CHIRLA
Coalition For Humane Immigrant Rights of Los Angeles

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

February 18, 2014
Laura Dawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I- 821D, Revision of a Currently Approved CollectionOMB Control Number 1615-0124 Docket ID USCIS-2012-0124

Dear Chief Dawkins:

The Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) submits the following comments in response to the request for public comment by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) 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, Doc No: 2013-30131.

CHIRLA was formed in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles; promote harmonious multi-ethnic and multi-racial human relations; and through coalition-building, advocacy, community education and organizing, empower immigrants and their allies to build a more just society.

CHIRLA is in strong support of this directive. Since its implementation, CHIRLA has educated and assisted thousands of people to about DACA. We believe it is in the best interest of the government and taxpayers to renew DACA and improve its outgoing implementation.

This program has allowed thousands of immigrant youth to be out of the shadows, yet the narrow criteria has left out many immigrant youth who cap out of age and or had a non-violent offense. We strongly urge USCIS to reconsider the age cap and crimes from significant misdemeanors to violent offenses.

CHIRLA comments recommend the following:

1) **USCIS should consider a longer renewal window than the proposed 90-120 days and should implement policies to protect youth whose documents may expire during the adjudication process.**

CHIRLA provides legal services and we are concerned that the current 90-120 day renewal window is too narrow in light of processing times. When DACA was first implemented, CHIRLA's legal department was overwhelmed and started setting up appointments months in advance, thus unable to serve all potential applicants, who had to find alternative legal service provider.

Furthermore, based on our experience most applicants have not received a final decision until three or four months after filing, with large numbers receiving decisions more than 120 days after filing.[1] In some cases, some applicants have waited as long as a year for a final decision.[1] Thus, renewal applicants filing in the 90-120 day window risk having DACA and their EAD expire during the adjudication process.

First, USCIS should consider allowing applicants to file for renewal earlier than 120 days before expiration, so that applicants and service providers can use early filing to avoid expiration during adjudication. This will also enable applicants to have sufficient time to seek legal services and gather supporting documentation. We suggest expanding the window to allow DACA recipients to file for renewal as early as six months before their EAD expiration date.

Second, timely filing of a renewal application should automatically extend deferred action and employment authorization until a final decision is reached. Third, an applicant who misses her renewal window should still be allowed to apply as a renewal applicant. Finally, a DACA recipient should not accrue unlawful presence if her DACA expires during the renewal adjudication process. This would bring the renewal process in accord with existing policy, because USCIS' Frequently Asked Questions on DACA state that applicants who turn eighteen while their applications are pending will not accrue unlawful presence.

2) Publish two separate application forms for the Renewal Request and for the Initial Request to avoid confusion and delay.

Navigating the I-821D application and determining which answers are required for renewals and which are required for initial applicants is confusing. While the draft Form I-821D indicates that certain sections are required for initial requests and others are required for renewal requests, this labeling is not consistent throughout the form. For example, Part 5 for Criminal, National Security, and Public Safety Information does not indicate whether initial applicants, renewal applicants, or all applicants should fill out this section.

Additionally, the labeling of sections as "For Initial Request Only" and "For Renewal Requests Only" on the form appears to conflict with information in the draft Instructions for Form I-821D, which state that applicants 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 what the form itself states. This inconsistency is likely to create confusion and lead applicants to inadvertently submit incomplete applications, or to supply unnecessary information and documents.

Because the form seeks different information from initial and renewal applicants, a single application form is confusing and difficult to navigate, even for experienced practitioners. Unlike the I-821 form for Temporary Protected Status (TPS), which only differentiates between initial applications and renewals in the first question, the draft I-821D form alternates back and forth between sections required for initial and renewal applicants. Applicants seeking to renew TPS need only answer one question as to whether they are an initial or renewal applicant, and then proceed to answer the same set of questions. By contrast, individuals seeking to renew DACA would be required to navigate a complicated form that requires them to complete some sections and skip others, or complete the entire form, based on a combination of instructions contained in the I-821D form and the form instructions.

The complex form is especially problematic because, in our experience, most DACA applicants are proceeding pro se and do not have the assistance of attorneys or accredited representatives to help them complete the application forms. CHIRLA provided information to thousands of pro se applicants in DACA's first year.

We ask USCIS to create two separate forms for the initial and renewal applications to make the processes more user-friendly for pro se applicants. Separate forms will require less complex instructions and will be easier for applicants who lack legal assistance or expertise to properly complete. Two separate, less complex applications will also better inform applicants as to what supporting documents are required, leading to fewer rejections, Requests for Evidence (RFE's), and adjudication delays.

3) **The Removal Proceedings Inquiry on page 1 Question 5 should be deleted or an "unknown" option should be provided because the options contain complex legal terms that most DACA applicants are unfamiliar with.**

USCIS should delete the Removal Proceedings Information section on page 1 question 5 or, in the alternative, provide an "unknown" option because this question will confuse applicants and will delay their application. Applicants may not be aware that they had previous interactions with U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or EOIR, or be clear as to what occurred in those interactions. If they or their family members were placed in removal proceedings, many applicants were very young when the proceedings took place and may not have any records of the proceedings. Some may have been administratively removed while attempting to enter the U.S. at a young age. 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. Therefore, USCIS should delete this question or provide an "unknown" option.

