



February 12, 2013

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U.S. Citizenship and Immigration Services, Department of Homeland Security

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Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I- 821D, Revision of a Currently Approved Collection

Dear USCIS Desk Officer,

The American Immigration Council (AIC), the American Immigration Lawyers Association (AILA), the Catholic Legal Immigration Network, Inc. (CLINIC), and the National Immigration Law Center (NILC) submit the following comments in response to the notice of revisions to Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and accompanying instructions published in the Federal Register on Friday, December 14, 2012.

AIC is a 501(c)(3) tax-exempt, not-for-profit educational and charitable organization whose mission is to educate the American public about the contributions of immigrants to American society, to promote sensible and humane immigration policy, and to advocate for the just and fair administration of our immigration laws. Founded in 1987, the AIC carries out its mission through its four divisions: the Legal Action Center, the Immigration Policy Center, the International Exchange Center, and the Community Education Center.

Founded in 1946, AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

CLINIC supports a national network of community-based legal immigration services programs. Its network includes over 210 affiliated immigration programs, operating out of 350 offices in 47 states. CLINIC's network employs roughly 1,200 staff, including attorneys and accredited representatives who, in turn, serve over 700,000 low income immigrants each year. CLINIC and its member agencies provide free and low-cost representation to family-based immigration applicants, applicants for Deferred Action for Childhood Arrivals (DACA), victims of trafficking and criminal predation, refugees, asylum-seekers, domestic violence survivors, Special Immigrant Juveniles, persons in removal proceedings, and applicants seeking Temporary Protected Status.

Founded in 1979, the National Immigration Law Center (NILC) is the only national legal advocacy organization in the U.S. exclusively dedicated to defending and advancing the rights of low-income immigrants and their families. NILC promotes ways to advance just and humane immigration reform policies that are in line with our country's core values. Ultimately, NILC's goals are centered on promoting the full integration of all immigrants into U.S. society. Ensuring that as many people as possible are able to apply for programs such as DACA is critical to meeting that goal.

INTRODUCTION

In its December 14, 2012 notice, U.S. Citizenship and Immigration Services (USCIS) seeks public input on proposed changes to Form I-182D and the accompanying instructions. Form I-821D allows individuals to request that USCIS defer action in cases of certain young people who came to the United States as children based on a memorandum on prosecutorial discretion issued by the Secretary of Homeland Security on June 15, 2012. We provide comments on both the proposed revisions to the draft form and the form instructions.

We commend USCIS for several changes to the form and instructions that help clarify the type of information required to successfully complete the process for requesting Deferred Action for Child Arrivals (DACA). Notably, the form now provides a more complete explanation of "removal proceedings" in question 3.a of Part 1 and uses the phrase "status or outcome" in question 3.b of Part 1. We also appreciate USCIS's modification of question 15 in Part 1, which now asks DACA requesters to specify their status as of June 15, 2012 instead of their status at entry. In addition, the instructions now provide greater detail. In particular, they provide much more comprehensive descriptions of the types of documents that will be accepted to demonstrate that a requester meets DACA's educational requirements. They also clarify and expand the types of documents that may be used to prove identity.

While we welcome these changes, we encourage USCIS to make several additional changes to Form I-821D to make it more understandable and accessible to DACA requesters, particularly those requesters who are unrepresented.

FORM I-821D

Page 1

USCIS has developed detailed and informative instructions to accompany Form I-821D. However, an individual preparing Form I-821D may not immediately understand that the instructions are available because the form does not reference them until page 4. Given the complexity of the request process and the importance of the instructions in describing the DACA eligibility criteria and required evidence, reference to the instructions at the beginning of the form would be beneficial. Notably, the Form I-589, Application for Asylum and Withholding of Removal, mentions the accompanying instructions at the top of the form: "See the instructions for information about eligibility and how to complete and file this application...."

Recommendation: Like the I-589 Form, the Form I-821D should include a reference to the accompanying instructions at the top of the first page of the form.

Page 1, Part 1, 3.c

Several places on the form include fields that require the DACA requester to provide dates in the format mm/dd/yyyy. We appreciate USCIS specifying in the instructions to the form that requesters may provide approximate dates if they do not know an exact date. This clarification will help many DACA-eligible individuals who came to the United States as young children and may not remember exactly when certain events happened. The message conveyed in the instructions, however, should also be included in the form in each place where a requester is asked to provide a date. This will help resolve any lingering confusion.

Recommendation: The form should include the following language parentheticals after "mm/dd/yyyy": (an approximate date is acceptable).

Page 1 Part 1. 3.c and 3.d

The amendments to the form expand on an existing field requesting the "Date and Location of Proceedings." A DACA requester completes this field after indicating that he or she is currently or has been in removal proceedings. The proposed changes to the form require the requester to indicate the "Date of Proceedings" with an exact day, month and year, but do not define what "Date of Proceedings" means. It is unclear what date USCIS is requesting in this question: the most recent hearing date, the next hearing date, the date the proceedings were administratively closed or terminated, the date removal proceedings were initiated, or the date that a final removal order was issued. USCIS should make it clear in the instructions what date the requester should specify.

