Practice Advisory for Criminal Defenders:[1]
Certain Criminal Offenses May Bar Persons from Applying for the New Deferred Action Status Program Announced by President Obama

On June 15, 2012, the Obama Administration announced that it would not deport certain undocumented persons who entered the U.S. as children. The Department of Homeland Security (DHS) has offered some initial guidance on the type of criminal offenses that will make a person ineligible to be granted **deferred action**. Deferred action means that, even though the individual is undocumented and subject to deportation, the government agrees to "defer" any actions to remove them. So, in essence, even though deferred action does not provide a pathway to getting lawful permanent resident status (a greencard) or citizenship, it will allow young people to remain in the U.S. and apply for a work authorization document from the government that entitles them to legally work in the U.S.

This advisory for criminal defense counsel outlines defense strategies to preserve a client's possible eligibility for deferred action.

Identifying Eligible Clients: Basic Eligibility Requirements & Crime-Related Bars

Under *Padilla v. Kentucky*, the U.S. Supreme Court made clear that it is part of defense counsel's Sixth Amendment duties to advise a client of the consequences that a criminal disposition can have on the client's eligibility to maintain or obtain lawful immigration status and/or seek relief from deportation. As such, defenders should screen any client who is 30 years old or younger to determine if she is eligible to seek deferred action. Where she is, it is important to let her know this (you may be her only source of this information) and to attempt to resolve her criminal proceedings to preserve her eligibility to apply.

To qualify for deferred action, the individual must:
(1) be 30 years old or younger;
(2) have entered the U.S. when she or he was under age 16;
(3) have been physically present in the U.S. on June 15, 2012 and continuously resided in the U.S. during the preceding five years (except for brief and innocent absences for humanitarian purposes);
(4) be currently in school or have graduated from high school or obtained a GED, or are honorably discharged from coast guard or armed forces; and

[1] The Immigrant Legal Resource Center (www.ilrc.org) is a partner organization of the Defending Immigrants Partnership, a national collaborative to assist criminal defense counsel effectively represent noncitizen defendant (www.defendingimmigrants.org). Thanks to Ann Benson, Mike Mehr, Graciela Martinez, and Raha Jorjani for their insightful comments.

(5) **have not been *convicted of* a felony, a significant misdemeanor, or multiple misdemeanors**, and **not pose a threat to public safety or national security**.

A broad array of criminal offenses will bar eligibility including:

- A conviction for a **felony.** A felony is a federal, state or local offense that carries a potential sentence of more than one year.
- A conviction for a "**significant misdemeanor**." A "significant misdemeanor" is a federal, state, or local criminal offense punishable by no more than one year of imprisonment or even no imprisonment that involves: **violence, threats, or assault, including domestic violence; sexual abuse or exploitation; burglary, theft, or fraud; driving under the influence of alcohol or drugs; obstruction of justice or bribery; unlawful flight from arrest, prosecution, or the scene of an accident; unlawful possession or use of a firearm; drug distribution or trafficking; or unlawful possession of drugs.** DHS plans to further clarify the meaning of "significant misdemeanor."
- 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.
- 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" threat**. Examples that may fall into this category are **gang membership** or **participation in criminal activities**.

WARNING: While a **juvenile delinquency adjudication** does not constitute a "conviction" under immigration laws, DHS has not yet decided whether juvenile adjudications will be treated the same as adult convictions under deferred action. It is possible that DHS will decide that a juvenile adjudication will count as conviction and, thus, potentially bar eligibility.

Until further guidance is provided, juvenile defenders should assume that the crimes bars described above will apply to juvenile adjudications, making a juvenile client ineligible for deferred action. Therefore, as a matter of precaution, defenders should employ the defense strategies below. Defenders should also screen youth clients for eligibility for other forms of relief as youth may be eligible to obtain lawful status in a number of ways. See *Summary Checklist for Defense of Noncitizen Juveniles* available at www.defendingimmigrants.org.

