up the relevant state laws to see how they can legally disclose juvenile incidents and records. Generally, sealing allows an individual to have his or her whole record erased and sealed, such that legally the case is considered never to have occurred under state law. For example, California Welfare & Institutions Code § 781(a) provides that once juvenile records are sealed, “the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed.”

This raises the question whether a person with a sealed record has the right to deny or not disclose that the incident or case ever happened for purposes of DACA or any other immigration benefit. It is important to note that *there is no known legal exception allowing nondisclosure of a juvenile adjudication for federal immigration purposes* even when a state law provides that the juvenile adjudication does not exist. So even if an entire case is sealed, it is recommended that the requestor disclose the incident because it may appear that the individual is engaging in fraud if he or she fails to disclose the information. Also, even though the case may currently be sealed, the FBI and DHS might have known of the case before the sealing. In many states, juvenile records can be sealed and this prevents juvenile delinquency records from being shared with the federal government and appearing on the FBI rap sheet. But in some states, like in California, a person cannot seal his or her record until he or she turns 18. As a result, sealing will not protect a youth if information was shared with the federal government while he or she was still a minor.

While sealing under a state law may protect against disclosing the existence of an offense (but not for immigration purposes), confidentiality provisions may protect against the disclosure and dissemination of juvenile information and juvenile court records. Many states, including California, maintain confidentiality provisions that prohibit the open disclosure of information and records concerning youth in the child welfare system and juvenile justice system. Generally, confidentiality provisions limit who can see and obtain juvenile court records and provide that court permission is needed to disseminate records to unauthorized parties. In California, for example, even if the juvenile or parent obtain the records lawfully, they will violate state law if they then disseminate the records to an unauthorized party, such as USCIS or an immigration attorney, without first obtaining court permission to do so. Moreover, in California, even if juvenile court proceedings are never instituted and a juvenile matter is handled informally juvenile records remain confidential.⁸ For purposes of DACA, a requestor, therefore, may not disclose juvenile records based on certain state laws to USCIS without obtaining a court order. Further guidance on this issue follows. Every person should research the relevant state confidentiality laws before disclosing these records in a DACA request.⁹

Q: When requesting DACA with a juvenile adjudication, does a requestor need to disclose the adjudication on Form I-821D in response to Question 1 of Part 3?

⁸ *Lorenza P. v. Superior Court* (1988) 197 Cal.App.3d 607 (“Even if juvenile court proceedings are not instituted and the matter is handled informally the juvenile’s records relating to the incident remain confidential.”) (*T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 780-781 [94 Cal.Rptr. 813, 484 P.2d 981]; *Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103, 106-109 [163 Cal.Rptr. 385].)”

⁹ Some resources include: Reporter’s Committee for Freedom of the Press “Juvenile Access Chart,” May 2012 at www.rcfp.org/secret-justice-access-juvenile-justice/juvenile-access-chart and American Bar Association’s resource, “Think Before You Plead: Juvenile Collateral Consequences in the United States” at www.beforeyouplea.com.

Have you ever been arrested for, charged with, or convicted of a felony or misdemeanor in the United States? *Do not include minor traffic violations unless they were alcohol- or drugs-related. Do include incidents handled in juvenile court.*

☐ Yes ☐ No

A: There is no specific guidance as to whether disclosure is only required where the person actually appeared before a juvenile court. For example, some youth's charges are resolved by citation issued by law enforcement and therefore, never appeared in juvenile court. However, the better question in these cases is whether the person was subject to an arrest.¹⁰ If the DACA requestor was arrested as a juvenile, but charges were never filed or the person never appeared in court, it is still advisable to disclose the arrest on the I-821D.

Although there are arguments against disclosure of juvenile incidents, since DACA is discretionary you do not want to risk looking like you are trying to omit important information. USCIS will look closely at a case where a requestor does not disclose a prior juvenile adjudication, but the background check shows that there was an arrest or other incident. Failure to disclose might be considered fraud and lead to the initiation of removal proceedings. It is, therefore, recommended to disclose juvenile adjudications.

Q: Question 1 of Part 3 of the I-821D also states that if someone answers "Yes" he or she must include copies of records. If a requestor answers yes, does he or she need to submit any juvenile delinquency documents with his or her DACA request?

If you answered "Yes" you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law.

A: It depends on your jurisdiction's laws. Although the form states that a requestor must include copies of records, USCIS is planning on modifying the form by adding that requestors do not need to submit records if it is "prohibited under state law." Before turning over documents to USCIS or other federal immigration authorities, you need to ensure that you are complying with applicable state and local confidentiality provisions. There may be civil or criminal sanctions under state law for unauthorized disclosure of records.