Responding to this section of the application will also cause substantial delay. Although an applicant can request records under the Freedom of Information Act (FOIA), ICE's response time is currently six months.[1] Also, the complex terms of art found in this question, may cause pro-se applicants to seek legal advice from attorneys. This will postpone the filing of their DACA applications until they save enough money to pay for attorney fees and receive the results of their FOIA request.

4) **The question regarding initial place of entry into the United States (page 2, Question 17) should be made clearer.**

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.

Because of these issues, we recommend that the question be clearer on the form. The question should specify that the place of entry pertains to cities, entry gates, airports and ports inside the U.S. We also recommended including in the instructions 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.

5) **The questions regarding Current Status and Pending Immigration-Related Request (page 2, Question 20a-c) should be deleted because they are unnecessary and burdensome.**

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.

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

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 parent, 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, and refuse to show documents to clients.[2] Thus, an applicant and her parents may be unaware of or unclear about the nature of any pending applications she might have.

Furthermore, 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. 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.

6) The Education and Military Service Information section of the Renewals Request should be simplified because the current series of questions is confusing even to experienced practitioners.

The current Education Service Information checklist on page 3 for renewal applicants is confusing. Even experienced practitioners have difficulty determining how to navigate this section. The instructions that follow Question 25 are particularly confusing, because they instruct the applicant to read Questions 26-29, but to only answer one of these questions. We recommend condensing this section into two basic questions. Question 25 could remain the same, but Questions 26-29 should be condensed into a single Question 26. An example of how this could be achieved is attached as Exhibit A. This would allow the instructions on the form following Question 25 to be simplified to read "If you selected Item 25.d, answer Question 26. Otherwise, skip to Part 4, Travel Information," or something similar. Simplifying the education and military service section will make it clearer to applicants which questions they must answer, reducing the chances that an application will result in an RFE.

If the DACA program continues, it is possible that recipients will need to renew more than once. The language of the Education and Military Service Information section for renewal applicants should reflect this possibility. This will avoid the need for USCIS to revise the form in the future. Instead of asking applicants how they demonstrated they met the education or military service criteria for their *initial* application, Question 25 should ask how applicants demonstrated they met these criteria on their *last approved* application. It is the most recent information, not the initial information provided, that would be most useful to USCIS.

For example, an applicant might have initially received DACA because she was currently attending high school but she might continue to be eligible two years later because she has since graduated. If this applicant renews again, she should indicate that she was eligible on her most recent application because she had graduated from high school. This is clearer than requiring her to answer two questions: one stating that she

[2] 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].

was eligible based on school enrollment when she first applied for DACA, and a second stating that she remains eligible because she has since graduated. It is also more useful to provide information demonstrating how the applicant has maintained eligibility, rather than information indicating how she demonstrated eligibility in the past. The form instructions could explain that for applicants who are renewing for the first time, their "last approved" application is their initial application, and for applicants who are renewing for the second time, their "last approved" application is their prior renewal application.

We recommend rewriting this section as follows. Question 25 should read: "How did you demonstrate that your education or military service met the criteria for Deferred Action for Childhood Arrivals on your *last approved* application for Deferred Action for Childhood Arrivals?" The answer choices would remain the same. Questions 26-29 should then be consolidated into a single Question 26, with multiple answer options. See Exhibit A.

7) **Graduates from training programs should not be required show employment; rather, completion of the program should be sufficient to renew their DACA.**

USCIS currently requires that graduates from education, literacy, or career training programs must be employed in order to renew their DACA application. This unnecessarily penalizes renewal applicants who clearly made substantial progress in their qualifying education, literacy, or career training program, but who may be unemployed despite a good faith effort to find a job. With an unemployment rate of 6.7% in the U.S., and 8.5% in California (the state with the largest number of DACA applicants[3]), not all these graduates will be able to secure employment. Given the competitive job market, the few employers that are hiring will most likely select unemployed college graduates instead of training program graduates.

We urge USCIS to delete the employment requirement for renewal applicants who have completed an education, literacy, or career training program or, in the alternative, to expand the requirement to include applicants who are actively seeking employment.

An additional burden is placed on these applicants because they are required to be employed in their field of training.[4] This poses a very difficult challenge because even professionals in this competitive job market are forced to practice outside their field of expertise. Similar to those professionals, in order to survive DACA applicants need to find employment even if it is outside of their training. This is especially true for recent graduates who accept temporary work outside of their training until they find a better position. If USCIS does not allow these DACA recipients to renew their deferred action, it will only make it more difficult for DACA recipients to one day obtain employment in their field of training.

Most DACA beneficiaries have been undocumented for a while and therefore unable to secure employment. Their limited job experience puts them at a disadvantage when looking for jobs. It stacks the odds against them as they try to enter a work force where people their age already have formal job experience.

