February 18, 2014

Laura Dawkins
Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services, Department of Homeland Security
USCISFRComment@uscis.dhs.gov

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

OMB Control Number 1615-0124
Docket ID USCIS-2012-0124

Dear USCIS Desk Officer:

The Immigrant Legal Resource Center submits the following comments in response to the notice of revisions to Form I-821D, Consideration of Deferred Action for Childhood Arrivals (DACA) and accompanying instructions published in the Federal Register on December 18, 2013.

The Immigrant Legal Resource Center (ILRC) is a national non-profit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC has been providing technical expertise and training on immigration law and policy since 1979.

ILRC has been involved with the Deferred Action for Childhood Arrivals (DACA) program since it was announced in June, 2012. In particular, ILRC provides seminars on DACA issues, coordinates a network of practitioners across the country sharing advice on DACA requests, and supports a variety of workshop models for assisting DACA applicants.

In light of this experience, the ILRC makes the following recommendations regarding the proposed revisions to the I-821D and instructions:

1. Simplify the Proposed I-821D Form

The confusing structure of the proposed I-821D form creates a substantive barrier to receiving or renewing DACA. To facilitate the DACA request process for initial applicants and those renewing, ILRC strongly recommends a simpler, more consistent form for DACA renewal applications.

Navigating the proposed I-821D application and determining which answers are required for renewals and which are required for initial requestors is unnecessarily confusing. In its current state, the form switches back and forth between initial and renewal sections, making it more difficult to keep track of whether it is being properly completed. In contrast with the I-821 form for TPS, which only differentiates between initial applications and renewals in the first question, the proposed form leaves applicants and representatives uncertain which sections must be completed and what is required for renewal or initial requests. Likewise, it is not clear what evidence renewal applicants must submit, if any. The labeling of sections "For Initial Request Only" and "For Renewal Requests Only" on the form also appears to conflict with the draft Instructions for Form I-821D, which state that requestors who initially received deferred action from Immigration and Customs Enforcement (ICE) must "complete the entire form and respond to **all** questions on the form," regardless of whether the form states "For Initial Requests Only" or "For Renewal Requests Only." These inconsistencies are likely to create confusion and lead requestors to inadvertently submit incomplete applications or unnecessary information and documents.

Further, the draft Form I-821D inconsistently labels which sections are required for initial requests and which are required for renewal requests. Sometimes a heading indicates that only initial or only renewal applicants need to fill out the section. Other times a question is divided in two, and initial applicants must answer differently than renewal applicants. In other cases, only half-way through the questions does CIS clarify how the questions should be answered or by whom. For example, it is not clear if initial or renewal requestors must complete Part 4, Questions 3-5 on page 5 of the form. "For Initial Requests Only" appears in bold, but then the form states "If you are filing for initial deferred action, you may skip to Part 5…" In other questions, no information is provided at all. For example, the form does not indicate whether initial requestors, renewal requestors, or all requestors should fill out Part 5 - Criminal, National Security, and Public Safety Information. These sections should be reordered and streamlined to make sense and minimize changes in the instructions.

In our experience, most DACA requestors are unrepresented and do not have the assistance of attorneys or accredited representatives to help them complete the application forms. Many other DACA applicants complete their DACA request *pro se* or in group processing settings with the help of volunteers, overseen by immigration attorneys and/or BIA accredited representatives. With a form that jumps back and forth between new and renewal requests, a pro se applicant or non-lawyer volunteer may be easily confused. It is particularly easy to make errors that will result in having to redo the application, or worse, an unnecessary Request For Evidence (RFE) or Rejection that delays an eligible DACA applicant's approval. It also burdens legal reviewers who must distinguish renewal from initial applications and correct errors. In the Central Valley, reviewing attorneys at workshops have observed DACA requestors re-write the current I-821D request form three or four times before answering the questions properly, and the current DACA request form is far simpler than the proposed revisions.

> ***Recommendation:*** USCIS should isolate questions that initial and renewal requestors must answer into two, continuous sections of the form and should clearly differentiate what information initial and renewal requestors are each required to submit. This format would resemble USCIS Forms I-360 (Petition for Amerasian, Widow(er), or Special

Immigrant) and I-131 (Application for Travel Document), which cluster questions for different types of requestors or immigration benefits together. Questions required for renewal versus initial applications must be clearly and consistently marked. We recommend dividing Part 1 of the proposed form into multiple parts and renumbering all of the Parts, so that initial and renewal questions are in separate Parts. We also suggest that USCIS employ the one column format utilized in the I-360 and I-131 form, with shaded and captioned bands separating each section of the form, making it easier for the requestor to determine which sections to complete.

Recommendation: USCIS should make the evidentiary requirements for DACA explicit by specifically and expressly identifying which evidentiary requirements renewal requestors must satisfy. Requestors seeking renewal should not be required to submit any evidence in support of their renewal request unless the individual is currently in removal proceedings or she has been charged with or convicted of a felony or misdemeanor.

2. Reduce the Cost of DACA renewals and Expand Fee Exemptions

The costs of DACA applications and existing criteria for granting fee exemptions are a significant barrier for many DACA-eligible individuals. Many requestors have foregone applying for DACA or delayed submitting an application solely because they lacked the funds to apply. Studies show that the most common reason why individuals who appear to be DACA-eligible do not apply is the cost of filing.[1] A large segment of DACA-eligible youth come from low-income families – 35% of DACA-eligible youth live in families with incomes at the federal poverty level (FPL), while another 66% live in families with incomes below 200% of the FPL.[2]

Those who applied for DACA initially (and those that are still in the process of applying) did not have a timeframe to apply, allowing them to raise the necessary costs of the application fee without any pressure. The fact that there is a narrow window of time in the renewal process creates added pressure on youth and families to raise the funds to pay for the application fees. Consequently, the high fees coupled with the narrow window of time will likely cause beneficiaries to fall out of DACA status. Moreover, for families with more than one DACA requestor, the burden of paying the filing fee is multiplied.

