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Electronically Submitted to via [Regulations.gov](http://www.regulations.gov)

May 2, 2016

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

RE: Agency Information Collection Activities: Form I-821D, Extension of a Currently Approved Collection (March 3, 2016); Docket No. USCIS-2012-0012; OMB Control Number 1615-0124.

Dear Ms. Deshommes:

The Immigrant Legal Resource Center (ILRC) submits the following comment in response to the extension of Form I-821D, *Consideration of Deferred Action for Childhood Arrivals* and instructions. Founded in 1979, ILRC is a national resource center that provides training, consultations, publications, and advocacy support to individuals and groups assisting low-income persons with immigration matters. ILRC works with a broad array of individuals, agencies, and institutions, including immigration attorneys and advocates, criminal defense attorneys, civil rights advocates, social workers, law enforcement, judges, and local and state elected officials.

ILRC is uniquely qualified to provide comments regarding the proposed rulemaking in light of its extensive training of practitioners regarding Deferred Action for Childhood Arrivals (DACA). This extensive technical knowledge includes regular trainings, seminars, and advisories, including *DACA: The Essential Legal Guide*,¹ *Advanced DACA – Latest Developments and Advance Parole*,² *DACA Renewal and Advance Parole Practice Advisory*,³ and other

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¹ ILRC Staff Attorneys, *DACA: THE ESSENTIAL LEGAL GUIDE*, (Immigrant Legal Resource Center) (2nd ed. 2013).

² *Advanced DACA - Latest Developments and Advance Parole, Trainings & Seminars*, IMMIGRANT LEGAL RESOURCE CENTER (Last accessed March 7, 2016), <http://www.ilrc.org/trainings-webinars/webinars/advanced-daca-latest-developments-and-advance-parole>.

³ *DACA Renewal and Advance Parole*, IMMIGRANT LEGAL RESOURCE CENTER & UNITED WE DREAM, Aug. 2015, available at <http://www.ilrc.org/resources/daca-renewal-and-advance-parole-practice-advisory-english-spanish>.

guidance. In light of this deep reservoir of technical knowledge, we submit the below comment.⁴

1. PROVIDE ADDITIONAL GUIDANCE REGARDING ADVANCE PAROLE

ILRC received numerous reports from DACA recipients and legal practitioners that the lack of clear guidance regarding advance parole has led to a variety of problems stemming from a lack of guidance on: (a) permissible travel dates; (b) consequences for travel outside of permissible travel dates; and (c) DACA evidentiary burdens.

A. Permissible Travel Dates

When U.S. Citizenship and Immigration Services (USCIS) approves a DACA recipient's request for advance parole, it issues Form I-512L, *Authorization for Parole of an Alien Into the United States*. USCIS, however, does not provide any additional guidance regarding the interpretation of Form I-512L. This lack of guidance confuses many applicants about permissible travel dates and leads to negative consequences stemming from travel outside of permissible periods. This confusion stems from USCIS often issuing Form I-512L with a prospective "Date Issued" (and therefore providing a travel document to an individual *before* they are allowed to travel) or using a specific numerical count of days to enumerate the validity of the advance parole document, e.g. "30 days." Accordingly, USCIS should insert the following language on page 3, *General Instructions*:

"Advance Parole. If you wish . . . U.S. time zone.

IMPORTANT: If USCIS approves your request for advance parole, you will receive Form I-512L, Authorization for Parole of an Alien Into the United States. This form will contain two important dates. The date under "Date Issued" represents the beginning validity period of the advance parole document. You must only depart on or after the "Date Issued" date. The second date under "PAROLE" is the date by which you must be paroled back into the country. Sometimes, this section instead gives a numerical count of days, for example "30 days." In those cases, you must be paroled back into the country before that number of days have elapsed after the "Date Issued" date."

B. Negative Consequences for DACA

Travel without advance parole will cause DACA recipients to break continuous residence and make them ineligible for renewal. USCIS considers an individual traveling "without" advance parole, even in cases where an individual possess a valid Form I-512L but leaves before the issuance date, to have "interrupted" their continuous residence, thereby automatically terminating their deferred action under DACA. For example, if a DACA recipient requested and obtained Form I-512L with an issuance date of March 1, 2016 but left the country on February 15, 2016 with her advance parole document in hand, USCIS would still consider that individual as traveling "without" advance parole, breaking continuous residence and being consequently

⁴ Underlined text indicates an insertion. Strikethrough indicates a deletion. For ease of formatting and readability, this comment does not use block quotes, but rather quotation marks in conjunction with indents.

ineligible for DACA renewal. Due to the lack of guidance on this issue and confusing language of Form I-512L, travel before the issuance date of Form I-512L has become a serious problem among the DACA community. ILRC has been tracking this issue and has elevated close to a dozen cases where individuals accidentally traveled before their issuance date and were subsequently denied DACA renewal.