A possible solution to this problem is for USCIS to consider the completion of the training program equivalent to a high school diploma or GED and not require employment in their field of training after their graduation. These students have dedicated a vast amount of time and money to finish their programs and possess as much potential as a high school graduate. And it is important to note that DACA is not an employment-based benefit. For these reasons, USCIS should consider the completion of these programs

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[3] US Citizenship and Immigration Service (USCIS), "Deferred Action for Childhood Arrivals" data for August 2012, June 30, 2013, http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-7-12.pdf.

[4] USCIS Frequently Asked Questions, Education, Q9.

equivalent to a high school diploma or a General Education Development (GED) certificate and sufficient for renewal.

8) **Continued enrollment in school should be sufficient to meet the "substantial progress requirement.**

USCIS should find that DACA recipients still in school have met the "substantial progress" requirement in consideration of their social and economic circumstances. Many of these DACA recipients need to provide financially for their families, which requires them to balance classes and a work schedule. This results in the recipient being unable to enroll in a full course of study and being unable to perform well in every class. Another reason why DACA recipients can only enroll in a few units at a time is the high cost of education. The fact that many DACA applicants have high levels of poverty coupled with the requirements in some states that unauthorized immigrants must pay higher tuition and the lack of government financial aid limits them to only enrolling in a minimal number of classes.

Moreover, requiring that DACA recipients pass a GED exam or other equivalent State-authorized exam is unrealistic. Recently, the GED exam was revamped, with the goal of building a program from the ground up to serve adult learners. However, the recent changes, according to some adult education experts, will be more rigorous and expensive. Notably, nine states – Iowa, Montana, Indiana, Louisiana, Maine, Virginia, New York, Missouri, and New Hampshire – have eliminated the GED exam and will now offer other tests. The Los Angeles Unified School District will not be providing the GED exam this year and will be awaiting California's decision on whether it will offer the updated GED exam, another test, or a series of exams. Further, the entire GED exam will now be taken online, thereby requiring a new set of skills, which will pose problems for some people. Consequently, the limited experience with the new GED exam puts DACA recipients at a disadvantage at passing the GED exam. For these reasons, enrollment in school should be sufficient to constitute "substantial progress."

9) **The information collected under the Processing Information section on page 4 is unnecessary and may deter applicants from completing the form.**

The demographic information requested under the Processing Information on page 4, part 2, which includes ethnicity and race, do not serve a purpose in this application. This information bears no relevance to DACA guidelines and does not assist adjudicators in determining if deferred action is warranted in an individual's case. This information is not necessary for identity verification or criminal background purposes because initial and renewal applicants must submit their biometrics. No form other than the N-400 requires this type of information, and there is no clear justification for requiring it on the 821-D.

Requesting height, weight, and ethnic and racial information may intimidate many applicants. 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.[5] 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.

[5] DACA Implementation Survey; Telephone Interview with Kathy Khommarath, Staff Attorney, Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) (Jan. 27, 2014).

10) **Page 5, Question 1 instructs applicants not to include minor traffic violations unless they were drug- or alcohol-related. USCIS should clarify that a driving without a license offense that is a misdemeanor under state law is a minor traffic violation and not require documentation of this offense.**

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 is a "wobbler" offense that may be charged as either an infraction or a misdemeanor.[6] Many undocumented individuals in California have convictions for driving without a license because until recently, these individuals were unable to obtain California drivers' licenses.[7]

It is unclear whether DACA applicants must submit documentation pertaining to misdemeanor offenses for driving without a license. In fact, the certified disposition for such offenses is often requested in an RFE, such that some practitioners have simply submitted these documents with the initial filing as a matter of course. 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.[8] In each of these states, unlicensed driving may constitute a misdemeanor in circumstances that are not alcohol- or drug-related.[9]

We ask that USCIS 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.

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.[10] As a result,

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[6] 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.

[7] Christopher B. Dolan, *Licenses coming for undocumented drivers, The Examiner, Nov. 7, 2013,* http://www.sfexaminer.com/sanfrancisco/licenses-coming-for-undocumented-drivers/Content?oid=2621311.

[8] 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].

[9] Cal. Veh. Code § 12500; Cal. Pen. Code § 19.8; 625 ILCS 5/6-101; Tex. Trans. Code § 521.021; Tex. Dep't of Public Safety, Texas Driver's Handbook 10 (2012), http://www.txdps.state.tx.us/internetforms/Forms/DL-7.pdf.

[10] Time for Action on Driver's Licenses for Undocumented Immigrants, Irish Voice Editorial, Jan. 31 2014, http://www.irishcentral.com/news/irishvoice/Time-for-action-on-drivers-licenses-for-undocumented-immigrants.html ("In all, 11 states have either passed or are considering passing driver's license bills that would allow the undocumented to operate a vehicle legally."); 1200 Immigrants Get Illinois Drivers Licenses, NBC Chicago, Jan. 15, 2014, http://blogs.sacbee.com/capitolalertlatest/2014/01/am-alert-305.html; Advocates Push to Give Undocumented New York Immigrants Driver's Licenses, N.Y. Daily News, Jan. 8, 2014, http://www.nydailynews.com/news/politics/advocates-push-give-n-y-undocumented-licenses-article-1.1570407; Undocumented Immigrants in Nevada Get Legal Drivers Licenses, Statescoop, Jan. 6 2014, http://statescoop.com/nevada-undocumented-immigrants-get-legal-drivers-licenses/ ; Governor Signs Bill Allowing Driver's Licenses for Undocumented Immigrants, NBC Los Angeles, Oct. 3, 2013, http://www.nbclosangeles.com/news/local/Jerry-Brown-Undocumented-Immigrants-Drivers-License-Bill-Signed-226327361.html.

