

Submitted via email to: USCISFRComment@uscis.dhs.gov

April 26, 2016

Samantha Deshommes
Acting Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, D.C. 20529-2140

**Re: Agency Information Collection Activities: Consideration of Deferred Action for
Childhood Arrivals, Form I-821D; Extension, Without Change, of a Currently
Approved Collection
OMB Control Number 1615-0124**

Dear Ms. Deshommes,

The Catholic Legal Immigration Network, Inc. (CLINIC) submits the following comments in response to U.S. Citizenship and Immigration Services' (USCIS) March 2, 2016 notice regarding extension of Form I-821D (Consideration of Deferred Action for Childhood Arrivals) and the accompanying instructions. While USCIS has proposed no change to the form, CLINIC recommends several revisions that may enhance and improve the application process for individuals and representatives.

CLINIC supports a national network of community-based legal immigration services programs which regularly advise and assist individuals with applications for Deferred Action for Childhood Arrivals (DACA). This network includes over 280 programs operating out of 350 offices in 46 states, as well as Puerto Rico and the District of Columbia.

CLINIC is invested in the promotion and success of DACA. Over ninety percent of CLINIC's affiliates provide free and low-cost representation to thousands of DACA applicants. CLINIC offers an extensive collection of DACA resources for legal service providers including application materials, workshop toolkits, webinars and podcasts, as well as community outreach and education materials.¹ CLINIC also advocates with the Department of Homeland Security (DHS) and its components on behalf of our affiliates to address systemic DACA issues or when problems arise in individual DACA cases.

¹ CLINIC's DACA Resources are available at: <https://cliniclegal.org/resources/deferred-action-childhood-arrivals>.

The social teachings of the Catholic Church state that regardless of their legal status, migrants, like all persons, possess inherent human dignity which should be respected and government policies that respect the basic human rights of the undocumented are necessary.² Accordingly, our policy recommendations and advocacy regarding the DACA program are guided by these principles.

I. General Comments

We appreciate this opportunity to provide comments on Form I-821D and instructions. This comment builds on CLINIC's extensive experience assisting representatives and individuals understand and gain access to the program. Further, our comments are informed by survey responses from our affiliates, who provided their firsthand experience with DACA applications. Our survey respondents hail from 15 states, including jurisdictions with the largest populations of DACA recipients such as California, Colorado, Florida, Texas, and Illinois, as well as less densely populated areas such as Idaho, Tennessee, and West Virginia. We believe the diversity of these perspectives are invaluable to providing USCIS with well-informed feedback.

CLINIC commends USCIS's decision to adopt many of the recommendations provided in response to USCIS's April 4, 2014 notice regarding proposed changes to Form I-821D and instructions.³ We encourage USCIS to continue its efforts to review and improve forms, instructions, and guidance to adjudicators and the field as the program and other directly-connected policy matters develop. CLINIC recommends USCIS make several changes to the current form and instructions to help initial and renewal applicants, as well as their representatives, better navigate the application process.

The form review process also provides opportunity to share broader policy concerns regarding the DACA program. One such concern is that recipients who timely file their renewal applications and are awaiting adjudication may lose work authorization and accumulate unlawful presence as they wait to receive their DACA renewal. A lapse in work authorization can result in immediate termination or temporary lapse in employment and wages that are critical to DACA recipients' livelihoods. Further, the accrual of unlawful presence may have a significant impact on eligibility for future immigration benefits. We recommend that USCIS automatically extend deferred action and work authorization for renewal requesters whose applications are pending adjudication, particularly in those instances where the delay in processing is caused by service delays.

Another DACA-related policy concern is the cost of DACA applications. Our survey respondents indicate that the top two barriers to applying for DACA are establishing physical presence and residence and affording the filing fees. Additionally, recent reports by the Brookings Institute and American Immigration Counsel indicate that the \$465 filing fee significantly influences and many times becomes a

² See *Strangers No Longer, Together on the Journey of Hope: A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the United States*, United States Conference of Catholic Bishops, Inc. and Conferencia del Episcopado Mexicano, page 16, paragraph 8 (2003) available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/strangers-no-longer-together-on-the-journey-of-hope.cfm>

³ Comments submitted by CLINIC, American Immigration Lawyers Association, American Immigration Counsel and National Immigration Law Center on Proposed Revisions to Consideration of Deferred Action for Childhood Arrivals, Form I- 821D, AILA Doc No. 13021522 (dated February 12, 2013), available at www.aila.org/infonet/aic-aila-clinic-and-nilc-comments-on-form-i-821.

barrier to an individual's application.⁴ CLINIC also strongly encourages USCIS to explore opportunities to expand its fee exemption policy and offer full and partial fee waivers for families with multiple eligible members. The filing fees can become even more challenging in the context of low-income families⁵ with multiple eligible applicants. The high DACA application cost can result in families having to making the difficult choice to file an application for one family member over another. To fully address this issue, CLINIC recommends exploring fee exemptions for individuals whose household income is below 150% of the U.S. poverty level and immediate family members who are residing in the same household.