Overall, a more generous fee policy would ensure that those who are DACA-eligible have access to the benefits of the program. Currently, about 11% of DACA-eligible youth are parents who support children living in the home. The need for creating a more generous fee policy will likely become even greater because youth who meet other eligibility guidelines, but are under 15 (thereby aging into DACA), have even higher levels of poverty, with more than half of this group living in households with incomes less than twice the poverty level.[3]

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[1] Migration Policy Institute, Issue Brief: Deferred Action for Childhood Arrivals at the One-Year Mark, 5 (Aug. 2013), http://www.migrationpolicy.org/pubs/cirbrief-dacaatoneyear.pdf [hereinafter MPI Brief].
[2] MPI Brief.
[3] MPI Brief.

Recommendation: For these reasons, USCIS should reduce the DACA fee for renewal requestors. This would bring the DACA program in line with other renewal contexts, where USCIS permits individuals to pay a lower fee to renew their existing status.[4]

The agency should likewise expand the categories of individuals who qualify for a fee exemption, allowing more low-income requestors to access DACA. For example, the agency should consider allowing all parents with children living in the home to be eligible for a fee exemption if their household income is below 150% of the federal poverty level.

3. **Ensure that the Application Process and Review Keeps DACA Accessible:**
   (a) Extend the Proposed Renewal Filing Period
   (b) Automatically Extend Employment Authorization
   (c) Prevent Accrual of Unlawful Presence
   (d) Allow Renewal Filing After Expiration of Previous DACA

The proposed instructions to Form I-821D indicate that USCIS may reject requestors' submissions if they file for renewal more than 120 days prior to the expiration date of their DACA period. We are concerned that the proposed timeframe is too narrow to accommodate the potentially high volume of requests for DACA renewals. The current posted processing times for Form I-821D is six months[5] or more[6] depending on the USCIS Service Center. Even if requestors are aware of the short window and file their renewal requests in a timely fashion, we fear that their requests will not be adjudicated in time and they will lose their DACA and work authorization.

Moreover, under the proposed DACA renewal filing period, requestors will risk losing their work authorization. The current processing time for Employment Authorization Document (EAD) renewals is 90 days[7] after the approval of a concurrently filed DACA request (with a processing time of six months or more). Thus, a renewal requestor must file more than 90 days before his DACA expiration date to ensure USCIS has adequate time to process his EAD renewal. This means a requestor must file within the first 30 days of the proposed 120 day period. This short timeframe will jeopardize the employment of DACA recipients and have ramifications for employers who will have no choice but to terminate or suspend DACA recipients whose documents expire during the renewal adjudication period. DACA renewal requestors' loss of work authorization also may have a detrimental impact on the U.S. economy, as it is estimated that 61% of DACA recipients obtained a new job since receiving DACA.[8]

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[4] For example, while the total cost of adjusting to legal permanent resident status is $1070, the total cost of renewing a green card is $450, and the cost of removing the conditional basis of a green card is $590.
[5] *See* USCIS Processing Time Information, *available at* *https://egov.uscis.gov/cris/processTimesDisplayInit.do.*
[6] *See* Practice Alert on Long-Pending Cases at the Nebraska Service Center (Updated 12/30/13), AILA InfoNet Doc. No. 13110747 (posted Dec. 30, 2013).
[7] *See* USCIS Processing Time Information, *available at* https://egov.uscis.gov/cris/processTimesDisplayInit.do.
[8] Preliminary Findings from the National UnDACAmented Research Project, *available at* http://www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-dacamented

Finally, legal services providers experienced a high volume of DACA eligible requestors when DACA first became available in 2012, and expect a high volume of requests for renewal in the first few months of the renewal process. As a result, many DACA recipients may have trouble accessing legal support from non-profit or low-cost legal services providers in the narrow timeframe proposed for renewals, especially during the first few months.

In addition, the proposed I-821D form and accompanying instructions do not indicate whether DACA recipients who do not file before their DACA grant expires may still apply for renewal at a later point. USCIS should ensure that DACA applicants whose previous deferred action has expired may still apply for renewal. Failure to do so will result in the exclusion of many otherwise eligible immigrant youth from DACA protections. For example, the high costs and short application period may deter or delay applicants from filing for DACA renewal. Applicants who do not have savings to afford the DACA filing fees should not be penalized for taking longer to renew their DACA request. This would adversely impact the overall success of the DACA program

Recommendation: USCIS should expand the proposed DACA renewal filing period from to 150 days prior to the requestor's DACA expiration date. This will allow USCIS to timely process requestors' renewals before their deferred action and employment authorization expire. USCIS also should clarify the DACA renewal filing period on the Form I-821D and its instructions, and should encourage renewal requestors to file as early in the 150-day period as possible—ideally, at least 90 days prior to the DACA expiration date.

Recommendation: USCIS should grant automatic extensions of employment authorization for DACA renewal requestors who file within our recommended 150-day period. USCIS also should allow the DACA renewal receipt notice to indicate a temporary extension while the renewal request is pending. In some circumstances, a simple receipt will suffice as an extension of work authorization. The online I-9 instructions to employers provide that receipts may be valid in lieu of another qualifying document to complete the re-verification sections of the Form I-9. Specifically, they instruct employers that: "your employee may present a receipt for the application for the replacement of any List A, List B, or List C document. This receipt is valid for 90 days. When it expires, the employee must show you the replacement document for which the receipt was given."[9] An EAD is considered a List A document.