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. 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.

Furthermore, applicants have no concrete way to ascertain whether they may be deemed ineligible because they "pose a threat to national security or public safety." Attorneys cannot clearly advise any client who may have come to the attention of any law enforcement agency. The agency could at least specify that any information leading to a determination of ineligibility for this reason must be based on information available through a request for an FBI background check.

11) **Question 5.e on page 5 should be omitted because it is not relevant to DACA eligibility, was not contained in the original DACA form, and is overly broad and confusing.**

The draft renewal form adds a question that was not present on the original I-821 form. This question requires applicants 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." This question is confusing and will be difficult for many applicants to understand because of its broad language. The question is an apparent reference to the ground of inadmissibility contained in 8 U.S.C. § 1182(a)(3)(G). However, because DACA confers no status upon recipients, DACA applicants are not subject to grounds of inadmissibility and such an inquiry is irrelevant to DACA eligibility.

8 U.S.C. § 1182(a)(3)(G) renders inadmissible "[a]ny alien who has engaged in recruitment or use of child soldiers in violation of section 2442 of Title 18." However, the form question uses language far broader than that contained 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.*"[11] The form question asks whether the applicant has recruited used anyone under 15 to "*help* an armed force or group" without any reference to hostilities or to enlisting the person to serve *while* they were under 15. The broad language on the form could be read to include such innocuous activities as encouraging friends to join the U.S. military when they turn 18, recruiting for JROTC, or participating in volunteer activities that provide services to veterans. The question will confuse many pro se applicants, leading them to respond in the affirmative because of innocent activities completely unrelated to the kind of conduct that the Child Soldiers Accountability Act of 2008, which added the above referenced inadmissibility ground, sought to punish.[12] We recommend that USCIS delete this question from the form because it is irrelevant to DACA eligibility, in addition to being confusing and overly broad.

12) **USCIS should not request evidence and information that was submitted in the initial application because it will cause applicants and USCIS officers confusion and delay.**

It would be more efficient for USCIS to process renewal applications without having to review information and evidence that were provided in the applicants' initial DACA application. From the months of August 2012 to July 2013, USCIS received approximately 2,300 DACA applications per day with a peak of 5,489 applications per day in September 2012.[13] It is very likely that USCIS will receive the same number of

[11] 18 U.S.C. §2442(a) (emphasis added).
[12] Pub. L. 110-340.
[13] USCIS, Deferred Action for Childhood Arrivals, http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-8-15.pdf.

applications for renewal since current DACA recipients continue to need employment authorization and deferred action. Therefore, to avoid unnecessary backlogs and wasting valuable government resources, USCIS should not request information and evidence that is already available in previously filed applications.

Further, not requesting the same information and evidence submitted in the initial application would avoid confusing USCIS agents and the applicants. USCIS officers would not be required to wade through and sort documents that were considered in the initial application from the documents that provide new information. They would also not be forced to review documents that do not provide any new information from the initial submission. Not requiring applicants to locate and submit previously filed documents will also help prevent delays in filing renewal applications and confusion about which documents they need to submit.

For example, the Form I-821D instructions do not specify whether a renewal applicant must only submit post-DACA grant criminal records or if the applicant must re-submit all criminal records. To avoid redundancy of information and evidence, USCIS should only request applicants to provide documentation of arrests, charges and convictions that have occurred since their DACA approval.

13) **Unnecessary evidence about the applicant's criminal history should not be requested because some documents will be burdensome to obtain and others should not be considered.**

The Form I-821D draft instructions #12 requests criminal history information that is not requested in the original instructions. For example, #12A on page nine of the draft instructions requests the original official statements made by the arresting agencies if the applicant was arrested for a felony or misdemeanor in the U.S. or in any other country, but no charges were filed. Obtaining these documents will be extremely difficult for applicants because the arresting agency may not have any record of the arrest since no charges were filed. This requirement will be even more burdensome for those applicants arrested outside the U.S. because foreign arresting agencies may not maintain files in cases where charges were not filed, most applicants no longer have contacts abroad that can help them obtain these files, and some countries may only release criminal records to the applicant in person. Moreover, these additional documents may prejudice a fair adjudication of the DACA application. The requested documents constitute allegations of conduct by law enforcement agencies in circumstances where the agencies themselves ultimately decided to not move forward with the prosecution.

Question #12C asks for original or court-certified records of expungements, vacated convictions, sealed convictions, etc. According to an American Immigration Lawyers Association (AILA) survey, one of the reasons why DACA eligible individuals are not applying is because they are concerned as to how USCIS will treat their criminal history.[14] To increase the confidence of potential DACA applicants, unnecessary documents such as original and court-certified records of arrests or convictions that have been removed, set aside, etc. should not be required. DACA was enacted to provide opportunities to individuals who have been in the U.S. for most of their lives and meet other specific requirements; hence, USCIS should be encouraging eligible individuals to apply through their policies.