DHS-HQ, USCIS, and the USCIS Ombudsman have all acknowledged the existence of this problem. USCIS is already in the process of updating its public facing guidance on DACA. USCIS, however, should also correspondingly update Form I-821D Instructions to eliminate this confusion. Accordingly, USCIS should insert the following language on page 3, *General Instructions*:

“Travel Warning. On or after . . . return to the United States.

IMPORTANT: Even if USCIS approves your request for advance parole and issues you an Advance Parole Document, Form I-512L, authorizing your parole, you must still leave on or after the “Date Issued” date on Form I-512L and return on or before the expiration of your parole. Departing before your “Date Issued” date, even with an advance parole document, may impact your ability to obtain renewal of DACA. Additionally, failure to return before the expiration of your parole may impact your ability to re-enter the country and obtain renewal of DACA.”

Additionally, USCIS should make the following changes on page 2, *What is a Childhood Arrival for Purposes of This Form?*:

“An individual may be considered for **Renewal** of DACA if he or she met the guidelines for consideration of Initial DACA (*see above*) AND he or she:

1. Did not depart the United States on or August 15, 2012 without advance parole;
* * *
. . . threat to national security or public safety.

IMPORTANT: Departing without advance parole includes both individuals who leave the country without a valid grant of advance parole **and** individuals who obtain advance parole and leave before the issuance date of their grant or re-enter after expiration.”

C. Use and Retention of Form I-512L

After approving a request for advance parole, USCIS issues two identical copies of Form I-512L. USCIS, however, fails to provide any guidance regarding the use of this form, including informing the applicant that: (a) U.S. Customs and Border Protection (CBP) will permanently retain one copy of the form; (b) CBP must stamp both copies; (c) CBP should allow the applicant to keep a copy of the form; and (d) the applicant (particularly DACA recipients) should endeavor to maintain a copy of the form for future immigration applications and requests for relief.

This lack of clear guidance has led many immigrants to report confusion to ILRC regarding the actual logistics of returning with an advance parole document. In some cases, CBP has erroneously taken both copies of Form I-512L without protest from an applicant because of a lack of understanding of the correct procedure. In other cases, applicants only travel with one copy of form I-512L because there is nothing to indicate that they need both, identical forms. In yet other cases, CBP has refused to stamp an individual's Form I-512L. Finally, USCIS strongly encourages that DACA recipients seeking renewal include a copy of their I-512L in their renewal request, but nothing in the Form I-131 Instructions indicates that form I-512L is essentially mandatory for non-advance parole purposes.⁵ Accordingly, USCIS should insert the following language in the appropriate section of the instructions:

"Form I-512L. If approved, USCIS will issue you two identical copies of Form I-512L, Authorization for Parole of an Alien Into the United States. Travel with both original forms as both are necessary to be paroled back into the country. At a port-of-entry, a CBP officer will stamp both forms and retain one copy. You should keep the other stamped form in order to include a copy with your application when applying for renewal of DACA."

2. PROVIDE CLARITY ON FILING DATES FOR RENEWAL

Previously, USCIS policy was to reject DACA renewal requests filed more than 150 days prior to the expiration of an individual's period of deferred action. USCIS, however, changed this policy in the June 15, 2015 DACA FAQ, which now states that requests filed before 150 days will no longer be rejected. Accordingly, USCIS should make the following changes on Form I-821D Instructions, page 1, *When Should I Use Form I-821D*:

"CAUTION: If you file Filing 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. 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. 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."

The proposed language is identical to the question 50 of the official USCIS DACA FAQ.⁶

3. UPDATE GUIDANCE REGARDING CONFIDENTIAL STATE RECORDS IN LIGHT OF NEW LAWS

Under current policy, USCIS does not require juvenile adjudication records from "a state with laws prohibiting their disclosure."⁷ Similarly, Form I-821D provides that court records must be

⁵ While USCIS does indicate that individuals should submit a "Copy of Advance Parole Document" on page 7 of the Instructions, it does not indicate that a failure to submit such documentation could potentially lead to delays in adjudication and erroneous denials, both of which ILRC has seen in various DACA renewal cases.

⁶ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Frequently Asked Questions Q50 (June 15, 2015), available at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

provided unless disclosure is “prohibited under state law.”⁸ Troublingly, however, in cases where records are protected by a state confidentiality law, USCIS still requires requestors to provide information regarding the content of those records. Informing DACA requestors that they may withhold court records but must disclose the information *within* those records is not only counterintuitive but defeats the very purpose of state confidentiality laws. Moreover, many state laws protect not only the court records but the information contained *within* those records. For example, California recently enacted AB 899, a clarification of existing California juvenile confidentiality law. Under AB 899, the legislature concluded that information contained within juvenile adjudication records is similarly protected from disclosure, not just the records themselves,⁹ an interpretation that California courts have agreed with.¹⁰ The relevant statute reads as follows:

(a) It is the intent of the Legislature in enacting this section to clarify that juvenile court records should remain confidential regardless of the juvenile’s immigration status. . . .