Recommendation: Given the constraints on applicants because of processing times, DACA recipients should not accrue unlawful presence if their DACA expires during the renewal adjudication process. USCIS should permit the DACA renewal request receipt notice to serve as proof that the individual is in deferred action status to avoid the accrual of unlawful presence while the individual's renewal request remains pending.

Recommendation: We recommend that USCIS accept renewal applications even after the initial DACA period has expired to accommodate low-income applicants.

[9] *See* "Receipts," *available at* http://www.uscis.gov/i-9-central/acceptable-documents/receipts/receipts.

4. Simplify the Education and Military Service Information Section

The education section for renewal applicants is very difficult to follow. Even experienced practitioners have difficulty determining how to navigate this section and it likely will cause even greater confusion for *pro se* requestors. Firstly, the instructions do not tell an applicant who selected boxes 25.a, 25.b, or 25.c what to do with the rest of the section. Presumably this is because the applicant has no further eligibility to demonstrate, but the complete lack of instruction makes this requirement unclear. Again, most DACA applicants proceed *pro se*, and those who must grapple with this section are those who may not have finished high school or an equivalent yet. Many of these DACA applicants are working parents who are struggling to keep up with expenses and care for their children, as well as pursue education and immigration relief under the DACA program.

Second, the rest of the section is extremely redundant, longwinded, and difficult for a pro se applicant to distinguish one question from the next. Even with the brief instructions preceding Questions 26-29, it is difficult to understand that only one of the questions need be answered. An "item number" is not a term with any familiar meaning that someone outside the agency would understand. CIS should revise this section, refer to the "item numbers" in more straightforward language such as "questions," and substantially reorganize this section to make it comprehensible to limited English proficiency applicants.

Some terms within this section also are not defined. For example, Question 25.d. refers to being enrolled in "school," broadly. Since it does not clarify the term, requestors may be confused as to whether it refers to any school that is considered qualified education for DACA (including elementary, middle school, high school, college; as well as adult schools, literacy programs, GED programs, career training and vocational schools, etc.). Students enrolled in any of these types of programs may have difficulty determining whether they were considered "enrolled in school" at the time of their initial application, and may therefore be confused as to which subsequent question(s) they should answer.

Additionally, the answer options in the education section are not comprehensive. For example, Items 26 and 28 each provide 5 response options, Item 27 does not include the option of indicating that the requestor is currently enrolled in a literacy or career training program. If the requestor proceeds to Item 29 to indicate that the options above do not reflect his or her circumstances, he/she is directed to "explain your reasons for not meeting the educational guideline." This instruction is misleading because Items 26, 27, and 28 do not encompass all the ways that a person might qualify for DACA renewal. Requestors might wrongly believe, based on reviewing this form, that he or she is not qualified to renew DACA.

If the DACA program continues, it is possible that recipients will need to renew more than once. Instead of asking requestors how they demonstrated they met the education or military service criteria for their *initial* application, Question 25 should ask how requestors demonstrated they met these criteria on their *last approved* application. This will avoid the need for USCIS to revise the form in the future. The form instructions could explain that for requestors who are renewing for the first time, their "last approved" application is their initial application, and for

requestors who are renewing for the second time, their "last approved" application is their prior renewal application.

Recommendation:
We recommend rewriting this section as follows. Questions 26 through 28 should be stricken and replaced by the following questions for renewal applicants:

26. At the time I was last approved for Deferred Action for Childhood Arrivals I was

- ***26.a.*** ☐ ***Enrolled in a public or private elementary school, junior high, middle school, high school, or secondary school.***
- ***26.b.*** ☐ ***Enrolled in an education program that assists students in obtaining a high school diploma or its recognized equivalent under state law or in passing a GED exam or other equivalent state-authorized exam.***
- ***26.c.*** ☐ ***Enrolled in an education, literacy, or career training program (including vocational training) designed to lead to placement in postsecondary education, job training, or employment.***

27. ***At this time, I (check all that apply)***

- ***27.a.*** ☐ ***Have graduated from the public or private elementary school, junior high, middle school, high school, or secondary school I was enrolled in when I initially requested DACA.***
- ***27.b.*** ☐ ***Have obtained a high school diploma or its recognized equivalent.***
- ***27.c.*** ☐ ***Have passed a GED or other equivalent State-authorized exam.***
- ***27.d.*** ☐ ***Am enrolled in postsecondary education.***
- ***27.e.*** ☐ ***Have obtained employment for which I received training through the program in which I was enrolled when I initially requested DACA.***
- ***27.f.*** ☐ ***Am still in school and I have made substantial, measurable progress toward graduating from the school or completing the program in which I was enrolled when I initially requested DACA.***
- ***27.g.*** ☐ ***Am enrolled in a new/different education, literacy, or career training program (including vocational training) designed to lead to placement in postsecondary education, job training, or employment.***

5. Allow Completion of Career Training Programs to Satisfy the Renewal Education Requirement

USCIS currently requires that graduates from education, literacy, or career training programs be employed, or be enrolled in post-secondary education or in another post-secondary education, job training, or employment program to renew their DACA application. This unnecessarily penalizes renewal requestors who have made substantial progress in their

qualifying education, literacy, or career training program, but who may be unemployed, or not enrolled in post-secondary education, or another type of program.