Additionally, USCIS should not require court-certified records of vacated convictions because vacated judgments are not considered a conviction for immigration purposes if they were vacated for constitutional defects, statutory defects, pre-conviction errors affecting guilt, and if the criminal court failed to advise a defendant of the immigration consequences of a plea.[15]

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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, http://op.bna.com/dlrcases.nsf/id/lfrs-97xp89/$File/DACA%20Survey.pdf.

[15] 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.

Similarly, where an applicant was never convicted of a crime, or was arrested and charged but the charge was dismissed, sealed and/or expunged, such charges should not count against the applicant in the immigration context. Our criminal justice system operates on the principle that a person is innocent until proven guilty, and ensures that persons charged with crimes cannot be convicted absent a judicial process that meets constitutional requirements. The importance of limiting evidence of convictions to valid convictions is even written into the federal immigration laws.[16] Requiring an applicant to submit records such as arrest records may severely prejudice the applicant, particularly since the applicant has never been afforded an opportunity to challenge the alleged charges in a constitutionally-valid judicial forum, and remains innocent in the eyes of the law.

Finally, if a criminal court has decided that a person's arrest or conviction should be vacated, expunged, set aside or otherwise removed, the person should not be required to submit relevant documentation, especially where a court has itself limited access to the applicable records. For instance, 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 confidential juvenile records outside the state child welfare and juvenile justice systems without a court order. *See* California Welfare & Institutions Code §§ 827 and 828; Cal. Rules of Court Rule 5.552(a). DACA applicants 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 applicants may navigate complex local procedures to gain access to their juvenile records only to discover that these records are sealed and unavailable. Moreover, submitting even those court records that are available to USCIS would be inherently prejudicial to the applicant as USCIS would see that the person at some point had contact with the criminal justice system. USCIS should defer to the court's determination and not subject the applicant to double scrutiny.

14) **A more generous fee waiver is necessary to ensure financial difficulty does not cause eligible youth to delay or forego filing DACA applications.**

The lack of a fee waiver is a significant barrier to many DACA-eligible individuals. We have encountered many applicants who have forgone applying for DACA or delayed submitting an application solely because they lack the funds to apply. For example, one legal services provider reported a student who lost a college scholarship because her family could not afford the DACA fees. Her scholarship offer was contingent on her receiving DACA. She began preparing an application, but when her family was unable to provide the application fees, she gave up on both the application and her college plans.[17] This is but one example of the significant role cost plays in a young person's decision about whether and when to apply. Another Los Angeles legal services provider reported that for applicants who are just now coming forward to apply for DACA, despite having been eligible since the program began, the most common reason for delay is an inability to afford the filing fees.[18]

Studies show that the most common reason why individuals who appear to be eligible for DACA do not apply is the cost of filing.[19] A large number 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

[16] *See* 8 U.S.C. § 1229a(c)(3)(B).
[17] Interview with H. Marissa Montes and Emily Robinson, Clinical Attorneys, Home Base Immigration Clinic, Loyola Law School (Jan. 27, 2014).
[18] Telephone Interview with Kathy Khommarath, Staff Attorney, CHIRLA (Jan. 27, 2014).
[19] DACA Implementation Survey; MPI Brief.

families with incomes below 200% of the FPL.[20] A more generous fee waiver would ensure that those who appear to be eligible for DACA have access to adjudication of their eligibility. The need for a more generous fee waiver will likely become even greater as the program continues, because youth who will likely meet other eligibility criteria, but are under 15, have even higher levels of poverty, with more than half of this group living in households with income at the FPL, and more than 80% living in households with incomes less than twice the poverty level.[21]

The youth who are in the process of applying for DACA initially do not have a time-limitation which allows them to raise the necessary funds. That is why many undocumented youth took longer to apply. The fact that there is a time-limit in the renewal process creates extra pressure on youth and families to come up with the money. The high fees coupled with time-limits will make beneficiaries fall out of DACA status.

Moreover, for families with more than one DACA applicant, the burden of paying the filing fee is multiplied. One legal services organization found that more than half of the individuals it assisted came from families with more than one DACA-eligible member[22]. Lastly, providing a more generous fee waiver for DACA applicants would bring DACA in line with the other humanitarian-based petitions.

Existing regulations give USCIS the authority to waive fees for DACA applicants. While there is no fee for DACA itself, all DACA applicants are required to submit an Application for Employment Authorization, which carries a $380 fee. Current regulations allow USCIS to waive this fee.[23] Additionally, existing regulations provide that the Director of USCIS may "provide that the fee may be waived for a case or specific class of cases that is not otherwise provided in this section, if the Director determines that such action would be in the public interest and the action is consistent with other applicable law."[24] Because regulations already permit a waiver for the Application for Employment Authorization, creating a waiver of this fee for DACA applicants is consistent with other applicable law. Thus, existing regulations give USCIS the ability to implement a fee waiver for DACA applicants either under the explicit authorization to waive fees for the I-765, or under the Director's discretion to provide a waiver for a class of cases when doing so is in the public interest.

