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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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July 30, 2018

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Docket ID USCIS-2012-0012; OMB Control Number 1615-0124: Public Comment of the Immigration Reform Law Institute on the Form I-821D and Instructions to Form I-821D.

The Immigration Reform Law Institute ("IRLI") writes in response to the U.S. Citizenship and Immigration Service's (USCIS) request for public comment on **Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Consideration of Deferred Action for Childhood Arrivals**, 83 Fed. Reg. 25025. Docket ID USCIS-2012-0012; OMB Control Number 1615-0124.

IRLI is a nonprofit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI appreciates this opportunity to comment on the Consideration of Deferred Action for Childhood Arrivals ("DACA") program Form I-821D and its accompanying Instructions for completion. In doing so, IRLI urges USCIS to make several changes to both the Form and Instructions to reduce loopholes in the administration of the program

and to otherwise bring the application process in-line with the DACA program's authorizing policy memorandum.[1]

I. Background.

On June 15, 2012, former Secretary of the U.S. Department of Homeland Security ("DHS"), Janet Napolitano, announced the creation of the DACA program. In doing so, she declared that the Obama Administration would be granting deferred action to a subsection of the illegal alien population who arrived in the United States as minors and meet certain other criteria determined by DHS. Approved applicants would be granted deferred action for a period of two years (which could be renewed), as well as employment authorization. Secretary Napolitano effectuated this new policy in a memorandum entitled, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (hereinafter the "Napolitano Memorandum").[2]

The Napolitano Memorandum authorizing the program set forth the criteria that applicants must demonstrate to qualify for DACA.[3] It expressly states:

> The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:
>
> • came to the United States under the age of sixteen;
> • has continuously resided in the United States for a (sic) least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
> • is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
> • 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; and
> • is not above the age of thirty.

[1] While it has been IRLI's longstanding position that a policy memorandum was insufficient to establish the DACA program, it recognizes that a discussion on the merits of DACA itself would be outside the scope of this specific request for comment. As such, it invites interested parties to review its briefing on the invalidity of the DACA program on its website http://www.irli.org/ (*see e.g.*, IRLI's amicus brief in *Regents of Univ. of California v. DHS;* its amicus brief in *Trustees of Princeton University v. United States*; and its amicus brief in *Texas v. United States*).

[2] SEC'Y JANET NAPOLITANO, U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012).

[3] *Id.* at 1.

The Napolitano Memorandum therefore sets forth the basic guidelines governing initial grants of DACA status and renewals under the program, as there is no other statutory or regulatory foundation for the program. As a result, the Form I-821D and the Form I-821D Instructions have served as interpretations of that Memorandum, dictating the practical administration of the DACA program.

In this public comment, IRLI argues that the current information collection process for DACA applicants is insufficient to adhere to the Napolitano Memorandum's purported criteria, creating loopholes resulting in the improper administration of the program. IRLI will first make recommendations for revisions to the Form I-821D, and then to the Form I-821D Instructions.[4]

II. Recommended Revisions to the Form I-821D.

A. IRLI recommends that all fields on the Form I-821D be required for *both* DACA Initial Requests and DACA Renewal Requests.

Presently, the Form I-821D allows current DACA beneficiaries seeking to renew his or her status to skip over Part 3 of the Form. However, Part 3 covers critical information to ensure the applicant meets the program's qualifying criteria, including: educational information; military service information; information regarding arrival age, date, and place of entry; and immigration status on June 15, 2012, the date DACA was announced. To ensure all of the program's requirements are continually met, IRLI recommends USCIS require all fields on the Form I-821D be filled out by all applicants for DACA.

Recently released USCIS data on the DACA program indicates that requesting that applicants for renewal fill out all aspects of the Form may be necessary to confirm that beneficiaries under the program meet its criteria and that the program is otherwise operating as billed to the American people. For instance, according to USCIS, 7,814 DACA beneficiaries were arrested sometime *after* their application was approved.[5] Although the Form requests information regarding criminal history even for renewals (Part 4), the existence of an arrest after receiving an

[4] On September 5, 2017, Acting DHS Secretary Elaine C. Duke issued a policy memorandum rescinding former Secretary Napolitano's memorandum establishing DACA. However, due to preliminary injunctions issued by the U.S. District Court for the Northern District of California and the U.S. District Court for the Eastern District of New York, DHS was not allowed to proceed with rescission as of the date of this submission. As such, IRLI recognizes USCIS's limitations in revising its administration of the DACA program and makes the suggestions contained herein for consideration if and when DHS is permitted to make changes.