An additional burden is placed on these requestors because they are required to be employed in their field of training. This requirement poses a very difficult challenge to DACA recipients in today's competitive job market, as many individuals—regardless of immigration status or education level— are forced to find employment outside their fields of training or expertise.

> ***Recommendation:*** We recommend that this requirement be eliminated. USCIS should consider the completion of these programs as equivalent to a high school diploma or a General Education Development (GED) certificate and sufficient for renewal.

6. Ensure that Progress in Qualifying Education Programs Maintains DACA Eligibility

According to the proposed form, USCIS imposes different renewal requirements on DACA recipients depending on how they initially met the DACA education requirement. DACA requestors who are enrolled in 1) a public or private elementary school, junior high or middle school, high school or secondary school or 2) an education, literacy, or career training program (including vocational training) that is designed to lead to placement in postsecondary education, job training, or employment must demonstrate "substantial, measurable progress" toward graduating from or completing the program. In contrast, renewal requestors who are enrolled in an education program that assists students in obtaining a regular high school diploma or its recognized equivalent under state law, or in passing the GED or other equivalent state-authorized exam, must pass the exam or receive a high school diploma. USCIS' FAQs provide no rationale for this distinction.

> ***Recommendation*:** USCIS should require that DACA recipients still in school, regardless of the type of program, meet the "substantial progress" requirement in consideration of their social and economic circumstances. This would allow those in GED or equivalent programs to demonstrate that they are making progress or that continued enrollment in any of the programs described above fulfills the education requirements for renewal.

7. Exercise Discretion for Individuals Who Do Not Meet the Education Requirement

a. Create a work option

Many individuals who do not meet the education requirement for renewal are willing and capable of contributing to the labor force. To allow this segment of the immigrant youth population to access greater economic and family stability, USCIS should permit individuals who cannot meet the completion or substantial progress standards to renew their DACA status so long as they can demonstrate that they were "continuously employed" when they did not meet the education requirement.

> ***Recommendation:*** USCIS should adopt an employment option for DACA renewal eligibility that allows a DACA grantee to qualify for renewal status if "continuously

employed" throughout the period beginning 90 days after USCIS deferred action in his or her case. Individuals who were on medical leave, maternity leave or other employment leave, or are or were the primary caretaker of a child or person requiring supervision, or were unable to work due to circumstances outside the control of the requester would remain eligible for DACA renewal.

In addition, if USCIS creates this new option for renewal requestors, it should also grant this option to all DACA requestors who are applying after the date the renewal period opens, including first-time requestors who cannot meet the education requirement.

b. Allow for medical and disability exceptions to the education requirement

In addition to these exceptions, USCIS should provide for an explicit exception to the employment and education requirements for a DACA applicant who has a physical or mental disability (as defined in section 3(2) of the Americans with Disabilities Act of 1990 (42 U.S.C. §12102(2)) or as a result of pregnancy if such condition is evidenced by the submission of documentation prescribed by the Secretary.

***Recommendation*:** USCIS should establish a disability, pregnancy and medical exception to the employment and education DACA requirement suggested above. Alternatively, the agency should consider creating an exception similar to the exception to the English and civics requirements for naturalization.[10] In that context, USCIS conducts an independent assessment of whether the requestor is eligible for a waiver based on his or her disability. The disability must be permanent, lasting or expected to last at least 12 months and must prevent the requestor from learning English or civics. The requestor must be unable to pass the test even with "reasonable accommodations," as defined in the Rehabilitation Act of 1973.[11] The requestor must submit a Form N-648, in which a medical professional diagnoses the disability and provides information to certify that it is a qualifying disability.[12]

8. Clarify the Rule Regarding Non-Profit Literacy Programs

Page 8, Question 9A of the instructions for Form I-821D indicate that individuals enrolled in certain literacy programs may establish that they meet the "currently in school" guideline by submitting evidence that the relevant program is funded in whole or in part by federal, state, local, or municipal funds or is of demonstrated effectiveness. This language mirrors the USCIS DACA Frequently Asked Questions webpage.

Missing from both the FAQ and the draft instructions is the fact that individuals enrolled in literacy programs administered by non-profit entities can establish that they meet the

[10] 8 U.S.C. §1423(b)(1) ("The requirements of subsection (a) shall not apply to any person who is unable because of physical or developmental disability or mental impairment to comply therewith").
[11] Catholic Legal Immigration Network, Inc. "The Disability Waiver and Accommodations," *available at* https://cliniclegal.org/sites/default/files/231718_CLINIC_07.pdf
[12] "Form N-643, Medical Certification for Disability Exception," *available at* http://www.uscis.gov/sites/default/files/files/form/n-648.pdf.

"currently in school" guideline by providing evidence of enrollment in such programs. We learned this information from the DACA Standard Operating Procedures Manual, which was obtained from USCIS in response to a Freedom of Information Act request.[13] This rule regarding non-profit literacy programs should be shared with the broader public.

