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Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief Regulatory Coordination Division
20 Massachusetts Avenue NW
Washington, DC 20529–2140

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

Comments by Heartland Alliance's National Immigrant Justice Center Regarding Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I–821D, Revision of a Currently Approved Collection.

Dear USCIS Desk Officer:

Heartland Alliance's National Immigrant Justice Center serves approximately 10,000 noncitizen clients per year through direct immigration legal services, advocacy, and impact litigation. With a staff of 40 attorneys and paralegals and more than 1,500 active pro bono attorneys, the National Immigrant Justice Center (NIJC) is one of the largest legal service provider for low-income immigrants and refugees in the country. Our comprehensive program provides immigration legal services to immigrants including "Childhood Arrivals," asylum seekers, unaccompanied immigrant minors, survivors of human trafficking, and immigrant crime victims.

To date, NIJC has provided legal consultation regarding Deferred Action for Childhood Arrivals (DACA) to more than 1130 youth. NIJC has trained more than 650 *pro bono* attorneys to complete DACA applications, and with these *pro bono* partners, has represented more than 710 youth in their DACA applications. NIJC has also provided information about DACA to more than 1000 people through presentations and webcasts with schools and community groups. NIJC has also trained more than 325 Chicago Public Schools counselors and 490 social and legal service providers to note DACA eligibility and link youth with appropriate legal resources.

Based upon its vast experience in direct legal representation of immigrant youth, NIJC provides the following recommendations to ensure that the DACA renewal process is as efficient and uniform as possible. We appreciate your consideration of our comments.

Suggestions for Efficient Processing/Adjudication of DACA Requests

I. USCIS should simplify the proposed Form I-821D

Navigating the proposed I-821D application and determining which answers are required for renewals and which are required for initial requestors is unnecessarily 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. Sometimes the headings have directions indicating whether initial or renewal requestors must answer, while other times instructions are embedded among the questions; in some cases no information is provided

The proposed I-821D form also alternates back and forth between sections required for initial and renewal requestors throughout the application. This format contrasts sharply with the I-821 form for TPS, which only differentiates between initial applications and renewals in the first question. It is unclear whether individuals seeking to renew DACA may be required 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 accompanying instructions. 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.

The confusing structure of the proposed I-821D form creates a substantive barrier to receiving or renewing DACA. 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.

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. 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.

II. USCIS should revise the questions regarding currently-pending applications so as to elicit responses that facilitate timely adjudication.

Proposed Form I-821D, Page 2, Part 1, Question 20.b. instructs initial applicants to indicate "whether you have other immigration-related requests pending." Question 20.c. instructs renewal applicants to indicate "any immigration status you have received," and "whether you have had any other immigration-related requests pending."

We support timely case processing and suggest that these questions be modified to request information to facilitate adjudication of all pending applications within current processing times. Currently, this question is likely to be interpreted as a "yes" or "no" question and may not provide USCIS the necessary information regarding the other immigration–related pending request.

Recommendation 1: Form I-821D, Question 20.b., should read "If you have any other immigration-related requests pending, please write the relevant form number(s) and receipt number(s)."

Form I-821D, Question 20.c. should read, "Since you have received Deferred Action for Childhood Arrivals, provide any immigration status you have received. If you have any other immigration-related requests pending, please write the relevant form number(s) and receipt number(s)."

Recommendation 2: We suggest that USCIS use this additional information to ensure adjudication of all applications within posted processing times.

III. To streamline application and adjudication procedures, USCIS should adopt the model of Temporary Protected Status (TPS) and specify that renewal applicants need not submit evidence of their continuous residence since the date of their last application.

Page 2 of the proposed instructions for Form I-821D states, "An individual may be considered for Renewal of Deferred Action for Childhood Arrivals if [...] he or she: [...] 2.Has continuously resided in the United States since he or she submitted his or her request for Initial Deferred Action for Childhood Arrivals up to the present time."

However, Page 10, Evidence for Renewal Requests, does not address whether applicants should submit evidence of meeting this requirement.

Recommendation: USCIS should follow the TPS model and not require renewal applicants to submit evidence of their continuous residence. The regulations for TPS state: "Completing the block on the I–821 attesting to the continued maintenance of the conditions of eligibility will generally preclude the need for supporting documents or evidence." See 8 C.F.R. § 244.17.

On Page 10, Evidence for Renewal Requests, we suggest adding the language. "Completing Part 3, Question 1.b. on Form I-821D attesting to continuous presence will generally preclude the need for supporting documents of continuous presence since the date of approval of initial Deferred Action. You do NOT have to submit evidence of your continuous residence with your renewal request."

IV. As a matter of efficiency, USCIS should notify DACA applicants in the event that they waive the collection of biometrics.

On page 3 of the proposed instructions in the Biometrics Service Appointment section, it states in relevant part: "USCIS may, in its discretion, waive the collection of certain biometrics." Waiving biometrics facilitates prompt adjudication and is convenient for applicants. However, applicants should be notified in the event of a waiver so as to prevent applicants and legal representatives from conducting unnecessary inquiries and placing increased burden on USCIS customer service.