[5] U.S. CITIZENSHIP AND IMMIGRATION SERVS., DACA REQUESTORS WITH AN IDENT RESPONSE, TABLE 2 (2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DATA_DACA_CRIM.PDF.

initial grant of DACA could be an indicator that the program's other criteria—such as current school enrollment, graduation, or an honorable military discharge (Part 3)—are not met upon renewal. Nonetheless, Form I-821D exempts renewals from filling out Part 3.

The Napolitano Memorandum requires—and the American people were assured—that illegal aliens with DACA meet certain qualifying criteria. While the Napolitano Memorandum makes clear that DACA is "subject to renewal," it contains no indication that the qualifying criteria for such renewal is to be different or any less comprehensive than the qualifying criteria for the initial grant. To be sure, the Napolitano Memorandum contains no statement to the effect of, "The criterion that an applicant currently be in school, graduated from high school, obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States shall not be considered upon renewal." Therefore, regardless of whether it is for an initial request or a renewal of status, USCIS should ensure that all qualifying criteria are actually met and therefore reported on the Form I-821D by all applicants.

B. IRLI recommends that USCIS remove or otherwise amend the disclaimer not to report "minor traffic violations" in Part 4 of the Form I-821D.

Question 1 of Part 4 of the Form I-821D addresses criminal conduct by the applicant while in the United States. It reads:

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

To better comport with the requirements of the Napolitano Memorandum, and to eliminate any potential for uncertainty or fraud in the application process, IRLI recommends USCIS remove or otherwise amend the clause, "*Do not include minor traffic violations unless they were alcohol- or drug-related.*" (hereinafter the "minor traffic violations" clause).

First, the Napolitano Memorandum makes no such disclaimer regarding the nondisclosure of minor traffic violations. The pertinent criterion states that to be considered for DACA an applicant cannot have been, "convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose[] a threat to national security or public safety[.]" Nowhere in the Memorandum does it qualify aspects of the criterion to exclude disclosure any specific type of conduct; neither should Question 1 of Part 4 of the Form. Rather, USCIS should remove the minor traffic violations clause in Question 1 and allow the plain

language of the Napolitano Memorandum to stand. Removing the clause to require all violations be reported to USCIS ensures that agency adjudicators—and not the applicant or the applicant's attorney—determine what is relevant to the decision-making process.

According to the agency's own data, USCIS approved 53,792 DACA requestors with a "prior arrest."[6] Of this, the USCIS data reveals that 20,926 (or nearly 40%) of those with a prior arrest, were the result of driving-related offenses unrelated to driving under the influence (DUI). The data further reveals that 4,611 DACA requesters were approved despite a drug-related arrest, and 2,378 were approved despite an arrest for driving under the influence (DUI).[7]

Although DACA's guidelines are clear that it is only *convictions* and not arrests (and only certain ones at that) that weigh against approval, it bears repeating that the Napolitano Memorandum grants the agency discretion to deny applicants if the applicant poses a threat to public safety. As such, one might rightfully question to what extent any arrests or criminal history—even if it never resulted in a conviction—might warrant a discretionary denial on national security or public safety grounds as a matter of sound public policy.

Alternatively, USCIS should consider clarifying and defining the language used in the minor traffic violations clause to ensure there is no ambiguity on this part of the Form. As it stands, the material terms of this clause, such as "minor" and "alcohol- or drug-related", are undefined and therefore could either be accidentally—or intentionally—misconstrued and therefore misreported.[8] Accordingly, if not removed, amending this question to provide greater clarification on the terminology is critical to ensure that USCIS is acting with complete knowledge of an applicant's background when it adjudicates applications. As such, IRLI urges USCIS to remove or amend the minor traffic violations clause to provide greater certainty to applicants as to which specific offenses must be reported.

III. Recommended Revisions to the Form I-821D Instructions.

IRLI recommends several revisions to the Instructions for filling out the Form I-821D to ensure it leads to completion of the application in a manner that complies with the authorizing Napolitano Memorandum and eliminates any loopholes in the administration process.

