



May 5, 2014

Laura Dawkins

Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services, Department of Homeland Security
USCISFRComment@uscis.dhs.gov

**Re: Agency Information Collection Activities: Consideration of Deferred Action
for Childhood Arrivals, Form I-821D; Revision of a Currently Approved
Collection**

Dear Ms. Dawkins,

The Catholic Legal Immigration Network, Inc. (CLINIC) submits the following comments in response to USCIS's April 4, 2014 notice regarding proposed changes to Form I-821D (Consideration of Deferred Action for Childhood Arrivals) and the accompanying instructions.

CLINIC supports a national network of community-based legal immigration service programs. The network includes over 240 immigration programs operating out of 397 offices in 46 states, Puerto Rico, and the District of Columbia. CLINIC's network employs roughly 1,400 staff, including attorneys and accredited representatives who, in turn, serve over 300,000 low income immigrants each year. CLINIC and its member agencies provide free and low-cost representation to thousands of applicants for Deferred Action for Childhood Arrivals (DACA).

Introduction

CLINIC is pleased with USCIS's decision to adopt many of the recommendations provided in response to USCIS's December 18, 2013 notice regarding proposed changes to Form I-821D and instructions. We are especially pleased with USCIS's decision to extend the DACA renewal application window to 150 days. We commend USCIS for simplifying the education-related questions in Form I-821D and eliminating questions about current status and pending immigration requests. We also commend USCIS for clarifying the instructions on renewal evidence and how initial and renewal applicants should fill out Form I-821D.

Nevertheless, we encourage USCIS to make several changes to the latest proposed draft form and instructions to help both initial and renewal applicants better navigate the application process. Among our chief concerns is that DACA recipients who timely file their renewal

applications and are awaiting adjudication may lose work authorization and accumulate unlawful presence. We urge USCIS to automatically extend deferred action and work authorization for renewal requestors whose applications are pending adjudication. We also strongly encourage USCIS to expand its fee exemption policy.

Form I-821D

➤ *Page 1, Reference to Instructions*

We are pleased that USCIS refers to the accompanying instructions on Form I-821D. While the instructions include a note specifying that USCIS may reject a renewal request filed more than 150 days prior to the expiration of a current period of deferred action, this information is absent from the form itself. The application form should reference the renewal application period ultimately determined by the agency. Renewal applicants, especially those who are pro se, would benefit from a more prominent instruction.

Recommendation: The preliminary instruction on page 1 of Form I-821D should be amended as follows:

START HERE. Type or print in black ink. Read Form I-821D Instructions for information on how to complete this form. ***Renewal requests may be submitted up to 150 days prior to the expiration of your current period of deferred action. 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.***

➤ *Page 1, Part 1, Information About You (For Initial and Renewal Requests)*

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 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):

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

OR

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

- *Page 4, Part 4, Criminal, National Security, and Public Safety Information (For Initial and Renewal Requests)*

In our comments regarding the first draft form and instructions, we raised several concerns regarding the Criminal, National Security, and Public Safety section. We are pleased that USCIS adopted one of our recommendations and clarified that renewal requestors do not need to re-submit documents already submitted with a prior DACA request (on page 10 of the instructions).

We urge USCIS to amend the application form so that it is consistent with the instructions and does not solicit information that renewal requestors have previously provided. Such a requirement is burdensome for applicants. It is also unnecessary for USCIS adjudicators to assess information that was already reviewed and evaluated during the initial application process.

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:

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.

- *Page 4, Part 4, Question 1, Juvenile Convictions*

We encourage USCIS to eliminate requests for information and records related to juvenile adjudications. 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. 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.

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.*

➤ *Page 4, Part 4, Questions 1 and 2, Arrest Record*

Applicants must provide an arrest record for any felonies or misdemeanors in the U.S. or any crimes elsewhere. Arrest records and charging documents are unreliable and prejudicial. The form and instructions should limit evidence of criminal convictions required for DACA cases to the record of conviction. This would afford more predictability and accuracy in determining DACA eligibility and assure that the adjudicator is only considering relevant evidence.

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

If you answered “Yes,” you must include a certified court disposition, 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.

Form I-821D Instructions

➤ *Page 1, When Should I Use Form I-821D? - Automatic Extension*

We are concerned that a 150-day time frame to adjudicate renewal applications is insufficient without providing additional protections for applicants. The current average processing time for I-821Ds is 6 months and many DACA requests have been pending for much longer.

Employed DACA recipients whose work authorization expires while their renewal request is being adjudicated will face termination or suspension. This will harm DACA recipients, their families, and employers, and undermine the objective of DACA - to provide protection and stability to DACA grantees.

We commend USCIS for giving DACA renewal applicants who file at least 120 days before the expiration date a short extension. However, we are concerned that those who file within, for example, 50 or 15 days before their expiration date will face unnecessarily harsh consequences.