> ***Recommendation***: We encourage USCIS to modify as follows item 9 falling under the heading "Evidence for Initial Requests" (new language in ***bold italics***):
>
> **9. What documents may demonstrate that you: a) are currently in school in the United States at the time of filing…?**
> USCIS recognizes…
> **A.** To be considered "currently in school," you are to demonstrate that…
> **(1)** A public…
> **(2)** An education, literacy, or career training program *(including vocational training or an English as a Second Language (ESL) course)* that is designed to lead to placement in post-secondary education, job training, or employment, and where you are working toward such placement, and that the program:
> ***(a) If a literacy program, is administered by a non-profit entity; or***
> ***(b)*** Is funded in whole or in part by Federal, state, local, or municipal funds; or
> ***(c)*** Is of demonstrated…
> **(3)** An education…
> **(a)** Is funded…
> **(b)** Is of demonstrated…
> **(4)** A public…
>
> Evidence of enrollment may include…
> If you have been accepted for enrollment…
> ***If you are enrolled in a literacy program, evidence that the program is administered by a non-profit entity includes a copy of a valid letter from the Internal Revenue Service confirming exemption from taxation under section 501(c)(3) of the Internal Revenue Service Code of 1986, as amended, or equivalent section of prior code***. ***May also include a class catalog or description that indicate the program is run by a nonprofit or information from the organization's website.***
> If you are enrolled in an educational, literacy, or career training program *(including vocational training or an ESL course)*, evidence that the program is funded in whole or in part by Federal…
> If you are enrolled in an educational, literacy, or career training program that is not publicly funded….

[13] National Standard Operating Procedures (SOP) Deferred Action for Childhood Arrivals, prepared by Service Center Operations Directorate, September 13, 2012, at 54, 59, *available at* http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf.

9. Eliminate or Clarify Requests for Criminal History Evidence

Many DACA eligible individuals are not applying for DACA because they are concerned about how USCIS will treat their criminal history.[14] In an effort to successfully implement the DACA program, USCIS should consider eliminating the following requests for criminal history evidence, which are overly broad and irrelevant to DACA eligibility.

a. Criminal History for Incidents Since the Previous DACA application.

The I-821D asks for any arrests and convictions in the DACA applicant's past. For renewal applicants, this is redundant and confusing. They have already provided this information to USCIS just two years prior, and it is more logical to answer this question for only the period since their previous application. Without providing any instruction here, some DACA applicants will answer these questions incorrectly, resulting in unjustified delay or denials of DACA renewals.

In addition, the I-821D instructions do not specify what criminal records a renewal requestor must submit. The lack of instructions suggests that renewal applicants must refile any documents related to criminal convictions that they already submitted with their previous application. This is overly burdensome on both applicants and reviewing officers.

> ***Recommendation***: To avoid confusion and repeated solicitations for duplicative information and evidence, USCIS should only require requestors to provide criminal history documentation for the period since their last DACA filing.

b. Criminal Records from Foreign Countries, or for Arrests or Charges that do Not Result in a Conviction.

The proposed instructions include a new request for records: Question 12.A. on page 9 asks for an original official statement by the arresting agency or an order by the relevant court for each arrest, if the requestor was arrested for a felony or misdemeanor in the United State or a crime in any other country, and no charges were filed. The new request places an unnecessary burden on requestors because arresting agencies and courts may not maintain records of arrests where no charges were ultimately filed or may destroy them after a certain period of time.

Requiring requestors with arrests outside the United States to comply with these new instructions is especially burdensome and unfair. Foreign arresting agencies may not keep files for cases where they did not file charges or may be unwilling to provide such a certification. Furthermore, the records may contain false or misleading information, especially in countries where police misconduct is high. The instructions state that if the requestor is unable to provide such documentation or if it is not available, an explanation including the requestor's efforts to obtain the documentation is necessary. In addition to the time spent trying to obtain these

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[14] AILA, Immigration Advocates Network, American Immigration Council, Summary of DACA Implementation Survey 2.0 Results as of April 2, 2013, *at* http://op.bna.com/dlrcases.nsf/id/lfrs-97xp89/$File/DACA%20Survey.pdf.

records, requestors must then spend additional time documenting their efforts. All of this needlessly delays a potential requestor from submitting an application.

Soliciting arrest records that do not result in conviction unfairly prejudices the requestor because arrest records create the presumption of guilt, even though arrest records are not proof of criminal conduct.[15] Arrest records can include allegations that were erroneous, false, or misleading. To rely on those allegations distorts the "totality of the circumstances" standard utilized in DACA determinations because of the heightened possibility that innocent people will be denied DACA. For example, a person who was arrested because of mistaken identity or because of police misconduct may have an arrest record that could include egregious allegations of criminal conduct. Considerations such as mistaken identity or allegations of misconduct will likely not reach USCIS since a record of dismissal will not cite to reasons for the dismissal of the charges.

> ***Recommendation:*** USCIS should eliminate the request for records involving arrests that did not lead to the filing of charges to make the application process less burdensome and to avoid prejudicing DACA adjudication.

c. Expunged, Vacated, and Sealed Convictions

Question 12C on page 10 of the instructions states: "If you have ever had any arrest or conviction vacated, set aside, sealed, expunged, or otherwise removed from your record, submit: (1) An original or court certified copy of the court order vacating, setting aside, sealing, expunging, or otherwise removing the arrest or conviction; or (2) An original statement from the court that no record exists of your arrest or conviction." These records may not constitute convictions under settled immigration precedent and should not be relevant for determining DACA eligibility.[16] Obtaining and disclosing these records may violate state laws. Further, it is burdensome to require requestors to provide evidence of no record. Eliminating this request would make the required evidence for DACA more consistent with the evidence of convictions allowed by our federal immigration laws.

USCIS should not require court-certified records of vacated convictions because vacated judgments are not convictions for immigration purposes if they were vacated for statutory or constitutional defects, pre-conviction errors affecting guilt, and if the criminal court failed to advise a defendant of the immigration consequences of a plea.[17]

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[15] US Push on Illegal Bias Against Hiring Those with Criminal Records, New York Times, June 20, 2012. This article shows that employers carry biases in their hiring practices when they review arrest records. "Lies, Damn Lies, and Arrest Statistics," The American Society of Criminology Meetings (1995), *available at* http://www.colorado.edu/cspv/publications/papers/CSPV-015.pdf. This article provides a series of articles on the influence and use of arrest records in the criminal justice system.