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[6] U.S. CITIZENSHIP AND IMMIGRATION SERVS., DACA REQUESTORS WITH AN IDENT RESPONSE, TABLE 3 (2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DATA_DACA_CRIM.PDF.

[7] *Id.*

[8] The Instructions to the Form I-821D provide the single example of "driving without a license unless they were alcohol- or drug-related."

A. On Page 1, in the Section entitled, "When Should I Use Form I-821D": Amend the Application Acceptance Window.

This section provides information regarding the timing of filing the I-821D. It encourages DACA beneficiaries to file a renewal application between 150 and 120 days prior to the expiration of their DACA status and instructs renewal applicants that applications filed prior to the 150 day recommended window may be returned. In addition to creating this narrow one-month "ideal" renewal window, this section also explains the process for beneficiaries to file for renewal up until one year after their status has expired.

Openly allowing beneficiaries in a blanket fashion to renew status for up until a year *after* such status has expired sends the message that failing to meet immigration deadlines has no meaning (or consequence). As such, the current expectation that renewal applications may be filed—and accepted—nearly one year following the expiration of the initial DACA grant presents a backdoor means to extend the initial period of DACA status from two *to three* years. It is confusing and makes little sense to permit applicants to file for renewal for up until a year *after* expiration while penalizing applicants who apply too early by rejecting and returning submissions. This practice should be ended and the instructions amended to better accommodate early, rather than late, filers.

B. On Pages 1-2, in the Section entitled, "What is a Childhood Arrival for Purposes of This Form?": Require All Applicants Complete All Sections of the Application.

This section includes the basic DACA qualifying criteria as set forth in the Napolitano Memorandum and outlines the requirements for both a DACA Initial Applicant and a DACA Renewal Applicant. As discussed in Section II.A. of this comment, IRLI recommends amending this section to ensure the criteria is the same for both initial grants and renewals of DACA such that all applicants are required to demonstrate compliance with the Napolitano Memorandum's qualifying criteria. This could easily be achieved by either placing both under the same heading, or simply changing the text prefacing the renewal criteria such that it reads, "An individual may be considered for **Renewal** of DACA if he or she *continues to meet* the guidelines for consideration of Initial DACA." Refusing to amend this section has the potential effect of permitting individuals to enroll in a school for the purposes of obtaining an initial grant of DACA with no intent to remain in or complete a program of study since evidence of such criteria is not formally requested upon renewal.

C. On pages 5-10, in the Section entitled, "Evidence for Initial Requests Only": Tighten Required Evidentiary Standards to Ensure Documents can be Verified and Comport with the Napolitano Memorandum.

i. *Remove the "relevant document" standard.*

Several of the Form I-821D questions explained in this section instruct first-time DACA applicants to submit "any" document that the applicant believes is "relevant" to proving the particular criterion at hand. Specifically, parts 2.H., 3.H., 4.D., 5.H., 7.H., 8.D., and 10.E. in this section. IRLI recommends USCIS remove this fluid "relevant document" standard and replace it with an express delineation of acceptable documentation.

For instance, when it comes to Instruction 10 on page 9 regarding proof of honorable military discharge, the Instructions permit an applicant to provide copies of the following:

A. Form DD-214, Certificate of Release or Discharge from Active Duty;
B. NGB Form 22, National Guard Report of Separation and Record of Service;
C. Military personnel records;
D. Military health records; or
E. Any other relevant document.

However, it is difficult to come up with a scenario under which an honorably discharged individual would need to go outside of the evidence referenced in 10.A.-10.D to demonstrate an honorable discharge. Indeed, permitting such broad self-reporting of information is an invitation to fraud. Therefore, IRLI recommends USCIS revise the Form I-821D Instructions to clearly enumerate a list of acceptable documentation.

ii. *Clarify definition of "currently in school".*

According to the Napolitano Memorandum, when it comes to educational attainment, an applicant must be "currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States." However, the instructions for demonstrating one is "currently in school" as listed on page 8, number 9.A.(2) and 9.A.(3) are incredibly broad, arguably pushing the bounds of the common reading and understanding of this criterion. While the instructions listed in 9.A.(1) meet the commonly understood definitions of "currently in school," the instructions in 9.A.(2) are questionable. In its first two descriptions,[9] Merriam-