Recommendation: The language on Page 3 under Biometrics Services Appointment should be modified as follows: ... USCIS may, in its discretion, waive the collection of certain biometrics *and will mail the applicant a notice of waiver of biometrics.*

V. Those who properly file renewal requests within 120 days of the expiration of their current grant should receive an automatic extension of deferred action and employment authorization until their renewal

application is adjudicated to prevent applicants from accruing unlawful status due to USCIS delays.[1]

The "NOTE" at the bottom of Page 2 of the instructions indicates that a DACA renewal request may not be filed more than 120 days prior to the expiration of the current period of deferred action. It is likely that many DACA applicants will apply within that period, but not receive a decision prior to the expiration of their current grant of deferred action. Automatic extensions of deferred action and employment authorization would allow applicants to maintain their lawful employment, and would prevent them from accruing unlawful presence during adjudication of their renewal request.

Recommendation: USCIS should look to the processing of Form I-751, Petition to Remove the Conditions of Residence, as a model and provide automatic extensions of DACA status and employment authorization upon receipt of properly filed renewal requests. *See* 8 C.F.R. § 216.4 ("Upon receipt of a properly filed form I-751, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition.")

USCIS should issue a receipt notice for requests for renewal of DACA stating that the period of deferred action and employment authorization is automatically extended for 120 days or until the director has adjudicated the request. If USCIS has not adjudicated the I-821D renewal request in 120 days, USCIS should issue a notice every 120 days extending deferred action and employment authorization for an additional 120 days until the I-821D renewal is adjudicated.

USCIS should clarify evidentiary requirements for renewals

Page 2 of the proposed instructions for Form I-821D states that to be eligible for renewal, an applicant who "qualified for Initial Deferred Action for Childhood Arrivals based on demonstrating that he or she was "in school" at the time that request was submitted," must have "since satisfied the education guideline for Renewals." The instructions then direct applicants to visit the Frequently Asked Questions at www.uscis.gov/childhoodarrivals "For more detail on the Renewal education requirements."

Page 10, Evidence for Renewal Requests – where renewal applicants will likely look for guidance – does not mention evidence regarding the education requirement.

Recommendation: We suggest including on Page 10, Evidence for Renewal Requests, the following instructions which draw on language on the proposed Form I-821D and the current instructions:

"If, at the time of your initial request for Deferred Action for Childhood Arrivals, you were enrolled in school, please visit the Frequently Asked Questions at www.uscis.gov/childhood arrivals for more detail on the education requirements for renewal requests. You will need to include supporting documents to demonstrate that you have graduated from school, have made substantial, measurable progress toward graduating from high school or the school in which you are enrolled, have passed a GED or other equivalent state-authorized exam, or are currently enrolled in a new/different education, literacy, or career training program (including vocational program) designed to lead to placement in postsecondary education, job training, or employment."

Please refer to **Item Number 9** on page 8 of these instructions for additional guidance regarding what documents may demonstrate the educational requirements.

[1] We recognize the Chicago DACA Collaborative for raising this concern and recommending this model.

USCIS should eliminate or clarify requests for criminal history evidence

VI. Applicants should not be required to disclose juvenile delinquency incidents or provide evidence thereof, as the requirement creates an irregular standard among states, places an undue burden on both the government and applicants, and is inconsistent with immigration case law.

Page 5, Part 5, Question 1 of the proposed form I-821D states "Have you ever been arrested for, charged with, or convicted of a felony or misdemeanor in the United States? […] ***Do include incidents handled in juvenile court.*** (emphasis added) […] If you answered "Yes" you must also include copies of all arrest records, charging documents, dispositions (outcomes), sentencing records, etc., **unless disclosure is prohibited under state law** (emphasis added). Similarly, Page 9, Section 12 of the proposed Form I-821D Instructions 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."

We support the inclusion of language in the proposed form recognizing that disclosure of some juvenile court records is prohibited under state law. However, NIJC's experiences working with hundreds of youth have illustrated both the burden that the current requirement places on applicants, and the unfair standard it creates. Thus, we recommend a more streamlined and uniform procedure.

As the laws regarding disclosure of juvenile delinquency dispositions vary from state to state, these instructions create an unfair standard by requiring evidence that may dissuade adjudicators from exercising discretion for some applicants but not for others.

Furthermore, for this provision to be effectively implemented, *pro se* applicants, legal representatives and adjudicators would all have to become experts in often-complex state laws regarding the parties to whom juvenile court records may be released. In some states, it may be unclear whether law prohibits the disclosure of this information.

Finally, the June 15, 2012 memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," establishes the criteria for considering an individual for deferred action as an exercise of prosecutorial discretion. The memorandum specifies that an eligible individual "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." Thus, the memorandum cites *convictions* as barring eligibility for DACA. Dispositions of juvenile delinquency are not considered convictions for the purpose of immigration law. *See* Matter of Devison, 22 I&N Dec. 1362 (BIA 2000) (*en banc*). Although DACA is an act of prosecutorial discretion, uniform procedures consistent with immigration law should be applied.