For these reasons, we recommend the following fee waiver structure for both new DACA applications and renewals. USCIS should offer a full fee waiver for DACA youth in households with incomes at or below 150 percent of the FPL. USCIS should also offer a fee reduction of one-half for DACA youth with household incomes at or below 200 percent of the FPL, for DACA youth in households where more than one family member is applying for DACA, and for DACA eligible youth who have other compelling circumstances justifying a fee reduction. In the alternative, we ask USCIS to expand the availability of existing fee exemptions to include all youth with incomes at or below 150 percent of FPL and to offer a partial exemption to reduce fees for youth with household incomes at or below 200 percent of FPL, youth in households with more than one DACA applicant, and to youth with other compelling circumstances justifying a fee reduction.

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[20] MPI Brief at 8.
[21] MPI Brief at 11.
[22] Telephone Interview with Kathy Khommarath, Staff Attorney, CHIRLA (Jan. 27, 2014).
[23] 8 C.F.R. § 103.7(c) includes the Application for Employment Authorization in the list of applications for which USCIS may waive fees.
[24] 8 C.F.R. § 103.7(d).

15) **USCIS should adopt a more secure method to mail the EADs because a concerning amount of applicants are not receiving them. And if applicants do not receive their EAD, they should not have to pay another $465.**

USCIS should send the Employment Authorization Document (EAD) to the applicant through a more secure form of mail such as certified mail to ensure that the EAD is not stolen or lost. Additionally, if the applicants are forced to replace their EAD, they should not be required to pay another $465.

USCIS's Secure Mail Initiative (SMI) has improved the delivery of sensitive documents to applicants; however there are serious flaws with SMI. SMI has made it possible for applicants to track the status of their documents but the major flaw is that a signature is not required for delivery. This is a key problem because although USCIS has sent EADS in a timely manner and the U.S. Postal Service (USPS) has delivered them to the correct address, many EADS have been stolen or lost. Although SMI is a step in the right direction, a more secure form of delivery is necessary to ensure that an EAD is not lost or stolen and is actually delivered to the applicant.

In addition, USCIS should not require the full fee when an applicant is requesting a replacement EAD. It is extremely difficult for many young adults who are full-time students and for their undocumented, underpaid parents to repay the filing fee. As discussed above, the majority of DACA eligible youth live in families with incomes below 200 percent of the FPL.[25] Furthermore, it is important to highlight that many DACA applicants come from households where more than one DACA application is submitted. To ask them to pay $465 for the replacement a few months after paying the original $465 is overly burdensome on the applicants and their families. In the alternative, USCIS should waive biometrics fees for recipients whose EADs are never received. USCIS should be considerate of the financial reality of DACA applicants because ultimately DACA is a humanitarian based program.

> The following story of Mr. X depicts the story of many applicants that had issues with their EAD: Mr. X's DACA request was approved in November 2013. All of the correspondence (biometrics notices, receipt notices, and approval notice) arrived to his address (he has lived in the same place for 6 years) without a problem. However, his EAD never arrived. USCIS shows the card as mailed and USPS shows the card as delivered, however it was never received by my client. Mr. X's household is currently at 116% of the 2013 Federal Poverty Guidelines, but he cannot apply for a fee waiver. Mr. X's family has to pay the $465 filing fee again, which is over half their monthly housing costs, not to mention the additional delay of several months in obtaining an EAD, social security number, and driver's license. Mr. X's mother said that she would have gladly paid $20 extra to have the card sent via certified mail. Mr. X is 18 and lives with his parents, but really wants to work so that he can help his family with living expenses.[26]

16) **USCIS should further the policy goal of protecting children from losing access to certain immigration benefits by adopting the position that DACA recipients who travel under Advance Parole have not departed the United States for purposes of the three and ten year bars.**

The Child Status Protection Act (CSPA),[27] which freezes a child's age to prevent her from "aging out" of eligibility for immigration benefits based on her status as an immediate relative reflects a sound policy of ensuring children do not lose access to important benefits due to processing delays and the passage of time.

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[25] MPI Brief at 7.
[26] Telephone Interview with Nora Phillips, Staff Attorney, CARECEN (Jan. 31, 2014).
[27] Pub. L. 107-208

We applaud USCIS for bringing the DACA process into line with this policy by implementing a policy that youth who turn 18 while their DACA applications are pending do not accrue unlawful presence. This policy will prevent many youth from potentially triggering the three and ten year bars.

Youth can be further protected from triggering these bars if USCIS adopts the position taken by the Board of Immigration Appeals (BIA) in Matter of Yarrabelly & Arrabally.[28] There, the BIA held that Adjustment of Status Applicants who left the United States under a grant of Advance Parole had not "departed" for purposes of the ten year bar. The central logic driving the BIA's decision in Arrabally is that individuals returning to the United States with advance parole have not effectuated "departures" within the ordinary meaning of the INA because they have been granted advance parole by the federal government for the express purpose of leaving the country temporarily and returning—without suffering a worsening of their immigration situation.[29] This logic also necessitates the conclusion that individuals with advance parole are not seeking admission to the United States when they present themselves at port of entries or land borders after their travel abroad because, as the BIA found, they have not "departed" the United States under the ordinary meaning of the INA. Due to the advance parole document that they have been issued they are, instead, being paroled back into the country.[30] As a result, the grounds of inadmissibility cannot be triggered when individuals with advance parole return to the United States.