II. Specific Comments to Form I-821D

1. Clarify the Definition of Initial and Renewal Requests.

➤ *Page 1, Part 1. Questions 1 and 2*

USCIS asks applicants to indicate whether they are initial or renewal requesters on Form I-821D. Individuals who have applied for DACA, received a denial, and seek to re-apply are likely to be confused about how best to respond in this section. In addition, Form I-821D instructions direct renewal requesters to whom ICE initially granted DACA to respond to all questions on the form and submit relevant documentation as though the individual were an initial applicant. However, USCIS asks these requesters to assert that they are filing a renewal request in Part 1 (as stated in Form I-821D instructions on page 11). We recommend that USCIS clarify both these issues on the form.

Recommendation: Question 1 should be amended as follows (new language in bold italics):

1. ☐ Initial Request – Consideration of Deferred Action for Childhood Arrivals (***includes applicants who are re-applying after an earlier application was rejected or denied***)

OR

2. ☐ Renewal Request – Consideration of Deferred Action for Childhood Arrivals (***check this box regardless of whether USCIS or ICE initially deferred action in your case.***)

2. Clarify That Renewal Requests Can Be Filed Within One Year of Expiration of the Previous DACA

➤ *Page 1, Part 1. Question 2*

⁴ Audrey Singer, Nicole Prchal Svajlenka, and Jill H. Wilson. 2015. *Local Insights from DACA for Implementing Future Programs for Unauthorized Immigrants* (Washington, D.C.: Brookings), available at: www.brookings.edu/research/reports/2015/06/04-local-insights-daca-singer-svajlenka-wilson.

Roberto G. Gonzalez and Angie M. Bautista-Chavez. 2014. Two Years and Counting: Assessing the Growing Power of DACA (Washington, D.C.: American Immigration Council), available at: www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca.

⁵ “We estimate that more than one-third (35 percent) of currently eligible DACA youth lives in families with incomes below 100 percent of the federal poverty level (FPL), and two-thirds (66 percent) live in families with incomes below 200 percent of FPL.” Migration Policy Institute, Issue Brief: Deferred Action for Childhood Arrivals at the One-Year Mark, page 8, 2013, available at: www.migrationpolicy.org/pubs/cirbrief-dacaatoneyear.pdf.

While the instructions recommend renewal requesters to file between 150 days to 120 days prior to their DACA expiration date, it is not indicated anywhere in the form or the instructions that renewal requesters are still eligible for renewal up to one year after their initial DACA expired. The lack of clear guidance on this issue might deter many requesters who were not able to file for various reasons within the recommended renewal period but still eligible to renew from renewing their DACA.⁶ This information is important but can only be found indirectly in the instructions and in the FAQs on USCIS website.⁷ The form should be amended to be consistent with the FAQs.

Comment: Question 2 should be amended to read: (new language in bold italics)

For this Renewal request, my most recent period of Deferred Action for Childhood Arrivals expires on (mm/dd/yyyy)

Note: You may file for a renewal within one year of the expiration date of your previous DACA. If you are filing beyond one year after your most recent period of DACA expired, you may still request DACA by submitting a new initial request.

3. Eliminate Processing Information

➤ *Page 2, Part 1. Questions 15 to 20*

The “Processing Information” section requests demographic information, including a requester’s ethnicity, race, height, weight, eye color, and hair color. This information is not relevant to DACA eligibility. In the interest of keeping the form as accessible and as short as possible, we suggest this section be eliminated.

Recommendation: The proposed “Processing Information” section should be eliminated from the form entirely.

Alternatively, if the questions are retained, the form instructions and outward facing guidance should advise applicants of the purpose for collecting the data and confirm that adjudicators may not take this information into consideration when making a determination. We recommend similar language as found in the N-400 instructions which explain that the information collected will be used for the specific purpose of conducting the background check. Similarly, internal guidance to USCIS adjudicators should clearly advise adjudicators that such information should not be taken into consideration when making a determination on a DACA case.

4. Clarify That Renewal Applicants Need Not Resubmit Information and Records That Have Been Submitted for Their Initial DACA.

➤ *Page 4, Part 4*

⁶ For example, it is indicated that many requesters have to save money for a few months to pay for the application fee. See page 8 of Mathay and McHugh. *DACA at The Three-Year Mark: High Pace of Renewals, But Processing Difficulties Evident*. Migration Policy Institute. August 2015, available at: www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident.

