



May 5, 2014

Laura Dawkins

Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services, Department of Homeland Security
oir_submission@omb.eop.gov

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

**OMB Control Number 1615-0124
Docket ID USCIS-2012-0012**

Dear USCIS Desk Officer:

The American Immigration Council (“Council”) and the American Immigration Lawyers Association (AILA) submit the following comments in response to the notice of revisions to Form I-821D, Consideration of Deferred Action for Childhood Arrivals (DACA) and accompanying instructions published in the Federal Register on April 4, 2014. We commend U.S. Citizenship and Immigration Services (USCIS) for significantly improving the previous draft of Form I-821D and accompanying instructions, and for incorporating many of our recommendations. We gratefully acknowledge USCIS’ ongoing commitment to open dialogue with stakeholders to ensure that the DACA program remains a success.

The Council is a 501(c)(3) tax-exempt, not-for-profit educational and charitable organization whose mission is to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. Founded in 1987, the Council carries out its mission through its four divisions: the Legal Action Center, the Immigration Policy Center, the International Exchange Center, and the Community Education Center.

Founded in 1946, AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. AILA’s 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

businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

Thank you for your attention to the comments that follow.

I. Automatically Extend Deferred Action to Any Individual Who Files A Renewal Request Before His or Her Initial DACA Grant Expires

We remain deeply concerned that a substantial number of DACA recipients will experience a temporary lapse in deferred action because they are unable to afford the fee for renewal or because they are unaware of the time period in which they must file a renewal request. This would severely impact DACA recipients and their families, employers, and communities. The best solution for all stakeholders is for USCIS to grant an automatic extension of deferred action and employment authorization to any individual who files a renewal request before his or her current period of deferred action expires.

We appreciate that USCIS has extended the renewal filing window and prominently displayed this information on the first page of the form instructions to mitigate the risk that DACA recipients will experience a lapse in deferred action. But we still fear that many individuals will not request renewal during the window of time suggested by the agency and that even if a person is able to file during the suggested period, the renewal request will not be adjudicated in a timely manner. According to the agency's most recent public statements, renewal requestors are instructed to file for renewal approximately 120 days before the expiration date of their initial period of deferred action, but not more than 150 days before that date.¹ USCIS states that if a person files a renewal request within 120 days, the request will be adjudicated "well before" the current period of DACA expires. However, in the aftermath of the program's announcement, USCIS projected a four-to-six month processing time for initial DACA requests.² These estimates turned out to be overly optimistic, as a substantial number of requestors experienced prolonged processing timeframes.³ We are concerned that the agency may again be unexpectedly delayed in its processing of requests. Delays in adjudicating renewal requests will leave DACA recipients in a precarious situation. They stand to lose their jobs, drivers' licenses, health insurance, and other benefits acquired since receiving DACA.

In the case of unexpected delays in processing a renewal request, USCIS states that it "may" provide automatic extensions of deferred action and employment authorization to requestors who file "at least 120 days before" their expiration dates. Thus, only individuals who file within a narrow 30-day window—between 150 and 120 days prior to the expiration date of their initial deferred action grants—may potentially benefit from USCIS' contemplated automatic extension policy. And even for those who apply within this window, USCIS does not guarantee an automatic extension.

¹ See USCIS, Consideration of Deferred Action for Childhood Arrivals, Update for DACA Renewals (April 9, 2014), available at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process>.

² DHS Advises on Various DACA Process Questions, AILA InfoNet Doc. No. 12090747 (posted Sep. 7, 2012).

³ See Practice Alert on Long-Pending Cases at the Nebraska Service Center (Updated 12/30/13), AILA InfoNet Doc. No. 13110747 (posted Dec. 30, 2013).

It is not realistic to expect that most DACA recipients will request renewal within the 30-day window.⁴ Low-income DACA recipients, in particular, may face serious challenges securing and submitting the filing fee during the 30 day window.⁵ If these DACA recipients are unable to submit the fee during the 30-day window, but are able to submit it prior to the expiration of their deferred action grants, they should not be unfairly penalized.

In addition, DACA renewal requestors' overlapping 150-day filing periods will complicate the timely delivery of legal services. We expect that a growing number of eligible renewal requestors will seek assistance from legal service providers at the same time. Due to high demand, requestors may experience difficulties in obtaining legal services and be unable to file 120 days prior to the expiration of their DACA grants.