[16] *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006); *Alim v. Gonzales*, 446 F.3d 1239 (11th Cir 2006); *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter2.html#footnote-15.

[17] *Id*.

If a requestor was not convicted of a crime, or was arrested and charged but the charge was later dismissed, sealed and/or expunged, USCIS should not consider those charges against requestors in the DACA context by subjecting them to scrutiny when the criminal court already determined the requestor's arrest or conviction merited the rehabilitative relief sought. To do otherwise would allow USCIS to "retry" a closed criminal case and consider evidence of facts beyond those that were considered in the criminal proceeding. This would be clearly prejudicial.

Another problem with this question is that the DACA application is foreclosed if these questions are not answered. If USCIS chooses not to eliminate this question, we suggest, in the alternative, that the instructions have the following additional language, which also appear in Questions 12A and 12B: "If you are unable to provide such documentation or if it is not available, you must provide an explanation, including a description of your efforts to obtain such evidence, in Part 9. Additional Information." This option would enable those having difficulties obtaining relevant documentation from the court to move forward with their request for DACA.

Lastly, the introductory paragraphs of this section state "If the charges against you were handled in juvenile court, and the records are from a state with laws prohibiting their disclosure, this evidence is not required." This statement is confusing because the language on the form is broader. The form asks requestors who have been arrested for or charged with a felony or misdemeanor in the United States to submit records for each arrest, unless disclosure is prohibited under state law. While we welcome this change for juvenile matters, this exception is too narrow because states prohibit disclosure in many types of cases, not just those handled in juvenile court. For example, convictions expunged under Connecticut General Statute § 54-142a require an order from the court for disclosure, unless law-enforcement officers are investigating a criminal activity or it is for the purpose of an employment application as an employee of a law-enforcement agency. To ensure consistency with the I-821D form, we recommend these instructions clarify that evidence is not required in any case where state law prohibits the disclosure of records.

> ***Recommendation****:* USCIS should remove the request for records where arrests or convictions have been removed, set aside, vacated, or expunged. USCIS should also remove the request for any records where disclosure is prohibited by law.

10. Misdemeanor Driving Without a License Offenses

There has been significant confusion regarding traffic violations that are misdemeanors under state law, but are not drug- or alcohol-related. In a number of states, driving without a license may constitute an infraction or a misdemeanor. For example, in California, driving without a license may be charged as either an infraction or a misdemeanor.[18] Many undocumented individuals in California have convictions for driving without a license because these individuals were unable to lawfully obtain California drivers' licenses.

[18] Cal. Veh. Code. § 12500 prohibits driving without a license. Cal. Pen. Code § 17(d) grants discretion to charge certain offenses as either an infraction or a misdemeanor, and Cal. Pen. Code § lists Vehicle Code § 12500 as an offense that may be charged as either an infraction or a misdemeanor.

It is unclear whether DACA applicants must submit documentation pertaining to misdemeanor offenses for driving without a license. In fact, after RFEs have requested certified disposition for such offenses, some practitioners have begun submitting these documents with the initial filing as a matter of course, even though such offenses do not affect DACA eligibility. Absent clarification, the issue of what types of traffic offenses require the applicant to submit documentation will continue to be an area of confusion. According to the Migration Policy Institute, California, Texas, and Illinois were first, second, and fifth in both in numbers of eligible youth and in numbers of DACA applications accepted for processing during DACA's first year.[19] In each of these states, unlicensed driving may constitute a misdemeanor in circumstances that are not alcohol- or drug-related.[20]

Moreover, many of those with unlicensed driving offenses drive as a matter of necessity, because they reside in rural and suburban areas that lack adequate public transportation. Whether an undocumented individual can obtain a driver's license depends on the state where she resides. Some states have changed or are in the process of changing laws to permit undocumented individuals to obtain licenses. As a result, individuals who have since obtained licenses in states where they were previously barred from doing so may have old offenses for driving without a license on their records.

> ***Recommendation:*** To ensure that applicants are treated uniformly and to avoid confusion, USCIS should not require applicants to submit documents relating to misdemeanors for driving without a license. USCIS should adopt a policy that misdemeanor offenses for unlicensed driving without a drug or alcohol element do not bar an individual from receiving DACA and should be defined as non-misdemeanors for DACA purposes. We also recommend that USCIS provide guidance that applicants are not required to submit documentation of these offenses.

11. Eliminate Requests for Information Not Relevant to DACA Eligibility

a. Location of Initial Entry to the U.S.

Question 17 asks the place of initial entry into the U.S. We have found that this question has created unnecessary confusion and even delays in completing the application. Often applicants have no clear memory or direct knowledge of their point of entry as they were very young at the time. These applicants must rely on fragmented memory and incomplete information supplied by their parents or relatives. In our experience, unreliable information causes many applicants to mistake the border town of neighboring countries for their point of entry. This issue especially impacts pro se applicants. Asking applicants to provide information that they may not understand or about which they may not have knowledge can lead to listing incomplete or erroneous responses.

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[19] Migration Policy Institute, Issue Brief: Deferred Action for Childhood Arrivals at the One-Year Mark, 5 (Aug. 2013), http://www.migrationpolicy.org/pubs/cirbrief-dacaatoneyear.pdf [hereinafter MPI Brief].
[20] Cal. Veh. Code § 12500; Cal. Pen. Code § 19.8; 625 ILCS 5/6-101; Tex. Trans. Code § 521.021 and DPS handbook.