USCIS should issue a clear statement that the Matter of Arrabally is interpreted to mean that the three and ten year bars, as well as other grounds of inadmissibility, do not apply to DACA recipients and other individuals with advance parole at the time that they return from travel abroad.

17) **To encourage robust DACA participation, USCIS should adopt an unambiguous confidentiality provision.**

USCIS should adopt confidentiality provisions to protect DACA applicants and encourage broader participation. The language on page 12 of the instructions regarding privacy is unclear and hard for a layperson to understand when information provided in the application can be shared with other agencies such as ICE. DACA eligible individuals are afraid that if they apply for DACA ICE will know of their unlawful presence in the U.S. and it will be easier for ICE to deport them. Providing information about their unlawful entry and status is a very frightening experience While USCIS' FAQ states that information from the DACA application will not be shared with ICE unless it meets USCIS's Notice to Appear guidance, this has failed to reassure DACA eligible individuals and these individuals have been dissuaded from applying.[31] In weighing their options, the potential risk of being removed from the U.S. is not outweighed by a temporary protection that can be terminated any time.

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[28] 25 I.&N. Dec. 771 (BIA 2012).

[29] The Board reasons that the statutory language in the 10-year bar puts most noncitizens "who are unlawfully present in the United States for a significant period of time on fair notice that if they leave this country—whether through removal, extradition, formal 'voluntary departure,' or other means—they will be unwelcome to return for at least 10 years thereafter. But the same cannot be said for the respondents, who left the United States and returned with Government authorization pursuant to a grant of advance parole." Id. At 776.

[30] The recent USCIS Policy Memorandum on "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces" (Nov. 13, 2013) outlines that the two inadmissibility grounds contained in INA § 212(a)(6)(A)(i) do not apply to aliens who entered the United States without inspection and subsequently receive parole (page 5). Arrabally certainly supports this conclusion. However, as discussed above, Arrabally also compels the broader conclusion that individuals returning to the United State with advance parole are not seeking admission at all.

[31] Telephone Interview with Kathy Khommarath, Staff Attorney, CHIRLA (Jan. 27, 2014).

Because DACA is meant to provide deferred action to individuals with low enforcement priorities, the confidentiality provision should be modeled after the Immigration Reform and Control Act (IRCA) of 1986[32]. The Immigrant Legal Resource Center (ILRC) found that the promise of confidentiality was essential to attracting many people to apply for IRCA. This was particularly important to eligible immigrants with ineligible family members who might face deportation.[33] USCIS's promise of confidentiality will guarantee the success of the DACA program.

18) **USCIS officers should be trained uniformly to avoid discrepancies in the adjudication process.**

USCIS officers in all service centers should be trained uniformly to provide DACA applicants and their representatives with clear information regarding the evidence required to prove the DACA requirements.

According to service providers, there have been discrepancies in the evidence required to prove the education and continuous residence requirements. The Nebraska Service Center has issued RFEs regarding current high school enrollment despite the applicant submitting a letter of enrollment and transcripts, when this evidence has been sufficient for Texas Service Center cases.[34] RFEs have also been issued requesting further evidence to prove continuous residence in the U.S. during the summer months if a student was not in school or working at that time. This has created confusion amongst legal service providers because the burden of proof has been applied differently by different adjudicators. If the officers are uniformly trained, unnecessary RFEs will not need to be issued, resources will be conserved, and the adjudication process will proceed more efficiently.

19) **USCIS should require applicants to demonstrate continuous residence for the five years preceding the date of their application, rather than since June 15, 2007, in order to expand the pool of potential DACA applicants.**

Based on the original DACA requirement, the continuous residence requirement should remain the five years preceding the date of the DACA application. Since two years have passed since DACA first went into effect, the applicant should only be required to prove continuous residence from June 15, 2009 rather than June 15, 2007. The consistency in the time period will permit new DACA eligible applicants that were in the U.S. before DACA took effect to apply. It is in the public interest to provide the same opportunity to students who arrived only two years later and were present when DACA was implemented.

Gathering sufficient evidence to prove continuous residence since June 15, 2007 has been the most challenging part in documenting eligibility for most DACA applicants.[35] Those individuals who waited years to have enough money to pay for the filing fee, but were eligible for DACA in 2012, now face a challenge of proving continuous presence for a longer period of time.[36] In general for everyone that applies for DACA, as years pass collecting documentation of their presence in the U.S. will only become more burdensome. Since DACA was enacted to provide temporary protection to youth that arrived in the U.S. at an early age and have

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[32] IRCA specified that information in a legalization application could not be used for any purpose other than to make a determination on the application or for penalizing false statements in the application. IRCA further specified that anyone who used, published, or permitted information in the application to be examined in violation of the confidentiality provisions would be fined and/or imprisoned for up to five years. Immigration Reform and Control Act, Pub.L. 99-603 § 1200-39, Nov. 6, 1986.