Page 2 Part 1. 15

The drop down menu at question 15 provides multiple options to describe a requester's "status" as of June 15, 2012. The vast majority of the listed options, if selected, would indicate that the person was in lawful status on June 15, 2012 and is therefore ineligible for DACA. Including these options, which are more likely to reflect the requester's previous status, is counter-intuitive and will cause confusion. Other

immigration benefits forms do not provide options for completing the form that would cause applicants to be ineligible for the benefit they are seeking. For example, Form I-130, Petition for Alien Relative, only allows a petitioner to select family members who could be eligible beneficiaries. Similarly, Form I-589, Application for Asylum and for Withholding of Removal, only allows applicants to indicate that they are seeking asylum or withholding of removal based on grounds that would make them eligible.

Recommendation: The form should provide only two options in the drop-down menu beneath “Status as of June 15, 2012”: 1) “no lawful status,” and 2) “expired”.

Page 4 Part 3. 1.

The form currently requires a DACA requester to indicate whether he or she has been arrested for, charged with, or convicted of a felony or misdemeanor in the United States, even if the incident was disposed of in juvenile court. The form further requires that a requester provide documents from the juvenile record, including copies of all arrest records, charging documents, dispositions, and sentencing records. The form only allows a person to withhold the records if the disclosure is prohibited under state law.

As the form recognizes, disclosure of juvenile convictions may violate state law. Though juvenile records are public in some states, many states do not permit the disclosure of juvenile records to parties outside the juvenile justice system without first obtaining a court order. For example, California state law prohibits sharing juvenile records outside the state child welfare and juvenile justice systems without a court order. See California Welfare & Institutions Code §§ 827 and 828. In these states, lawful disclosure may only occur after a person obtains court permission. DACA requesters in possession of their juvenile records may unknowingly violate the law by sharing these records with USCIS. Those who attempt to obtain a court order may be subjected to an arduous process, which will be particularly difficult for those who are unrepresented. Other DACA requesters may navigate complex local procedures to gain access to their juvenile records only to discover that these records are sealed and unavailable. In these cases, it is unclear how a requester should complete the form.

Because the procedures for obtaining disclosure of records depend on the laws of a particular state, adjudications of DACA requests will not be treated uniformly. Individuals who have ready access to their juvenile records must provide USCIS with information that will negatively impact their DACA requests, while other requesters will be protected against the consequences of making such disclosures. The disparity in the process for obtaining juvenile records will likely discourage deserving individuals from requesting DACA.

To ensure uniform treatment of all DACA requests, USCIS should not require DACA requesters to reveal whether they were charged with or convicted of a felony or misdemeanor if that incident was handled in juvenile court. Removing this requirement will prevent the unavoidably inconsistent and unfair treatment of DACA requesters who are subject to divergent state laws.

In addition, it is unclear whether documents like police reports would be covered by “arrest records.” This uncertainty may deter individuals from requesting DACA. Limiting evidence of criminal convictions in DACA cases to the record of conviction (charging documents, plea agreements, plea colloquy transcripts, and verdict or judgment of conviction) is generally consistent with the instructions on Form

I-821D and is consistent with sound policy. This limitation would lead to a fairer process as it sets a clear and uniform standard to evaluate the immigration consequences of the crime of conviction. It would also result in greater efficiency because it prevents a requester from submitting, and an adjudicator from reading, unnecessary documents that will not usually assist an officer in making his or her decision. Finally, limiting the evidence to the record of conviction would afford more predictability and accuracy in determining DACA eligibility.

Recommendation: The form should be amended to read (new language in ***bold italics***):

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 drug-related. Do ***not*** include incidents handled in juvenile court.*

If you answered “Yes” you must also include copies of all charging documents, ***plea agreements, plea colloquy transcripts, and verdicts or judgments of conviction, unless the records involved incidents handled in juvenile court, or the disclosure is prohibited under state law.***

INSTRUCTIONS TO FORM I-821D

Page 1, “When Should I Use Form I-821D?”

This section of the instructions does not appear to incorporate new language in the USCIS FAQs (updated January 18, 2013) clarifying that a DACA recipient is not in “lawful status” in the United States, but is “lawfully present during the period deferred action is in effect.” This language helpfully distinguishes “lawful presence” from “lawful status.”

Recommendation: USCIS should amend the second sentence of this paragraph to mirror the FAQs (new language in ***bold italics***):

An individual who has received deferred action is authorized by the Department of Homeland Security (DHS) to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

Page 1, “What Is a Childhood Arrival for Purposes of This Form?”

