



3489 W. 72nd Ave. Ste. 211
Westminster, CO 80030

(303) 433-2812
(303) 433-2823 FAX
www.rmian.org

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Via email: USCISFRComment@uscis.dhs.gov

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

**Re: Agency Information Collective Activities: Consideration of Deferred Action for
Childhood Arrivals, Form I-821D, Revision of a Currently Approved Collection OMB
Control Number 1615-0124**

Dear Ms. Deshommes:

The Rocky Mountain Immigrant Advocacy Network, hereinafter “RMIAN” respectfully submits the following comments in connection with the agency information collection activity for Form I-821D, Consideration of Deferred Action for Childhood Arrivals (DACA), and accompanying instructions published in the Federal Register on March 3, 2016.

RMIAN is a nonprofit organization that serves low-income men, women, and children in immigration proceedings. RMIAN promotes knowledge of legal rights, provides effective representation to ensure due process, works to improve detention conditions, and promotes a more humane immigration system, including alternatives to detention.

The DACA/DAPA project at RMIAN provides outreach and education to the community and high quality legal representation to eligible youth for DACA. The project works in collaboration with RMIAN’s established Children’s Program to support immigrant youth and their families.

INTRODUCTION

In its March 3, 2016 notice, USCIS sought public input on Form I-182D and the accompanying instructions. Based on a memorandum on prosecutorial discretion issued by the Secretary of Homeland Security on June 15, 2012, Form I-821D permits certain young people who came to the United States as children to request deferred action. We provide comments on both the current form and the form instructions.

While we are grateful for past revision of the form, we encourage USCIS to make several additional changes to Form I-821D to update it and make it more accessible to DACA applicants, particularly

those applicants who are unrepresented. In particular, we note the increase in denial rates¹ and believe our recommendations will improve the application process by helping applicants better understand how to complete the form and whether they are, in fact, eligible, thereby reducing inefficiency and waste in the system.

Further, we urge USCIS to review and revise its policy on the accrual of unlawful presence during the pendency of a timely filed request for renewal, particularly when a case is delayed due to extended Service processing times. We also recommend that the Service issue an automatic extension of work authorization upon filing a timely request for renewal to protect employees and employers from significant disruptions that result from lapses in work authorization. We have provided recommendations on revising the form instructions to reflect such a change.

USCIS's public facing guidance on the accrual of unlawful presence can be found on page 23 of USCIS' DACA Toolkit: Resources for Community Partners, which states the following:

If your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request. Similarly, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will not be authorized to work in the United States regardless of your age at time of filing until and unless you receive a new employment authorization document from USCIS.

However, if you have filed your renewal request with USCIS approximately 120 days before your deferred action and EAD expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS may provide deferred action and employment authorization for a short period of time.² (emphasis added).

In the absence of such a change, we recommend that USCIS align its practices with its public facing guidance to applicants, employers, and community partners, in particular, with the highlighted bold face italics above. This guidance creates an expectation that USCIS may grant short term or interim deferred action and work authorization when a case is timely filed yet subject to Service delays, which would provide greater stability and certainty for both applicants and their employers. However, USCIS has not implemented this important safeguard in practice. We encourage USCIS to do so, particularly in light of the approaching renewal season and recent extensions of service center processing times.

¹ See USCIS, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012--2016 (December 31)*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821_daca_performancedata_fy2016_qtr1.pdf.

² See the answer to Q50 at <https://www.uscis.gov/humanitarian/consideration---deferred---action---childhood---arrivals---process/frequently---asked---questions#renewal%20of%20DACA>.

Finally, we cannot overstate the need for making DACA more affordable and have included in this comment recommendations for fee waivers.

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 requestors on Form I-821D. Individuals who 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 requestors to whom U.S. Immigration and Customs Enforcement (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 requestors 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):

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

OR

Renewal Request – Consideration of Deferred Action for Childhood Arrivals (check this box if you received DACA, regardless of whether USCIS or ICE initially deferred action in your case)

2. Clarify that Renewal Requests can be filed within 1 Year of Expiration of the Previous DACA

Page 1, Part 1, Question 2

While the instructions recommend that renewal requestors file between 150 days to 120 days prior to their DACA expiration dates, neither the form nor the instructions indicate that they are still eligible for renewal up to one year after their initial DACA expired. This lack of clarity might deter many requestors who were not able to file for various reasons from renewing their DACA. This information is important but can only be found indirectly in the instructions and in the FAQs on the USCIS' website.³ Both the form and the instructions should be amended in accordance with the FAQs.

