



Understanding the Criminal Bars to the Deferred Action Policy for DREAM Act-Eligible Individuals

1. What are the crimes 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 to a certain extent what each of these terms means.

2. What do these crimes 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 no more than one year of imprisonment or even no imprisonment; and
- Involves the following characteristics:
 - Offenses involving violence, threats, or assault, including domestic violence;
 - Sex offenses: sexual abuse or exploitation;
 - Property offenses: burglary, theft, or fraud;
 - DUIs -- driving under the influence of alcohol or drugs;
 - Obstruction of justice offenses: obstruction of justice; bribery; unlawful flight from arrest, prosecution, or the scene of an accident (hit & run);
 - Firearms offenses: unlawful possession or use of a firearm;
 - Drug Offenses: drug distribution or trafficking (sales); or unlawful possession of drugs (even small quantity of marijuana).

DHS plans to further clarify the meaning of “significant misdemeanor.” We are waiting to see how DHS will determine whether a crime involves the above characteristics and whether there will be room for advocates to argue against such characterizations of the convictions at issue.

Convictions for “**multiple misdemeanors.**” This is defined as three or more non-significant misdemeanors not occurring on the same day and not arising 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.

Even without a conviction, criminal history, including arrests and dismissed charges, may be taken into consideration 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 at issue), participation in criminal activities, or participation in activities that threaten the U.S.

3. How are juvenile delinquency adjudications treated under the program?

DHS uses the word “conviction” and offenses arising out of juvenile court do not result in convictions but are juvenile adjudications. Because for immigration purposes such juvenile adjudications do not constitute convictions, it would appear that they would not be used against an applicant except where they might provide evidence of a threat to public safety. However, when this question asked on the national DHS stakeholder call, DHS stated that they didn't have an answer to this issue yet.

It is possible that DHS will decide that a juvenile adjudication will count as conviction and, thus, potentially bar eligibility for deferred action. In immigration court, DHS has not shown much leniency against youth with juvenile delinquency histories. In an informal survey the ILRC conducted with non-profit immigrant youth legal service providers across the country, we only heard of three cases of youth with juvenile delinquency that were offered prosecutorial discretion under the Morton memos and the facts involved in those cases were quite sympathetic.

4. 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:

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. For immigration purposes, it is not sufficient to expunge (ask to erase your conviction due to rehabilitation or the passage of time). 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.

5. What precautions do you advise for individuals who may have had contact with the juvenile or criminal justice systems?

Once the affirmative application process opens, no person should 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 use this time to 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.

- 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 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 arose.

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 one page warning for applicants with possible criminal history in English and Spanish that can be downloaded at www.nationalimmigrationproject.org .