[33] Immigrant Legal Resource Center, Lessons learned from the Immigration Reform and Control Act of 1986: A look at the "Border Security, Economic Opportunity and Immigration Modernization Act of 2013," 2013, http://www.ilrc.org/files/documents/lessons_learned_from_the_immigration_reform_and_control_act_of_1986_final.pdf.

[34] Telephone Interview with Kathy Khommarath, Staff Attorney, CHIRLA (Jan. 27, 2014).

[35] Telephone Interview with Mariel Abeleda, Staff Attorney, Immigration Center for Women and Children. (Jan. 30, 2014).

[36] Telephone Interview with Kathy Khommarath, Staff Attorney, CHIRLA (Jan. 27, 2014).

plans on residing in the country permanently, there is no need to require that they show continuous presence because other DACA requirements fulfill this goal. The applicant's arrival at an early age is proven by requiring that they enter the U.S. before the age of 16. Their presence since their arrival is proven by requiring presence on June 15, 2012.

However, if USCIS preserves this continuous residence requirement, USCIS should modify the requirement to request continuous presence from the filing date to five years back. This will be representative of the initial DACA requirement when in 2012 USCIS was requesting evidence of five years of continuous presence, beginning with 2007. Question 1.b. on page 4, Part 3 can be changed from "I have been continuously residing in the U.S. since at least June 15, 2007, up to the present time" to "I have been continuously residing in the U.S. since 5 years prior to the date of this application." There would not be an issue of a new wave of applicants who were not residing in the U.S. on the date that the DACA program was implemented because USCIS requires that the applicant was present on June 15, 2012. This will also facilitate the adjudication process because otherwise USCIS will be burdened with reviewing more documents proving the additional years of continuous presence.

20) **USCIS should adopt electronic filing for DACA to facilitate the submission process for USCIS officers, applicants, and legal service providers.**

USCIS should allow legal service agencies to file applications electronically and use one login username and password for all their client cases because it will make the process much less cumbersome, particularly for organizations filing large numbers of renewals. Electronic filing will enable many of the LA County DACA Taskforce organizations to facilitate free clinics for pro-se applicants. Electronic filing will also improve the submission process by getting applications to USCIS more quickly and by reducing the costs of photocopying and certified mail.[37] Since many applicants are computer literate, electronic DACA filing will be faster, more efficient, and less expensive for applicants.

21) **USCIS should publish the I-821D and instructions in the three most commonly used foreign languages to make DACA more accessible to limited English proficiency applicants.**

According to the Migration Policy Institute, thirty-one percent of DACA-eligible youth have limited English proficiency.[38] The need for pro bono legal immigration services far exceeds availability.[39] Because of this, many youth may be dependent on limited English proficient parents or relatives to assist them in preparing their DACA applications. The I-821D is currently available in English and Spanish, making the process more accessible to Spanish speakers. USCIS should also publish the new I-821D and instructions in the next two most commonly spoken foreign languages. This will make DACA more accessible to youth from other language backgrounds.

22) **USCIS should issue personal reminders to DACA recipients reminding them to renew.**

USCIS should send DACA recipients a reminder notice informing them that their DACA and EAD will expire soon and to submit renewal applications. Along with the notice, USCIS should send DACA recipients renewal information, a list of resources, and pro bono organizations to contact for assistance with filing their renewal application. DACA recipients may not know their DACA and EAD will expire soon and risk losing their employment if they do not timely file for renewal. The Temporary Protected Status (TPS) recipients that renew late because of a lack of a personal reminder illustrate the high probability of this occurring to DACA recipients.

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[37] Telephone Interview with Kathy Khommarath, Staff Attorney, CHIRLA(Jan. 27, 2014).
[38] MPI Report at 8.
[39] Notario Fraud Remedies at 10.

USCIS has an incentive to ensure the success of the program and should therefore assist the DACA recipients by issuing reminders and helpful materials.

23) **USCIS should collect and regularly publish data regarding DACA to ensure transparency and consistency of implementation.**

USCIS should establish a robust data collection process to ensure transparency and consistency of implementation. This data should be provided frequently to stakeholders so they can appropriately address concerns regarding the DACA process. For example, information on how many individuals are filing their DACA applications pro-se will help organizations estimate the number of individuals they need to provide with educational DACA materials. Also, data on the number of fee exemptions being granted and the length of the DACA processing time will help applicants and provide further transparency.[40] Finally, USCIS should regularly disseminate data reports in a timely manner.[41]

Thank you for your consideration of these comments. If you have any questions, contact Kathy Khommarath at Kathyk@chirla.org.

Sincerely,

Angelica Salas
Executive Director

Kathy Khommarath
Staff Attorney

[40] Telephone Interview with Mariel Abeleda, Staff Attorney, Immigration Center for Women and Children. (Jan. 30, 2014).
[41] There was a six month gap between August 2013 and February 2014 when the USCIS Monthly DACA Report was not published.