Recommendation: Because of these issues, we recommend eliminating this question, or in the alternative, that the question be clarified on the form. The question should specify that the place of entry pertains to cities, entry gates, airports and ports inside the U.S. It is also recommended to include in the instructions manual a list of most common entry points to the U.S. These points should be matched, when appropriate, with border towns of the neighboring country. This list would make the application process easier and decrease the likelihood that applicants provide erroneous information.

b. Removal Proceedings

Part 1, Question 5 of the I-821D form asks all requestors to provide information related to "removal proceedings" when it is only relevant for DACA eligibility purposes if the requestor is under 15 years of age. In those cases, requestors must show that they are in removal proceedings, have a final order or a voluntary departure order, and are not in immigration detention. Making this section applicable only to requestors who are under 15 years of age would lessen the burden for older requestors completing the form.

USCIS should delete the Removal Proceedings Information section on Page 1, Question 5, or provide an "unknown" option because this question confuses applicants. Many requestors, especially DACA workshop participants, may not have any information about their immigration history, as they were likely too young at the time to remember or understand what happened. Some may have been administratively removed while attempting to enter the U.S. at a young age. Also, many will not know the meaning of "removal proceedings" or the difference between the options. The options contain specific legal and procedural terms such as "administratively closed" and "subject to a final order" which applicants are likely to be unfamiliar with.

In order to gather this information, many practitioners file FOIA requests, delaying the DACA application in order to provide USCIS with information that is already more accessible to the agency than to the applicant. This is costly and unnecessarily delays DACA applications.

Recommendation: USCIS should delete this question, limit the applicability of this section to requestors under 15 years old or, in the alternative, specify that the "other" option means "I do not remember" or "I do not know." This recommendation would prevent requestors with no recollection of their immigration history from undergoing delays in filing their DACA requests

c. Current Status and Pending Immigration-Related Request

Questions 20.a, 20.b, and 20.c instruct the applicant to state any immigration status she may have and to indicate whether she has any pending immigration requests. This inquiry is unnecessary because Question 6 asks for the applicant's Alien Registration Number (A-Number). The A-Number provides USCIS with information about the applicant's past, approved, and pending immigration-related requests. Thus, USCIS does not need the applicant to provide this information.

Moreover, it is burdensome to ask applicants to provide information that they may not understand or to which they may not have access. In our experience, most applicants are proceeding pro se, and may not understand how to appropriately answer Question 20.a. Some applicants may be unaware of pending immigration requests filed on their behalf. For example, a relative may have filed a petition on behalf of the applicant and her parents, of which the applicant herself has no knowledge. An applicant may have a family member who has been the victim of *notario* fraud. Notarios often falsely claim that a form of relief has been granted, misrepresent the type of application they have filed, file applications without the client's knowledge or consent, refuse to show documents to clients, and retain documents.[21] Thus, an applicant and her parents may be unaware of or unclear about the nature of any pending applications she might have.

Because of these issues, the only way for many applicants to accurately answer Questions 20.a, 20.b, and 20.c, will be to first file a Freedom of Information Act (FOIA) request for copies of their immigration files. Filing a FOIA request would both delay the DACA application process and exacerbate the backlog of FOIA requests pending with the Department of Homeland Security.[22] Moreover, these questions provide no benefit to the adjudication process because they do not provide USCIS with any information that is not already in its possession. Asking for this information may delay or prevent the timely provision of legal services, particularly in group processing clinics where individuals seldom appear with their complete immigration history.

> ***Recommendation:*** To avoid confusion and delay, we recommend that USCIS delete the section regarding current status and pending immigration-related requests.
>
> In the alternative, we recommend that USCIS break Question 20.c into two sections to make it clearer to applicants what is being asked of them. We suggest that USCIS revise Question 20.c to read: "Provide any immigration status you have received since you received Deferred Action for Childhood Arrivals," and add Question 20.d that reads: "Indicate whether you have any other immigration-related requests pending." This mirrors the less confusing format used for Initial Requests.

d. Child Soldiers Accountability Act

The proposed Form I-821D adds a new question (Page 5, Part 5, Item 5.e.) asking requestors to indicate whether they have ever "[r]ecruited, conscripted, or used any person under 15 years of age to serve in or to help an armed force or group." The instructions do not provide any background or guidance on how to answer this question. As a result, this question will likely confuse many requestors. Further, this question goes beyond the scope of relevant information required to establish DACA eligibility.

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[21] Community Justice Project at Georgetown Law Center, Notario Fraud Remedies: A Practical Manual for Immigration Practitioners, 17, 18, 25 (2013), http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/Community-Justice/upload/Notario-Fraud-Remedies-A-Practical-Manual-for-Immigration-Practitioners.pdf [hereinafter Notario Fraud Remedies].

[22] U.S. Department of Homeland Security, "Open Government Plan 2.0," https://www.dhs.gov/open-government-plan.