[9] The remainder of the first definition reads, "**c** (1) **:** a group of scholars and teachers pursuing knowledge together that with similar groups constituted a medieval university (2) **:** one of the four faculties of a medieval

Webster defines "school" to mean "an organization that provides instruction: such as **a** : an institution for the teaching of children [or] **b** : [a] college, university . . . ."[10] Likewise, the first definition proffered by English Oxford Living Dictionaries defines it to mean "An institution for educating children."[11]

Instruction 9.A.(1) comports with these commonly understood meanings. It reads, "To be considered 'currently in school,' you are to demonstrate that you are currently enrolled in one of the following: (1) A U.S. public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or home school program meeting state requirements[.]" These programs are what the American people typically think of when they hear the term "school." However, Instruction 9.A.(2) on page 8 permits applicants to be taking part in an "education, literacy, or career training program (including vocational training)" with the "purpose of improving literacy, mathematics, or English or is designed to lead to placement in post-secondary education, job training, or employment . . . ." These instructions are extremely broad and outside the general understanding of what it means to be "currently in school" as described above. For instance, they indicate that a DACA applicant can merely be enrolled in a literacy (or an English as a Second Language) program and still meet the "currently in school" educational requirement. This is vastly different than attending a charter high school or being a full-time college student as Instruction 9.A.(1) describes.

Furthermore, the instructions in 9.A.(3) also appear overly broad when compared to the plain language of the Napolitano Memorandum. Again, the Memorandum states that if an applicant is not "currently in school," then the applicant can meet the educational requirement by having "graduated from high school," having "obtained a general education development certificate," or being an "honorably discharged veteran of the Coast Guard or Armed Forces of the United States[.]" A literal reading of the Memorandum indicates that to fulfill the educational requirement by way of a general education development certificate, at the time of filing, an applicant must have already "obtained"—past tense—and thereby completed a general education development program. However, Instruction 9.A.(3) allows applicants to demonstrate they are "currently in school" by providing evidence of attendance in a general education development program.

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university (3) **:** an institution for specialized higher education often associated with a university . . . **d** : an establishment offering specialized instruction [*e.g.*,] a secretarial *school* [,] driving *schools*."

[10] MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/school?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited July 24, 2018).

[11] ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/school (last accessed July 24, 2018).

If the Napolitano Memorandum intended for applicants to meet the educational requirement by being enrolled in a general education development program, it should have expressly stated such. To be sure, the Napolitano Memorandum made a point of stating that one could be "currently in school" or "graduated from high school". This begs the question as to why the Napolitano Memorandum did not make a similar enrolled vs. completed distinction when it comes to a general education development certificate program if that was the initial intent.[12] For instance, the Memorandum could have—but does not—read, "currently in school, has graduated from high school, is currently enrolled in a program to obtain a general education development certificate, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States." Accordingly, IRLI recommends USCIS reconsider what it considers evidence of an applicant being "currently in school" and replace it with instructions that better reflect the plain language and meaning of the Napolitano Memorandum's educational requirements.

iii. *Remove the disclaimer regarding minor traffic violations.*

As discussed in Section II.B. of this comment, IRLI recommends removing or amending the "minor traffic violations" clause in Part 4 of the Form I-821D. To conform with this recommendation, IRLI recommends removing the "NOTE" instructing applicants that they do not need to submit documentation concerning minor traffic violations on page 10 of the accompanying Instructions. Rather than relying on self-reporting or forcing an applicant to determine what is sufficiently significant or relevant to report in this context, USCIS should err on the side of gathering more—rather than less—information from applicants to ensure the agency and not the applicant is the one determining what is relevant to the adjudicatory process.

IV. Conclusion.

In conclusion, IRLI recommends making several changes to the Form I-821D and the Form I-821D Instructions to ensure compliance with the DACA program's authorizing guidelines and to close loopholes in the processing of DACA applications. This includes maintaining uniform criteria for both initial *and* renewal applicants, requiring full disclosure of any violations of law, and otherwise making certain that the Instructions for filling out the Form I-821D are sufficiently tailored to discern program eligibility in conformity with the Napolitano Memorandum.

Respectfully submitted,
Immigration Reform Law Institute

[12] *See* the *expressio unius est exclusio alterius* canon of interpretation, meaning "the expression of one thing is the exclusion of another."