(b) Nothing in this article authorizes the disclosure of juvenile *information* to federal officials absent a court order . . .

* * *

(e) For purposes of this section, “juvenile information” includes the “juvenile case file,” as defined in subdivision (e) of Section 827, and information related to the juvenile, including, but not limited to, name, date or place of birth, and the immigration status of the juvenile that is obtained or created independent of, or in connection with, juvenile court proceedings about the juvenile and maintained by any government agency, including, but not limited to, a court, probation office, child welfare agency, or law enforcement agency.¹¹

By requesting information contained within juvenile adjudication records (even if not requesting the records themselves), USCIS is forcing attorneys and pro se applicants to violate state confidentiality laws, including California’s. Moreover, attorneys disclosing information protected by state law also risk running afoul of professional ethical obligations, namely the obligation to keep client information confidential. Accordingly, USCIS should refrain from requesting *information* contained within juvenile adjudication records.

Relatedly, USCIS should also adopt a uniform, national policy of refraining from requesting all juvenile adjudication records and information, *regardless of whether an applicable state law exists*. Having a disparate set of requirements for every state is not only inconsistent and

⁷ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Form I-821D Instructions, Consideration of Deferred Action for Childhood Arrivals 10 (June 04, 2014), *available at* <https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf>.

⁸ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Form I-821D, Consideration of Deferred Action for Childhood Arrivals 4 (June 04, 2014), *available at* <http://www.uscis.gov/sites/default/files/files/form/i-821d.pdf>.

⁹ See CAL. WELF. & INST. CODE § 827(a)(1); CAL. WELF. & INST. CODE § 831(e).

¹⁰ See, e.g. *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 780 (“section 827 reposes in the juvenile court control of juvenile records and requires the permission of the court before any information about juveniles is disclosed to third parties by any law enforcement official”).

¹¹ CAL. WELF. & INST. CODE § 831(e) (emphasis added).

confusing, but could potentially lead to two similarly situated applicants receiving completely different outcomes dependent on what state they live in.

4. ALLOW REQUESTS FOR RENEWAL OF DACA AS A SUBSTITUTE FOR REPLACEMENT OF AN EAD

Currently, USCIS allows DACA recipients who lose their EAD to file for a replacement at the cost of \$465, the same cost as applying for renewal of DACA. In many instances, a DACA recipient who loses their EAD may not want to file for a replacement EAD and instead file for renewal, even if that renewal is very early in an individual's two-year DACA period. For example, a DACA recipient may not file for a replacement for an EAD at the cost of \$465 only to have to refile for renewal—paying *another* \$465—a few months or a year later.

While USCIS is now allowing DACA recipients to file more than 150 days prior to the expiration of DACA, ILRC regularly receives report of USCIS rejecting requests for renewal filed very early in an individual's DACA period, for example, during the first year of DACA. Accordingly, USCIS should allow DACA recipients to file for renewal at *any time* during their DACA period, for those recipients who lost their EAD and would rather just extend their period of DACA for two-years for the same cost as replacing an EAD.

5. CLARIFY MISCELLANEOUS LANGUAGE IN FORM I-821 AND I-821D INSTRUCTIONS

A. Underscore That It's Possible to Renew DACA within One Year of Expiration

The language that USCIS uses to inform DACA recipients who file within one year of their previous expiration of DACA is confusing and unclear. A more direct statement informing that this universe of people may file as renewal requestors is essential to better inform renewal requestors of their options. Moreover, lack of clear language—especially USCIS's current formulation of this policy—will undoubtedly lead eligible renewal requestors to apply as initial requestors, increasing the burden on both applicants and USCIS adjudicators. Accordingly, USCIS should make the following changes on Form I-821D Instructions, page 1, *When Should I Use Form I-821D*:

"NOTE: ~~If you have received DACA and you are filing within one year after your last period of deferred action expired, please follow the instructions provided below for renewal requestors. If your previous grant of DACA has already expired and you are filing within one year of the expiration date, you may file as a renewal requestor.~~"

Additionally, as some DACA recipients will have a period of DACA that expired in the past, USCIS must update the form language accordingly to clarify that individuals with expired DACA may apply for renewal. Accordingly, USCIS should make the following changes to Form I-821D, part 1, *Information About You*:

"For this Renewal request, my most recent period of Deferred Action for childhood Arrivals expires or expired on . . ."