The question appears to reference the Child Soldiers Accountability Act of 2008,[23] which created criminal and immigration prohibitions on the recruitment and use of child soldiers. The language on the form, however, is broader than that found in 18 U.S.C. § 2442, which criminalizes *knowingly* recruiting, enlisting, or conscripting "to serve *while such person is under 15 years of age* in an armed force or group" or using "a person under 15 years of age to *participate actively in hostilities.*"[24] The question on the form asks whether the requestor has recruited, conscripted or used any person under 15 years of age to "*help* an armed force or group" without any specific reference to intent, hostilities, or the relevant time period for enlisting the person. The broad language on the form could be interpreted to include activities, such as asking younger friends to join the U.S. military when they turn 18 or recruiting for Junior ROTC in high school. Unaware of the underlying basis of this request, many pro se requestors might respond in the affirmative to participating in activities that are completely unrelated to the kind of conduct that the Child Soldiers Accountability Act of 2008 was intended to punish.[25]

Under the Child Soldiers Accountability Act, "[a]ny alien who has engaged in recruitment or use of child soldiers in violation of section 2442 of Title 18" is inadmissible under 8 U.S.C. § 1182(a)(3)(G) and deportable under 8 U.S.C. §1227(a)(4)(F). Since DACA confers no status upon recipients, DACA requestors are not subject to grounds of inadmissibility. If the new question seeks to identify those who have violated the Child Soldiers Accountability Act and prioritize them for deportation as human rights violators,[26] the question should be more specific and the instructions should provide more guidance as to the purpose of the request and the consequences of responding in the affirmative. Otherwise, requestors may incorrectly respond in the affirmative and trigger deportation.

> ***Recommendation:*** USCIS should delete this question from the proposed Form I-821D because it is overly broad, confusing and irrelevant to DACA eligibility, or, in the alternative, provide more specificity and guidance on this question.

e. Eliminate Processing Information

The newly added "Processing Information" section requests demographic information, including a requestor's ethnicity, race, height, weight, eye color, and hair color. These questions may deter potential requestors who are worried about how their personal information might be used. Concerns about confidentiality and fear that information from the DACA application will be used to place people into removal proceedings is a significant reason why many prima facie eligible individuals do not apply for DACA.[27] Additionally, requests for information regarding race and ethnicity raise the concern that the data could lead to discrimination in the adjudication

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[23] The Child Soldiers Accountability Act established a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA.
[24] 18 U.S.C. §2442(a) (emphasis added).
[25] Pub. L. 110-340.
[26] NTA Memo 2011, *at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf
[27] AILA, Summary of DACA Implementation Survey 2.0: Results as of April 2, 2013, http://www.aila.org/content/default.aspx?docid=44331; Kathy Khommarath, Staff Attorney, CHIRLA. Interview Jan. 27, 2014.

of requests. Requesting height, weight, and ethnic and racial information may intimidate many applicants. Seeking this information now, when it has not been requested before, will intimidate eligible applicants who are already fearful of how the government might use their personal information. This deterrent effect will frustrate the purposes of the DACA program, and the information is not relevant to DACA eligibility.

> ***Recommendation*:** The proposed "Processing Information" section should be eliminated from the form entirely. In the alternative, instructions to the form should indicate clearly why this information is being solicited. The instructions currently indicate that the requested biographic information may reduce the time a requestor spends at the Application Support Center for biometrics collection. However, it is unclear whether the data will serve exclusively to expedite biometrics appointment and criminal records checks or achieve some other purpose. The Form N-400, Application for Naturalization, for example, requests similar information but explains that the requested information will be used to complete a background check. USCIS should provide more information as to the specific purpose of this data. Additionally, instructions should include a statement indicating that decisions to defer action in an individual's case will not be based on race, ethnicity, or physical description.

12. Retain Jurisdiction over DACA Requestors in Detention

Existing policies and the recently issued new form and instructions fail to adequately protect potential DACA requestors in detention. Current DHS policy provides confusing guidance for detained immigrants.[28] Detained immigrants do not receive a written determination from ICE or even a notification from ICE that the claim was denied. Moreover, anecdotal evidence indicates that ICE interprets DACA eligibility requirements differently than USCIS. Advocates report that ICE agents tell detained immigrants they are not eligible for DACA under any circumstances. This inconsistency within DHS creates far more tough evidentiary hurdles for detained immigrants, a population that typically lacks access to counsel and resources.

> ***Recommendation*:** USCIS should retain jurisdiction over detained DACA requestors to ensure they have the same opportunity as non-detained requestors to apply for DACA. The burden on USCIS is likely to be minimal because the number of detained requestors will likely be in the hundreds. Additionally, USCIS already has protocols on handling benefits claims by detained immigrants and can exercise discretion on behalf of DHS.

13. Requests for Evidence, Notices of Intent to Deny, Notices of Denial, and Notices of Intent to Terminate DACA

The current process fails to provide an opportunity for requestors or their attorneys to rebut findings that a requestor presents a public safety or national security risk before a denial is issued. In most cases, a requestor does not have an opportunity to present evidence demonstrating "exceptional circumstances," or to correct information that led to an erroneous

[28] *See* http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/deferred-action-process.htm.

denial or RFE. Requestors receive a "checkbox" form denial or "checkbox" RFE with no explanation about what information led to the disqualification.

If USCIS intends to deny DACA based on public safety or national security concerns, the requestor deserves an opportunity to rebut any unfavorable information. In some cases, USCIS's information may be erroneous or out of date. For example, a DACA requestor may have been listed in a gang database without his or her knowledge, and without actually being a gang member or otherwise involved with a gang.

> ***Recommendation:*** To allow requestors to address public safety or national security concerns, USCIS should provide an explanation of what allegations or incidents were the basis of a denial, notice of intent to deny, or notice of intent to terminate DACA.
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> ***Recommendation***: If a DACA requestor's record presents a possible public safety or national security concern, USCIS should notify the requestor of such concern and provide an opportunity for the requestor to present evidence of exceptional circumstances sufficient to warrant approval of DACA status.

Thank you for your consideration of the above-mentioned recommendations.

Respectfully Submitted,

The Immigrant Legal Resource Center