Recommendation: 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)

³ See the answer to Q50 at <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#renewal%20of%20DACA>.

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. Indicate that an Approximate Date is Acceptable on Form I-821D

Page 1, Part 1, Question 5f; Page 3, Part 2 Questions 2a, 3a, 4a, 5a, 6a, 6b, 7a, 7b, and Part 3, Question 2, 5c

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

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

4. Move “Removal Proceedings Information” to Part 4

Page 1, Part 1, Question 5

Requesting information about prior removal proceedings at the beginning of the application has a chilling effect on community members who already have a heightened fear of deportation.

Recommendation: Question 5 should be moved to Part 4.

5. Move Questions 8 – 10 to the Beginning of the *Travel Information* Section

Page 3, Part 2, Questions 8 – 10

USCIS asks a series of questions that each Requestor must complete in Questions 8 to 10 beginning with “*Have you left the United States without advance parole on or after August 15, 2012?*” An applicant who has never left the U.S. and thus does not answer Questions 6 to 7 may glance over and skip the section on “Travel Information” altogether missing Questions 8 - 10.

Recommendation: We recommend revising the form so that Questions 8-10 are at the beginning of the section under *Travel Information*.

6. Do not require Renewal Applicants to resubmit Criminal Disposition Evidence if previously submitted

Page 4, Part 4, Question 1

As a matter of efficiency, DACA renewal applicants should not be required to submit records of their arrests or convictions that they previously submitted with their initial applications. This requirement places an unnecessary burden on applicants as well as local courts, and may slow adjudication by including duplicative information in the record.

In addition, the form currently requires a DACA requestor to indicate whether he or she has been arrested for, charged with, or convicted of a felony or misdemeanor in the United States, even if the incident was handled in juvenile court. The form further requires that a requestor provide documents from the juvenile record, including copies of all arrest records, charging documents, dispositions, and sentencing records. The form only allows a person to withhold the records if the disclosure is prohibited under state law. 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. This process may be particularly difficult for those who are unrepresented. Other DACA requestors may navigate complex local procedures to gain access to their juvenile records only to discover that these records are sealed and unavailable. In these cases, it is unclear how a requestor should complete the form.

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

To ensure uniform treatment of all DACA requests, USCIS should not require DACA requestors 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 would prevent the unavoidably inconsistent and unfair treatment of DACA requestors who are subject to divergent state laws.

Finally, limiting evidence of criminal convictions to the record of conviction (charging documents, plea agreements, plea colloquy transcripts, and verdict or judgment of conviction) is generally consistent with the instructions on Form Notice of Information Collection: Form I-821D and Instructions I-821D and is consistent with sound policy. This limitation would establish a clear and uniform standard to evaluate the immigration consequences of the particular crimes. Finally, limiting the evidence to the record of conviction would afford more predictability and accuracy in determining DACA eligibility.

Recommendation: On the proposed Form I-821D, Page 4, Part 4, Question 1, the following sentence should be added to the bold section after the question. ***“Renewal applicants are not required to resubmit documents submitted in their initial request.”***

Recommendation: On the proposed Form I-821D, Page 4, Part 4, Question 2, the following sentence should be added to the bold section after the question. ***“Renewal applicants are not required to resubmit documents submitted in their initial request.”***

Recommendation: On the proposed Form I-821D, Page 4, Part 4, Question 2 should be amended to read:

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

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

INSTRUCTIONS TO FORM I-821D

1. 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 many that renewal requests can be filed even after the current DACA expires. This information is provided in the June 15, 2015 FAQ.⁴ But it is only implied in a confusing way in the instructions, which state: “If ... you are filing within one year after your last period of deferred action expired, please follow the instructions....”

Recommendation: We suggest USCIS revise the first “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 beyond one year after your most recent 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 between the date of expiration and the date your work authorization is renewed.

⁴ See answer to Q50 on <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#renewal%20of%20DACA>.

2. Update the Cautionary Message

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

The “Caution” message states: “If you file this request more than 150 days prior to the expiration of your current period of deferred action, USCIS may reject your submission and return it to you with instructions to resubmit your request closer to the expiration date.” This language seems to conflict with the updated FAQs, which provide: “Requests received earlier than 150 days in advance will be accepted; however, this could result in an overlap between your current DACA and your renewal. This means your renewal period may extend for less than a full two years from the date that your current DACA period expires.”