Recommendation 1: Page 5, Part 5, Question 1 of Form I-821D should read "Do NOT include incidents handled in juvenile court…," rather than "Do include."

Recommendation 2: Page 9, Section 12, of Form I-821D Instructions should omit the following struck through language: "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."

In the alternative, USCIS must not issue requests for evidence for juvenile records from states in which such disclosure of such records is prohibited, or should institute an appeal process for applications denied for failure to disclose juvenile records in accordance with state law.

VII. As a matter of efficiency, renewal applicants should not be required to submit records of their arrests or convictions that they previously submitted with their initial applications.

Page 5, Part 5, Question 1 of the proposed Form I-821D states "Have you ever been arrested for, charged with, or convicted of a felony or misdemeanor in the United States? [...] If you answered "Yes" you must also include copies of all arrest records, charging documents, dispositions (outcomes), sentencing records, etc. [...]." Similarly, Page 10, Section 12, B, of the proposed Form I-821D Instructions request "If you have ever been charged with or convicted of a felony or misdemeanor in the United States, or a crime in any country other than the United States, submit an original or court-certified copy of the complete arrest record and disposition for each incident [...]."

Those renewing DACA should not be required to resubmit records regarding arrests or convictions that they submitted with their previous requests. This requirement places an unnecessary burden on applicants as well as local courts, and may slow adjudication by including duplicative information to the record.

Recommendation: On the proposed Form I-821D, Page 5, Part 5, Question 1, the following sentence should be added to the bold section after the question. "Renewal applicants are not required to re-submit documents submitted in their initial request."

Recommendation: On the proposed Form I-821D, Page 5, Part 5, Question 2, the following sentence should be added to the bold section after the question. "Renewal applicants are not required to re-submit documents submitted in their initial request."

Recommendation: After the existing instructions on Page 10, Section 12, B, the following sentence should be added: "If you are seeking a renewal of Deferred Action for Childhood Arrivals, you do NOT need to resubmit evidence demonstrating the results of the arrests or charges brought against you if this evidence was submitted with your initial filing or in response to a Request for Evidence.

VIII. Applicants should not be required to submit arrest records, as this requirement unnecessarily burdens applicant as well as local court and law enforcement agencies. [2]

Page 10, Section 12, B, of the proposed instructions state: "If you have ever been charged with or convicted of a felony or misdemeanor in the United States, or a crime in any country other than the United States, submit an original or court-certified copy of the complete arrest record and disposition for each incident [...]."

A certified court disposition should be sufficient evidence of the outcome of an arrest. In cases where no charges were filed in court, a letter from the court in the jurisdiction of the arrest stating that no court records exist should be sufficient. The June 15, 2012 memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," establishes the criteria for considering an individual for deferred action as an exercise of prosecutorial discretion. The memorandum specifies that the individual "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety."

[2] NIJC Joins with the Immigrant Legal Resource Center in this comment

Requiring the submission of arrest records introduces information to an applicant's immigration file that has not been confirmed by criminal courts and may be false and prejudicial. Furthermore, this requirement may deter applicants residing in localities hostile to immigrants from applying because they do not wish to interact with local law enforcement in order to request their records.

Recommendation: The instructions at Page 10, Section 12, B, should read "submit an original or court-certified copy of the ~~complete arrest record and~~ disposition for each incident."

USCIS should reduce the cost of renewing DACA and expand the categories of individuals eligible for a fee exemption

The costs of DACA applications and the existing criteria for granting fee exemptions are a significant barrier for many DACA-eligible individuals. We have encountered countless requestors who 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.[3] 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.[4]

Notably, the undocumented youth 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.

***Recommendation*:** For these reasons, USCIS should set the DACA fee for renewal requestors at $200 ($115 processing, $85 biometrics fee), waiving the fee for a work authorization document. 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.[5]

Alternatively, the agency should consider adding several categories of individuals to the fee exemption criteria to allow more low-income requestors to access DACA. First, 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. Currently, about 11% of DACA-eligible youth are parents with children living in the home. In addition, USCIS should permit DACA requestors to obtain a fee exemption so long as their income is below 150% of the FPL.

Overall, a more generous fee policy would ensure that those who are DACA-eligible have access to the benefits of the program. The need for creating a more generous fee policy will likely become even greater because youth who will likely 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.[6]

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[3] 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].
[4] MPI Brief.
[5] 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.
[6] MPI Brief.

USCIS should retain jurisdiction of all DACA requests

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.[7] 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.[8]

Thank you for considering the above-mentioned comments. Should you have any questions or concerns, please do not hesitate to contact either of us at ktalbert@heartlandalliance.org (312.660.1611) or vesparza-lopez@heartlandalliance.org (312.660.1607).

Sincerely,

_____	_____
Karolyn Talbert	Vanessa Esparza-Lopez
Associate Director of Legal Services	Supervising Attorney

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

[8] See PM-602-0093, Adjudication of Adjustment of Status Applications for Individuals Admitted to the United States under the Visa Waiver Program, http://www.uscis.gov/sites/default/files/files/nativedocuments/2013-1114_AOS_VWP_Entrants_PM_Effective.pdf (last visited February 9, 2013).