⁷ See the answer to Q50 in USCIS FAQs updated June 15, 2015, available at www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#renewal%20of%20DACA.

It is provided in the instructions (page 10 to 11) that renewal requesters do not need to re-submit documents already submitted with a prior DACA request. We urge USCIS to add this information to the application form so that it is more prominent and better helps to eliminate confusion.

Recommendation: The form should indicate that renewal applicants need only provide information and records related to charges or convictions that occurred since they were granted DACA. Specifically, the form should include the following sentence at the beginning of Part 4:

Note: For Renewal Applicants: With regard to criminal/national security and public safety questions, you need only report on incidents and provide records related to incidents that occurred since your initial DACA application was approved. You do not need to report on or re-submit records that you already reported on or provided to USCIS.

5. The Form Should Not Request Information And Records Related To Juvenile Adjudications.

➤ *Page 4, Part 4, Question 1*

We encourage USCIS to eliminate requests for information and records related to juvenile adjudications. Many states do not permit the disclosure of juvenile records to parties outside the juvenile justice system without first obtaining a court order. To ensure uniform treatment of all DACA requests, USCIS should not require applicants to reveal whether they were charged with or convicted of a felony or misdemeanor if that incident was handled in juvenile court. Removing this requirement will prevent the unavoidably inconsistent and unfair treatment of applicants who are subject to divergent state laws.

Consistent with the above, requesters should not be asked to provide any records or documents regarding arrests, charges or convictions handled in juvenile courts. Applicants are currently instructed to submit original official statements from arresting agencies or courts confirming that no charges were filed for any felony or misdemeanor arrests in the U.S. or a crime in any other country. Applicants are also required to submit an original statement from the court indicating that no record exists of arrests or convictions that have been vacated, set aside, sealed, expunged, or otherwise removed from their criminal record. These requirements are overly burdensome for applicants. Many are likely to have difficulty obtaining statements of no record or no charges from courts or arresting agencies. These records can be prejudicial and unreliable.

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

Have you EVER been arrested for, charged with, or convicted of a felony or misdemeanor in the United States? ***Do not include minor traffic violations unless they were alcohol- or-drug-related. Do not include incidents handled in juvenile court.***

6. The Form Should Not Ask for Arrest Records and Charging Documents.

➤ *Page 4, Part 4, Questions 1 and 2*

Arrest records and charging documents can be unreliable and prejudicial and can create the presumption of guilt, even though they do not necessarily result in a conviction. Because of the disputed nature of arrest records and charging documents, CLINIC suggests that DACA decisions should not be based on these records unless there is a conviction.

Recommendation: The form should be amended to read:

1. Have you EVER been ~~arrested for, charged with, or~~ convicted of a felony or misdemeanor in the United States? *Do not include minor traffic violations unless they were alcohol- or-drug-related. Do not include incidents handled in juvenile court.*

If you answered “Yes,” you must include a certified court disposition, ~~arrest record, charging document, verdict or judgment of conviction, or sentencing record for each incident, unless the records involved incidents handled in juvenile court or~~ disclosure is prohibited under state law.

2. Have you EVER been ~~arrested for, charged with, or~~ convicted of a crime in any country other than the United States?

If you answered “Yes,” you must include a certified court disposition, ~~arrest record, charging document,~~ sentencing record, etc., for each **conviction**.

Form I-821D Instructions

1. Organize the Instructions in a Question-by-Question Format.

Many of our affiliates have pointed out that the instructions can be confusing at times. We suggest that a question-by-question instruction which corresponds to the form may be more helpful in guiding applicants to complete Form I-821D.

Recommendation: Organize the instructions in a question-by-question format that follows the numbering of the form.

2. Clarify That Renewal Requests Can Be Filed Even After the Current DACA Expires.

➤ *Page 1, When Should I Use Form I-821D? –Renewal Requests After Expiration*

It is not clear to applicants that renewal requests can be filed even after the current DACA expires. This information is provided in USCIS FAQs of June 15, 2015,⁸ but is not clear in the instructions. The instructions merely state that “If ... you are filing within one year after your last period of deferred action expired, please follow the instructions....”

Recommendation: We suggest USCIS amend the “Note” section to state:

NOTE: *You may file for a renewal within one year of the expiration date of your previous DACA. If you are filing more than one year after your latest period of DACA expired, you may still request DACA by submitting a new initial request. However, if you file for a renewal after your previous DACA expires, you will accrue unlawful legal presence AND you will not be authorized to work in the United States starting from your DACA expiration date.*

3. The Renewal Process Should Not Distinguish Between Those Granted DACA By ICE And Those Granted By USCIS.

⁸ See answer to Q50 in USCIS FAQs updated June 15, 2015, available at: www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#renewal%20of%20DACA.