Recommendation: We suggest USCIS revise the “*Caution*” section to state:

Caution: If you file this request more than 150 days prior to the expiration of your current period of deferred action, USCIS will accept your application; however, this could result in an overlap between your current DACA and your renewal. USCIS encourages renewal requestors to file as early in the 150- day period as possible—ideally, at least 120 days prior to the DACA expiration date.

3. DACA Requestors Should Not Accrue Unlawful Presence If Their DACA Expires During the Renewal Adjudication Process

Page 1, What is the Purpose of This Form?

DACA recipients should not accrue unlawful presence if their DACA expires during the renewal adjudication process. This would make the renewal process consistent with USCIS’s existing policy that requestors who turn eighteen while their applications are pending will not accrue unlawful presence.

Recommendation: USCIS should add the following language:

Note: A DACA renewal request receipt notice will serve as proof that you are in deferred action status to avoid the accrual of unlawful presence while your renewal request remains pending.

DACA FEES

1. Clarify that Homeless Status is Sufficient to Qualify for a Fee Exemption

USCIS current language on fee exemption eligibility states a requestor is eligible if “*under 18 years of age, homeless, in foster care, or under 18 years of age and otherwise lacking any parental or other familial support and your income is less than 150% of the U.S. poverty level.*” Currently it seems a requestor must be under 18 *and* homeless or in foster care.

Recommendation: We suggest clarifying that an individual’s homeless status is sufficient to qualify for a fee exemption.

2. Recognize other types of Debt, in addition to Medical Debt

Recommendation: We suggest USCIS consider other types of debt, including school loans, mortgages, etc.

3. Remove the 12-month Limitation on Debt Accumulation

Recommendation: We suggest USCIS not limit debt accumulation to the past 12 months. Rather, USCIS should consider the total amount of debt accrued.

4. Adjudicate Fee Exemptions through InfoPass

Renewal applicants who request fee exemptions sometimes do not receive a decision on their fee exemption in sufficient time to renew their DACA.

Recommendation: We suggest allowing local USCIS offices to adjudicate fee exemptions through InfoPass to reduce delay in the process.

5. Expand Fee Exemption Categories

The Migration Policy Institute estimates that 2.1 million youth could become eligible for DACA, with 1.2 million youth (58%) being eligible at the time of program launch.⁵ As of the first quarter of Fiscal Year 2015, USCIS has received a cumulative of 770,338 DACA applications, a considerably low proportion (37%) of the potentially- and immediately-eligible DACA population.⁶ A recent report by the Brookings Institution finds that the \$465 DACA fee has a significant influence on a requestor’s decision to apply for deferred action.⁷

⁵ Batalova, Jeanne, Sarah Hooker, and Randy Capps with James D. Bachmeier. 2014. DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action. (Washington, DC: Migration Policy Institute).<http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action>.

⁶ USCIS, Through Fiscal Year 2015, 1st Qtr. 2015 (Washington, DC: USCIS)http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20For%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr1.pdf.

⁷ Audrey Singer, Nicole Prchal Svajlenka, and Jill H. Wilson. 2015. Local Insights from DACA for Implementing Future Programs for Unauthorized Immigrants (Washington, DC: Brookings)http://www.brookings.edu/~media/Research/Files/Reports/2015/06/04daca/BMPP_Srvy_DACAImmigration_June3b.pdf?la=en.

Similarly, based on a national survey of DACA-eligible youth by the American Immigration Council, respondents identified economic limitations as the number one barrier to applying for DACA.⁸ These findings are not surprising given the socioeconomic characteristics of the DACA-eligible population. The Migration Policy Institute estimates that approximately 34% of the immediately eligible youth lived with families with annual incomes below 100% of the federal poverty level.⁹ Yet, despite the high rates of poverty in DACA households, USCIS only allows for fee exemptions in very limited circumstances.

Recommendation: We suggest USCIS consider expanding its fee exemption categories to DACA-eligible youth who are: (1) immediate-family members residing in the same household; (2) living in a household at or below 50% of the federal poverty level (FPL); (3) a parent; or (4) enrolled in postsecondary education.

CONCLUSION

We appreciate this opportunity to comment on Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and the accompanying instructions. We encourage continued dialogue and engagement with the affected community and other stakeholders regarding the implementation of the DACA initiative.

Sincerely,

Elizabeth Zambrana

RMAIN Equal Justice Works Emerson Fellow

DACA/DAPA Project at the Rocky Mountain Immigrant Advocacy Network

⁸ Roberto G. Gonzalez and Angie M. Bautista-Chavez. 2014. Two Years and Counting: Assessing the Growing Power of DACA (Washington, DC: American Immigration Council.)