Defense Strategies[2]

- **Informally defer the plea.** Ask the prosecution to agree to defer the plea hearing so that the defendant can voluntarily meet specified goals, e.g., perform community service, and then make an alternative plea or no plea after goals are completed.
- **Request a continuance.** Further guidance from DHS is anticipated by mid-August 2012. Given the stakes for the noncitizen defendant, request a continuance to permit additional guidance to inform negotiations and resolutions.
- **Seek a deferred adjudication disposition where a plea of guilty is not required**. If the offense at issue will - or could - be characterized as a "significant misdemeanor," or a non-significant misdemeanor offer is not on the table, and the prosecutor is unwilling to continue the case until further guidance from DHS is released, pursue negotiations to resolve the case through a deferred

[2] The criminal bars to deferred action are defined such that the defense strategy of carefully crafting the record of conviction to avoid a deportable or inadmissible offense may not be sufficient to protect your client. Furthermore, it is unclear at this time what kinds of evidence may be considered to determine if the offense falls within one of the criminal bars.

adjudication process (e.g. stipulated order of continuance, diversion) that does not require the defendant to admit guilt or admit to facts sufficient to warrant a finding of guilt. If a plea of guilty is entered, even if the case is later dismissed, it will not be "immigration safe."

- **Plead to a non-misdemeanor offense**, e.g., infraction or other non-misdemeanor public offense. Non-misdemeanor offenses under state law should not be considered "significant misdemeanor" or a misdemeanor.
- **Plead to an offense that is likely a non-significant misdemeanor.** Loitering, trespass, disturbing the peace, driving without a license, and routine traffic violations should be safe. Defense counsel can consider offering, in exchange for a reduced charge, a more severe non-jail sentence such as additional hours of community service, counseling, or work release.
- **Explore vacating a recent plea on the basis of legal error.** For example, in California, under Calif. P.C. § 1018, a court may allow a defendant to withdraw his or her plea "for good cause" before judgment is entered or within six months after the defendant is placed on probation if imposition of sentence is suspended. Another option is to work with the prosecutor to withdraw the plea and substitute another, safer plea.
- **Explore post-conviction relief.** Investigate possibilities of vacating the plea based on ineffective assistance of counsel or failure of the court to administer a statutory advisal on the immigration consequences. This is a possibility if at the time of plea the offense already was likely to have adverse immigration consequences.
- **Consider taking the case to trial.** If deferred action is the only way your client will have security against deportation, she may be want to take her case to trial if a plea will clearly make her ineligible for deferred action. The biggest risk of losing at trial would be an increased likelihood of actually spending time in jail (as opposed to a plea that would avoid this). If she spends time in jail, she may be apprehended by ICE.

Immigration Enforcement & Advising Your Client of His/Her Rights

- Qualifying persons in criminal custody with ICE detainers/holds may contact ICE directly at: the Law Enforcement Support Center's hotline at (855) 448-6903 (24 hrs, 7 days/wk), ICE Public Advocate on its hotline at (888) 351-4024 (M-F, 9am-5pm) or by email at EROPublicAdvocate@ice.dhs.gov.
- For persons already in ICE custody, DHS will conduct a criminal background check and may interview them. If the person qualifies for the program, the person should be released from immigration custody.
- For undocumented persons who are ineligible for the program, the defense priority may be to try to avoid contact with ICE by staying out of jail. However, counsel should be careful to advise this group of clients not to hastily accept a plea that would eliminate their options for lawful status without understanding the long-term consequences. Although a person may not be eligible for deferred action, try to plead to an offense that would not bar them from getting legal status in the future and is a low enforcement priority to preserve their eligibility for prosecutorial discretion.
- Warn your client not to apply for deferred action without getting their complete criminal history (including any juvenile history) reviewed first by an immigration lawyer.
- Advise your clients that DHS is not currently accepting **affirmative** applications for deferred action. The application will not be available until mid-August 2012. However, individuals who are in immigration removal proceedings may apply for deferred action at this time.

For more information on defending noncitizens in criminal proceedings visit www.defendingimmigrants.org (membership required).