➤ *Page 1, When Should I Use Form I-821D? – ICE DACA Grantees*

Applicants who initially received DACA from ICE and are seeking renewal are instructed to complete the entire form and provide documentation showing that they satisfied the guidelines at the time of their initial filing. Thus, they are treated by USCIS as initial applicants when requesting renewal and are required to submit all initial documentary evidence to support the request. This policy is objectionable because individuals who were approved for DACA by ICE were granted deferred action under the same DHS memorandum as applicants approved by USCIS. For this reason, it is neither reasonable nor justified to establish separate evidentiary requirements for a subset of DACA grantees. All DACA renewal applicants should be evaluated using consistent standards.

Moreover, imposing this requirement is particularly burdensome for ICE grantees because they were detained during the application process and are less likely to have copies of their initial applications. Such a policy places an undue burden on applicants to retrieve documents from ICE – a process that may be complicated, time consuming, and may delay applicants' ability to apply for renewal.

Recommendation: The language in the second "Note" section should be modified as follows (new language in bold italics):

NOTE: IF U.S. Immigration and Customs Enforcement (ICE) initially deferred action in your case and you are seeking a Renewal, you may follow the instructions on Form I-821D regarding renewal applications. ~~You must also respond to ALL subsequent questions on the form. You must also submit documentation to establish how you satisfy the guidelines as if you were filing an Initial request for consideration of deferred action.~~

➤ *Page 11, Evidence for Renewal Requests Only*

Recommendation: Page 11 of the instructions should be amended as (new language in bold italics):

If ICE initially deferred action in your case and you are seeking a Renewal, you must select and complete Item Number 2 in Part 1 of Form I-821D. ***You must complete the rest of the Form as a Renewal Applicant.*** ~~You must also respond to ALL subsequent questions on the form. You must also submit documentation to establish how you satisfy the guidelines as if you were filing an Initial request for consideration of deferred action.~~

4. Clarify Whether Other Education Programs Satisfy the Education Requirement.

➤ *Page 8, Section 9. What documents may demonstrate that you: a) are currently in school...?*

The education requirement has been identified by our affiliates to be a major obstacle to DACA applicants. We appreciate that USCIS permits a variety of education programs to qualify for the education requirement for DACA applications. However, our affiliates have asked for additional clarification on whether online GED instruction, online private high school training, and home schooling satisfy the education requirement.

Recommendation: Clarify whether online GED instruction, online private high school training and home schooling satisfy the education requirement for DACA applications.

5. Clarify What Information Provided in DACA Applications Will Be Disclosed to ICE, Which Will Subject the Requester to DHS Enforcement Priorities Per ICE FAQs⁹

➤ *Page 13, Other Disclosure Information*

Among the major barriers that prevent more eligible youth from applying for DACA is the fear that information disclosed in their DACA applications will be used against them or their families in detention or deportation proceedings.¹⁰

While USCIS states in the form instructions that information included in the DACA applications will not be used for immigration enforcement purposes (with some exceptions), it is unclear how this protection of information disclosure relates to U.S. Immigration and Customs Enforcement FAQs released on June 17, 2015.

Recommendation:

1. We ask that USCIS clarify whether information regarding a DACA requester's criminal record of a significant misdemeanor, driving under influence, identity theft and other incidents that qualify as an "Enforcement Priority" in the ICE FAQs on June 17, 2015 will be disclosed to ICE for immigration enforcement purposes.

If such information is to be disclosed to ICE, we recommend that USCIS add prominent notice language on Form I-821D instructions, warning requesters that disclosure of such information will subject them to Enforcement Priorities by ICE.

Conclusion

We thank you for your consideration of these comments and look forward to continuing to work with the agency on the promotion, improvement and implementation of DACA. Please do not hesitate to contact me at 301-565-4829 or jatkinson@cliniclegal.org, with any questions regarding our recommendations.

Sincerely,



Jeanne M. Atkinson
Executive Director

⁹ Frequently Asked Questions Relating to Executive Action on Immigration, released by Immigration Customs Enforcement on June 17, 2015, available at: www.ice.gov/immigrationAction/faqs.

¹⁰ See page 17 of Wong and Valdivia. *In Their Own Words: A Nationwide Survey of Undocumented Millennials*. United We Dream Network and Unbound Philanthropy. May 2014, available at http://media.wix.com/ugd/bfd9f2_4ac79f01ab9f4247b580aeb3afd3da95.pdf.