¹⁰ Generally, an arrest happens when a reasonable individual feels he is not free to leave. An advocate may want to also ask whether the police officer read the individual their Miranda rights.

In California, pursuant to the Welfare and Institutions Code sections 827 and 828, juvenile court information and files can be shared only with certain listed individuals; these include, for example, agencies working within the juvenile and child welfare systems, the minor, and the minor's parents. There is also an exception for attorneys and judges, but only for those attorneys or judges that are actively involved in juvenile proceedings involving the minor. There is no exception for immigration attorneys or even for the federal government, and in fact there are criminal penalties for those that violate these laws.

In California, even if the juvenile or parent obtain the records lawfully, they will violate the law if they then disseminate the records to an unauthorized party, such as USCIS, without first obtaining court permission to do so. While it may seem that the youth holds the power to determine whether or not to disclose his own confidential records, in some states, such as California, only the state court, not the youth, holds the authority to make that decision.

If juvenile records are protected by state confidentiality laws, as they are in California, consider the following approach:

Attach an addendum (not a declaration) to the Form I-821D explaining that you cannot disclose any juvenile court documents because they are confidential under state law, and court permission is required for disclosure. Be careful to not mischaracterize the law; for example, do not state that you cannot disclose the record under any circumstance if court authorization may indeed be possible. You may also include in the addendum a very short description of the charges for which the person was adjudicated delinquent as well as the disposition (sentence). The key is to be brief and direct and not to phrase descriptions in ways that may be viewed as admissions.¹¹ Sample language includes the following:

- I was arrested as a minor for petty theft. My case was handled in juvenile court, and it is now closed. My juvenile court case file is confidential under California law. I do not have a juvenile court order authorizing disclosure of documents related to this incident, so I am unable to provide them.
- In March 2010, when I was 13 years old, I was given a ticket for misdemeanor disturbing the peace at school. I completed community service and the case against me was dismissed. My case was handled in juvenile court. The juvenile court documents are confidential, so I am not including copies with this request.¹²

¹¹Note: Submitting a declaration on behalf of the requestor detailing the offense may be akin to submitting juvenile court records and may violate state confidentiality laws. Advocates should also carefully consider the possible future consequences of disclosing the relevant conduct. For example, disclosing a drug related offense may bar an individual from adjusting his or her status in the future.

¹² This excerpt was submitted in a pro per DACA request, which was approved quickly without issue.

Although not advisable, if you decide to submit the juvenile court records where state law protects their confidentiality, make sure to first obtain court permission and include a cover page explaining that USCIS is legally barred from disseminating the documents to EOIR or any other agency without court permission, if that is true in your state. *Note that redacting juvenile court documents on your own and submitting them to USCIS is not a substitute for obtaining juvenile court permission. Moreover, USCIS could view your redactions as an attempt to tamper with evidence.*

Advocates should be aware that disclosing such records in general can be problematic for several reasons: it may jeopardize future cases where an advocate might want to keep information from being disclosed; it can set expectations within USCIS or other relevant agencies that these records should be provided on a regular basis; and it undermines the important work advocates are doing to ensure that DHS (in particular ICE) does not obtain confidential juvenile court information without going through proper state court channels.

Q: If an individual decides to request DACA with a prior juvenile adjudication, should he or she submit any additional evidence to prove that he or she is not a threat to national security or public safety?

A: Yes, it may be wise to submit proof of the person's positive equities so that USCIS can consider other evidence that will counterbalance the person's juvenile adjudication. Positive equities can include evidence of rehabilitation, completion of court-mandated program or other programs such as counseling, payment of restitution, a recent span of time with a clean record, mitigating evidence about the crime, school/college attendance, community activities, and relationships to U.S. citizens (e.g., married to U.S. citizen or has U.S. citizen child), etc. Be sure, however, not to submit confidential juvenile documents demonstrating these equities without permission.

Some advocates have submitted client declarations not only to document positive equities, but also to present what they believe to be sympathetic facts underlying a juvenile adjudication – particularly one that sounds troubling on its face or which, if handled in adult court, would have triggered a DACA bar. Submitting such a declaration should be done, if at all, with extreme caution. Done improperly, a detailed declaration could expose a DACA requestor to referral for possible criminal prosecution as well as to a future finding of inadmissibility based upon facts disclosed in the declaration. Advocates should strongly consider providing a simple explanation in the I-821D, and consider a declaration only if the client receives an RFE. Regardless, if a declaration is submitted it should be very narrowly focused to address the circumstances of the incident without implicating the DACA requestor in any additional, uncharged delinquent conduct.