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## New immigration policy can carry risks for some immigrants

By Keil Hackley and Ryan Kosobucki

By now, most people in the United States know about the Obama administration's latest immigration enforcement — or, nonenforcement — policy known as Deferred Action for Childhood Arrivals, or DACA. It allows certain undocumented youth to apply for work authority in two-year increments.



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The Department of Homeland Security on Aug. 14 unveiled its formal application forms and instructions. While the DACA process appears to be fairly straightforward, and can be for many, surrounding the process are not.

First, inherent to the decision to declare one's presence — and for practical purposes, one's family — to the federal government are confidentiality considerations to mull over.

A faulty or improvidently submitted request can result in that applicant's referral to enforcement authorities, and there is no appeals process from a denied DACA application.

But beyond the obvious threshold decision to apply for this relief, there is any number of individual eligibility considerations and borderline cases certain to arise under DACA's newly articulated standards that can directly affect an applicant's chance of success.

Addressing each single plausible situation that we can immediately conjure up — and there are many — is beyond the scope of this article, but the following examples gives a taste of the contours a particular client's case can present.

### Lukewarm assurance

First, suppose an unqualified applicant takes a gamble and applies for DACA. While the Department of Homeland Security has offered some assurances regarding confidentiality as to applicants' families, those assurances are necessarily lukewarm.

Let's say our hypothetical DACA applicant has his case referred to ICE, the immigration enforcement authority, for suspected fraud, criminal activity that is an enforcement priority — or any number of other reasons.

DHS says that the information on the applicant's related family members — individuals who have quite likely overstayed a visa or made an illegal entry themselves — contained in the request will not be referred to ICE for purposes of immigration enforcement against family members.

But, because the entire policy and procedure themselves are purely creatures of administrative fiat, DHS makes clear that its "assurance" on use of information on family members or guardians "may be modified, superseded, or rescinded at any time" without notice, and essentially, not to rely upon it for anything.

And though DHS says it will not turn over application information to ICE for enforcement purposes, it informs us in the same breath that family members' information may be shared with ICE for ICE's assistance in the consideration of the DACA request itself.

### **Criminal history**

For applicants with criminal history, understanding the sentence imposed and the effects of any post-conviction relief is critical. In addition to a number of other requirements, a successful DACA applicant cannot have been convicted of a felony, a significant misdemeanor, or three or more other misdemeanors.

The significant-misdemeanor standard is a new immigration standard established particularly by DHS for the DACA program. Significant misdemeanors — and therefore disqualifying misdemeanors — for DACA purposes are domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking or driving under the influence, regardless of the sentence imposed. Also, being in custody in excess of 90 days for any other misdemeanor will upgrade it to serious.

Thus, notwithstanding that Florida judges have statutory authority to withhold adjudication in certain criminal matters that in theory shields a defendant from conviction and the collateral consequences that accompany it, a judgment of adjudication withheld historically is for immigration purposes, a conviction that adversely affects eligibility for immigration benefits.

There will be multifaceted considerations to be made in making application for DACA, and neither applicants nor their attorneys should take the process for granted. Potential applicants, if there is any question, ought to seek the opinion of qualified counsel to assess whether an application is in their best interest. If so, make it as complete and compliant as it can be under the law.

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