AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

MEMORANDUM

TO: Verification Division
United States Citizenship & Immigration Services

FROM: American Immigration Lawyers Association
Verification & Documentation Committee

RE: Concerns Regarding the *Guidance for Employers* Related to the Deferred Action for Childhood Arrivals (DACA) Initiative

DATE: January 11, 2013

The American Immigration Lawyers Association (AILA) is writing to express its concerns with certain portions of the *Guidance for Employers* that was released on November 19, 2012, in connection with the Deferred Action for Childhood Arrivals (DACA) initiative.[1]

About AILA

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent U.S. citizens, immigrant and nonimmigrant foreign nationals, their family members, and businesses in matters before the Department of Homeland Security (DHS), the Department of State (DOS), the Department of Labor (DOL), and the Department of Justice (DOJ), among other agencies. Many AILA members regularly advise and represent U.S. employers both in developing I-9 and E-Verify compliance programs and in preparing for and defending against worksite enforcement claims, as well as in complying with other workplace laws, including those that prohibit employment discrimination. Our members' collective expertise and experience makes us particularly well-qualified to offer views that we believe will benefit the public and the administration of our immigration laws.

AILA is a strong supporter of DACA and appreciates USCIS's swift implementation of and extensive public outreach on the initiative. We also appreciate USCIS's efforts to provide information to employers in

[1] http://www.uscis.gov/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/DACA-Fact-Sheet-I-9_Guidance-for-employers.pdf. Also posted on AILA InfoNet at Doc. No. 12111944 (Nov. 19, 2012).

connection with DACA, including the *Guidance for Employers* issued on November 19, 2012 ("DACA Guidance" or "Guidance"). We are, however, concerned with certain portions of the DACA Guidance, which appear to conflict with existing I-9 and E-Verify guidance and instructions from DHS. We ask that you review the DACA Guidance in light of existing agency policy and revise or clarify the Guidance as appropriate.

Updating I-9 Forms for Existing Employees

The DACA Guidance provides instructions to employers regarding existing employees who have been granted benefits under DACA. The Guidance states that:

> An employer receiving updated documentation from an employee should review the employee's previously completed Form I-9 and determine whether to complete a new Form I-9 or only to complete Section 3 of the previously completed Form I-9 based on the guidelines below.[2]

The guidelines referenced provide that an employer *should* complete a new Form I-9 for an existing employee if the employee's name, date of birth, attestation, or social security number has changed from the information recorded on the previously completed Form I-9. However, if the information in Section 1 has not changed, but the existing employee provides the employer with a new Employment Authorization Document (EAD), the employer is instructed to record the document information in Section 3 of the Form I-9 and sign and date Section 3, unless the previously completed I-9 form version is no longer valid.

While we acknowledge that there may be circumstances where it may be appropriate for an employer to complete a new Form I-9 for an existing employee who has been granted DACA and a new EAD, we disagree that current I-9 law and agency guidance mandate the completion of a new Form I-9 as a primary course of action, or the completion of Section 3 of an existing Form I-9 in the circumstances identified. Rather than *direct* a particular course of action, the DACA Guidance should *suggest* various options in accordance with the M-274 *Handbook for Employers*. For example, the DACA Guidance provides that if the employee's name changes from the name recorded on the existing Form I-9, then a new I-9 is required. However, the M-274 states that employers "are not required to update Form I-9 when an employee changes his or her name."[3] The M-274 further provides that the best way to correct Form I-9 is to "line through the portions of the form that contain incorrect information. Initial and date your correction."[4]

In addition, I-9 Central under the heading "Correcting Form I-9" provides the following guidance as to corrections to Section 1:

> If an employer discovers an error in Section 1 of an employee's Form I-9, he or she should ask the employee to correct the error as directed below.
>
> **The best way to correct the form is to**

[2] DACA Guidance, p. 2.
[3] *See* M-274, Handbook for Employers at p. 19.
[4] M-274, Question 33 at p. 43.

- draw a line through the incorrect information
- enter the correct information
- initial and date your correction

> I-9 Central suggests the use of a new I-9 Form to correct "multiple, recording errors on the form. A new Form I-9 can be completed if major errors (such as entire sections being left blank or Section 2 being completed based on unacceptable documents) need to be corrected. A note should be included in the file regarding the reason the employer made changes to an existing Form I-9 or completed a new Form I-9." …
>
> Last updated: 02/15/2012

In order to avoid unnecessary confusion among employers due to conflicting guidance, we suggest that USCIS amend the DACA Guidance so that it is consistent with the procedures outlined in the M-274.

In addition, the DACA Guidance requires employers to complete a new Form I-9 when the social security number recorded on the existing form changes, which is inconsistent with long-standing USCIS policy that that the social security number field on the Form I-9 is optional. Historically, it has been appropriate for an employee to correct a mistake or update a social security number by following the agency's guidance and striking the incorrect number, inserting the correct number, and dating and initialing the change on the Form I-9. We urge the agency to reconsider and revise its DACA Guidance to provide suggested best practices for dealing with DACA issues that are consistent with existing agency guidance.

Finally, we are concerned that the option to complete a new Form I-9 for a DACA employee could leave the employer with the incorrect impression that it is not necessary to retain the employee's original I-9. In the interest of clarification, we ask that the agency also include language in the DACA Guidance that tells employers who choosing to complete a new I-9 for a DACA employee to attach that form to the employee's existing I-9 and retain both as the employee's I-9 record.

Guidance on Use of E-Verify for Existing DACA Employees

The DACA Guidance also provides instructions to E-Verify employers who receive DACA work authorization from existing employees. The Guidance states that an E-Verify employer that completes a new Form I-9 for an existing employee based on new DACA work authorization should verify "the new Form I-9 information (for the existing employee) through E-Verify." We believe this guidance is incorrect and in direct conflict with the rules of the E-Verify program, as outlined in the E-Verify Memorandum of Understanding (MOU) and the E-Verify User Manual for Employers. Employers enrolled in E-Verify are restricted to verifying the I-9 information of **newly hired**

employees only.[5] The only exception to this rule (for federal contractors) is not contemplated by the DACA Guidance.

Therefore, we believe that the portion of the DACA Guidance instructing E-Verify employers to verify the employment authorization of existing employees who have presented DACA work authorization is incorrect and should be withdrawn. Even if the E-Verify employer determines that it should complete a new Form I-9 to document the new work authorization for an existing employee, that employee is not a new hire and the data should not be run through E-Verify. This portion of the DACA Guidance is in direct conflict with the rules of the E-Verify program and will cause substantial confusion and unintentional violations of the E-Verify MOU, thus subjecting well-intentioned employers to potential liability for selective and inappropriate use of E-Verify. We therefore respectfully request that the instruction to E-Verify employers to treat existing employees who present DACA documentation as newly hired employees be withdrawn.

[5] The E-Verify MOU, Article II(C)(8) states, "[e]xcept as provided in Article II.D [relating to federal contractors], the Employer will not verify selectively and will not verify employees hired before the effective date of this MOU." Similarly, the E-Verify User Manual for Employers, page 10 states, "[e]mployers participating in E-Verify MUST NOT: Check the employment eligibility of an employee hired before the company signed the E-Verify MOU." In addition, the USCIS E-Verify website states, in its Employee Rights Overview, "An employer that participates in E-Verify MUST NOT: … Use E-Verify to verify you if you are a current employee, unless the employer is currently a federal contractor with the Federal Acquisition Regulation (FAR) E-Verify clause in its federal contract." *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7279fb41c8596210VgnVCM100000b92ca60aRCRD&vgnextchannel=7279fb41c8596210VgnVCM100000b92ca60aRCRD.