USCIS proposes to modify this portion of the I-821D instructions, in particular the fifth criterion. The proposed change would provide that an individual may be considered for DACA if he or she:

5. Did not have a lawful immigration status on June 15, 2012; AND
 - a. Entered without inspection before June 15, 2012; or

- b. Was lawfully admitted before June 15, 2012 but without being given any immigration status; or
- c. Was admitted or paroled but his or her lawful immigration status or parole expired before June 15, 2012.

The current version of the form rather simply restates the criterion as enumerated in the USCIS FAQs:

- 5. Entered without inspection before June 15, 2012, or his or her lawful immigration status expired as of June 15, 2012.

We appreciate USCIS's efforts to clarify this eligibility criterion by breaking out these three scenarios and providing additional detail as to who may qualify. Proposed subpart (b), however, may create additional confusion by combining the words "lawfully admitted" and "without being given any immigration status." The use of the term "lawfully admitted" seems to imply formal contact or interaction with a U.S. Customs and Border Protection agent and does not clearly include scenarios where a person was "waived through" at a port of entry or where a person presented fraudulent documents to an immigration official. Individuals may more easily recognize their situation in subpart (b) if it were amended.

Recommendation: USCIS should amend subpart (b) to read:

b. Was admitted before June 15, 2012 but without any immigration status.

Page 2, "Who May File Form I-821D?"

For the same reasons, the section, "Who May File Form I-821D," should be amended to read (new language in ***bold italics***):

1. Childhood Arrivals Who Have Never Been in Removal Proceedings

If you have never been in removal proceedings, but were in unlawful status as of June 15, 2012, submit this form to request that USCIS consider deferring action in your case. For deferred action for childhood arrivals, unlawful status means your lawful immigration status expired as of June 15, 2012, you entered the United States without inspection, ***or were admitted before June 15, 2012 but without any immigration status.***

Page 3, "Initial Evidence."

Finally, the language should also be incorporated in the section, "Initial Evidence" (new language in ***bold italics***):

1. What Documents Should You Submit With Your Form I-821D?

...

(b) ...

(5) Did not have a lawful immigration status on June 15, 2012; AND

(a) Entered without inspection before June 15, 2012; or

(b) ***was admitted before June 15, 2012 but without any immigration status***; or

(c) Were admitted or paroled but your lawful immigration status or parole expired before June 15, 2012.

Page 2, "Who May File Form I-821D?"

Proposed amendments to this section describe the steps an individual must take if he or she is currently in detention and wishes to request DACA. The instructions state that a detained individual may not request deferred action from USCIS using Form I-821D, but must identify him or herself to a detention officer or contact the ICE Office of the Public Advocate. This information, however, is provided as a "note" to this section of the instructions and does not include the same level of detail as the USCIS FAQs. A detained requester may have limited access to information about DACA, it would be helpful if the instructions included more detail.

Recommendation: The instructions should reflect language in the USCIS FAQs and be expanded to read (new language in ***bold italics***):

2. Childhood Arrivals in Removal Proceedings, With a Final Order; or With Voluntary Departure

... If you are currently in immigration detention, you may not request consideration of deferred action for childhood arrivals from USCIS. If you think you meet the guidelines of this process, you should identify yourself to your detention officer or contact the ICE Office of the Public Advocate. ***You may reach the ICE Office of the Public Advocate through the Office's hotline at 1-888-351-4024 (9 a.m. – 5 p.m., Monday – Friday) or by e-mail at EROPublicAdvocate@ice.dhs.gov.***

Page 4, "Initial Evidence."

The proposed amendments to the instructions do not include any changes to the section describing documents that may be submitted to demonstrate that a person continuously resided in the United States during the 5-year period immediately before June 15, 2012 and up to the present date. Immigration practitioners and DACA requesters have reported that lack of evidence supporting continuous residence has resulted in requests for additional evidence.

Recommendation: USCIS should provide more detail about required evidence if, in fact, USCIS is evaluating evidence in a way that is not immediately apparent from the instructions. For example, if USCIS typically issues requests for evidence when there is more than a three month gap in continuous residence, particularly around the time that the continuous residence period is to begin (June 15, 2007),

then the instructions should reflect this. This clarification would save USCIS and requesters significant time and resources.

In addition, the instructions do not include any new language corresponding to the new USCIS FAQ requiring an individual who arrived in the United States before turning 16, left, and then returned to the United States prior to June 15, 2007, to have “established residence” prior to turning 16. According to the FAQs, a DACA requester must submit evidence demonstrating that he or she established residence, which may include records showing school attendance, work in the United States, or residence in the United States for multiple years prior to turning 16.

Recommendation: Since USCIS expects a DACA requester to provide evidence demonstrating he or she “established residence” under certain circumstances, the form and instructions should make this explicit.

CONCLUSION

We appreciate this opportunity to comment on Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and the accompanying instructions.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL
THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC.
THE NATIONAL IMMIGRATION LAW CENTER