B. Clarify that Certain Renewal Requestors Do Not File as Initial Requestors

USCIS requires initial DACA recipients who obtained DACA through ICE to file as initial requestors (and not renewal requestors) when filing for their first renewal. This policy is ostensibly for USCIS to obtain that individual's full evidentiary documentation and a complete Form I-821D. However, as of 2016, there will be DACA recipients who obtained initial DACA through ICE, subsequently renewed their DACA by applying as initial requestors, and now seek a *second* renewal. These requestors no longer need to apply as initial requestors even though ICE initially granted their DACA because USCIS already has a completed I-821D and supporting evidence (from their first renewal where they applied as initial requestors).

Yet, the language in the instructions still suggests that these individuals must apply as *initial* requestors because they initially received DACA through ICE. USCIS should update this language to communicate that individuals who were initially granted DACA through ICE and are renewing for the *second* time, no longer need to apply as initial requestors, but instead should apply as *renewal* requestors. Accordingly, USCIS should make the following changes on Form I-821D Instructions, page 1, *When Should I Use Form I-821D*:

“NOTE: If U.S. Immigration and Customs Enforcement (ICE) initially deferred action in your case and you are seeking a Renewal for the first time, you must file Form I-821D and select and complete Item Number 2. In Part 1. Of Form I-821D. 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. However, if ICE initially deferred action in your case and you previously applied as an initial requestor to renew your deferred action, then you may apply as a renewal requestor.”

C. Qualifying Non-Profit Educational Programs

The instructions do not inform requestors that they may submit a copy of an Internal Revenue Service (IRS) letter confirming tax exempt status for an education program to demonstrate that the program is administered by a non-profit entity and therefore satisfies DACA. Under USCIS's SOP DACA guidance,¹² non-profit educational programs satisfy DACA's educational requirement. Accordingly, USCIS should make the following changes on Form I-821D, page 9, *Evidence for Initial Requests Only*:

“(4) A U.S. public . . .

If you are enrolled in an educational, literacy, or career training program . . . representative's contact information. Alternatively, if you are enrolled in an education program administered by a non-profit entity, you may submit a copy of the IRS letter confirming tax exempt status under 501(c)(3) for the education program to demonstrate its non-profit status.”

¹² U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, National Standard Operating Procedures (SOP) – Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765), April 4, 2013, available at <http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf>.

6. PROMULGATE A MORE EFFECTIVE CHECKLIST AT END OF INSTRUCTIONS

Currently, USCIS provides a checklist of limited helpfulness on page 14 of the instructions. Presented in a manner that's visually difficult to understand, it does not effectively communicate what materials an individual should have in an initial or renewal request. A more effective list would include all potential materials to be included in an application (including the optional G-1145 and passport-style photos for Form I-765) in helpful, visually logical way, grouping Form I-765 requirements together and placing evidentiary burdens under Form I-821D. Accordingly, USCIS should strike the entirety of the content on Form I-821D Instructions, page 14, and replace it with something similar to the following:

"Checklist

For Initial and Renewal Requestors

- ☐ Form I-821D (all relevant **Item Numbers** completed and signed);
- Supporting Evidence for *Initial Requests*
 - ☐ Identification Document(s) verifying name and date of birth;
 - ☐ Proof of entry to the United States prior to the age of 16;
 - ☐ Evidence of continuous residence in the United States since June 15, 2007 to the present;
 - ☐ Evidence of physical presence in the United States on June 15, 2012;
 - ☐ If entered with visa or had lawful status previously, evidence of no lawful status on June 15, 2012;
 - ☐ Proof of fulfillment of educational or military service requirement; and
 - If applicable:***
 - ☐ Final order of removal by immigration judge;
 - ☐ Immigration judge's order terminating or closing removal proceedings; and
 - ☐ Criminal records and court disposition(s).
- Supporting Evidence for *Renewal Requests*
 - ☐ Copy of DACA approval notice and/or
 - ☐ Copy of current EAD (work permit)
 - If applicable and not previously submitted:***
 - ☐ Final order of removal by immigration judge;
 - ☐ Immigration judge's order terminating or closing removal proceedings;
 - ☐ Criminal records and court dispositions; and
 - ☐ Copy of stamped I-512L or other evidence regarding travel abroad.
- ☐ Form I-765 (all relevant **Item Numbers** completed and signed);
- ☐ Form I-765WS (all relevant **Item Numbers** completed);
- ☐ \$465 Filing Fee for Form I-765 and Biometrics;
- ☐ Two passport-style photos for Form I-765; and
- ☐ Form G-1145 (optional)."

Thank you for your consideration of ILRC's views. Should you have any questions regarding these comments, please feel free to contact Jose Magana-Salgado at (202) 777-8999 or jmagana@ilrc.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jose Magaña-Salgado', with a long horizontal stroke extending to the right.

Jose Magaña-Salgado
Immigration Policy Attorney