Recommendation: To protect DACA applicants who may experience renewal adjudication delays or may not be able to file renewal applications more than 120 days in advance of their expiration date, USCIS should automatically extend deferred action and employment authorization upon receipt of a renewal application. We urge USCIS to automatically extend deferred action to individuals who file a renewal request before their DACA grant period expires. To achieve this, we encourage USCIS to do the following:

- a. Issue an I-821D receipt notice indicating that deferred action and employment authorization have been extended until USCIS issues a decision on the renewal application; and

- b. Issue a notice in the Federal Register extending the validity of EADs (beyond the expiration date) until USCIS issues decisions on DACA recipients' timely filed renewal applications. To indicate employment eligibility, a DACA recipient would present:
 - (i) Form I-766 bearing the (c)(33) designation on the face of the card under "Category";
 - (ii) Receipt notice for I-821D bearing a receipt date that antedates the expiration date of the EAD; and
 - (iii) Federal Register notice regarding extension.

This policy would be consistent with USCIS policies relating to Temporary Protected Status (TPS) holders and Conditional Residents. Specifically, when TPS re-registrants will not receive new EADs until after the expiration of their current EADs, USCIS has granted automatic 6 month extensions to prevent gaps in employment authorization. In addition, conditional residents with pending Forms I-751 to remove conditions on residence have their status automatically extended for a year and may present their expired Form I-551 and Form I-707 as evidence of their status in the United States.

➤ *Page 1, When Should I Use Form I-821D? – Renewal Application Window*

To mitigate the risk that individuals will experience a lapse in deferred action, USCIS should affirmatively encourage DACA recipients to request renewal as early as possible within the 150 day window. USCIS should prominently display this recommendation on the first page of the instructions.

Recommendation: USCIS should encourage renewal requestors to file as early within the 150 day renewal window as possible, ideally 120 days before their DACA expiration date, in the instructions. We suggest USCIS include the following statement on page 1 of the DACA application instructions (new language in ***bold italics***):

When Should I Use Form I-821D?

[...]

CAUTION: 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. ***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.***

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

Applicants who initially received DACA from ICE are instructed to complete the entire form and provide documentation showing that they satisfied the guidelines at the time of their initial filing. This policy is objectionable because individuals who were approved for DACA by ICE were granted deferred action under the same DHS memorandum. 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 renewal process should not distinguish between those granted DACA by ICE and those granted by USCIS. Individuals who received DACA from ICE initially should be subject to the same renewal evidence rules as those who received DACA from USCIS.

➤ *Page 10, What evidence should I submit to demonstrate my criminal history?*

Applicants are 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.

Recommendation: Applicants should not be required to submit statements from arresting agencies or courts confirming that no charges were filed or that no records exist. Most importantly, applicants' inability to obtain these documents should not negatively impact the adjudication of their cases.

➤ *Page 10-11, Evidence for Renewal Requests Only*

We are pleased that USCIS will not require renewal applicants to re-submit documents already provided in previous requests. However, we suggest that USCIS clarify this instruction by explicitly limiting requests for documents related to criminal offenses to those offenses that occurred during the period after a prior DACA request was approved.

Additionally, as described above, it is unfair and burdensome to require an ICE-granted renewal requestor to complete all sections of the form and submit documentation as if he or she were an initial requestor. Uniform standards should apply to all renewal requestors, whether USCIS or ICE approved their previous DACA grant.

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

With your Renewal request, you only need to submit any *new* documents...

2. You have been charged with, or convicted of, a felony or misdemeanor ***since your previous DACA request was approved*** (please note, you do not need to submit these documents if you already submitted them with a previous DACA request).

...

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 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, What is the filing fee?*

The cost of DACA applications remains a barrier for many DACA-eligible individuals. A request for renewal of deferred action has the same filing fee as the initial request -- \$465 for the EAD and the biometrics fee.

Recommendation: We recommend expanding the fee waiver, for both initial and renewal applicants, to cover any individual whose family income falls below 150% of the Federal Poverty Level.

In addition, the agency should include youth in immigration detention in the category of individuals who are eligible for a fee exemption. Currently, approximately one third of DACA-eligible youth live in families with incomes below 100% of the federal poverty level (FPL), and two-thirds live in families with incomes below 200% of the federal poverty level.¹

Conclusion

We thank you for your consideration of these comments and look forward to continuing to work with the agency regarding this important program. Please do not hesitate to contact CLINIC's Director of Advocacy, Allison Posner, at 301-565-4831 or aposner@cliniclegal.org for additional information.

Sincerely,



Jeanne M. Atkinson, Esq.
Executive Director

¹ Batalova, Jeanne, Rai ... and Sandy Hooker. *Deferred Action for Childhood Arrivals at the One-Year Mark*. Migration Policy Institute. August 2013, available at <http://www.migrationpolicy.org/pubs/CIRbrief-DACAatOneYear.pdf>.