A lapse in deferred action and loss of employment authorization also will have a drastic impact on employers and the U.S. economy. A survey revealed that a high percentage of DACA recipients had obtained new jobs within several months of receiving DACA.⁶ Federal regulations require employers to re-verify that an individual whose employment authorization expires is still authorized to work in the United States.⁷ If DACA recipients do not receive proper documentation of extended work authorization, employers will be obligated to terminate those whose documents expire during the renewal adjudication period. DACA recipients will lose their income, and employers will have to expend resources to hire and train new employees.

Renewal requestors already experience financial hardship: over one third of DACA-eligible youth live in families with incomes at or below the federal poverty level (FPL) and two-thirds of these youth live in families with incomes at or below 200% of the federal poverty level.⁸ The loss of work authorization would impose additional hardship on DACA recipients and their families.

⁴ Contrast the situation of DACA renewal requestors with that of Temporary Protected Status (TPS) re-registrants, where DHS has recognized the need for an automatic extension while re-registration is pending. (See USCIS, Temporary Protected Status-Automatic EAD Extension, available at [http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Automatic%20Employment%20Authorization%20Document%20\(EAD\)%20Extension](http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Automatic%20Employment%20Authorization%20Document%20(EAD)%20Extension)). Unlike TPS re-registrants from a designated country who must comply with a single deadline, each DACA recipient will have to individually determine when he or she must renew. In the TPS context, community organizations and media serving the nationals of a designated country can disseminate crucial re-registration deadline information and orchestrate the delivery of timely legal services. DACA recipients, on the other hand, are not likely to encounter timely and widespread reminders to renew; each recipient has his or her own expiration date, and they are spread throughout the United States in different socioeconomic and cultural communities. Many DACA recipients may not even learn about USCIS's recommended filing window until after it has passed.

⁵ See Jana Kasperkevic, *The High Cost of Being a Legal Immigrant in the US: \$465*, The Guardian, Jan. 8, 2014 ("Cost has been one of the top reasons why people eligible for DACA delay their application....").

⁶ Roberto Gonzales and Veronica Terriquez, *How DACA is Impacting the Lives of Those Who Are Now DACAmented: Preliminary Findings from the National UnDACAmented Research Project*, August 15, 2013, available at <http://www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-dacamented>.

⁷ See 8 CFR § 274a.2(b)(1)(vii).

⁸ Jeanne Batalova, Randy Capps, 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>.

Recommendation: USCIS should grant automatic extensions of deferred action to DACA renewal requestors who file before their expiration dates. This automatic extension policy should temporarily extend work authorization and preclude the accrual of unlawful presence. USCIS should implement one of the following automatic extension policies:

- a. Provide notice on the I-821D receipt that deferred action and employment authorization are extended for six months from the date of the EAD expiration and issue interim EADs to any individuals whose requests are pending at the conclusion of the automatic extension period;
- b. Issue a notice in the Federal Register extending the validity of DACA-based EADs for six months beyond the stated expiration date to any individual who presents: (i) Form I-766 bearing the (c)(33) designation on the face of the card under “Category;” and (ii) a receipt notice bearing a receipt date that antedates the expiration date of the EAD; or
- c. Issue interim EADs to DACA recipients who request DACA before their expiration dates.

II. Encourage Timely Renewal Filings

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.

Recommendation: USCIS should encourage renewal requestors to file as early within the 150 day renewal window as possible, ideally at least 120 days before their DACA expiration dates. We suggest USCIS prominently display this recommendation by including 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.***

III. Clarify that Filing for Renewal is Permitted after Renewal Deadline

It is unclear whether USCIS will treat an individual who does not request renewal until after the expiration date of his or her initial DACA grant as a renewal or an initial requestor. USCIS should clarify that such individuals are to file as renewal requestors. This will avoid placing an onerous evidentiary burden on individuals who have already provided USCIS with evidence documenting their eligibility for DACA.

Recommendation: USCIS should amend the instructions to include language specifying that individuals who request renewal after the expiration of their initial DACA grants are not required to apply as initial requestors. 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....closer to the expiration date.

If you are unable to file your DACA renewal request before your initial DACA grant expires, you are not barred from renewing DACA. If you are applying for a renewal after your initial DACA grant has expired, you should follow the same instructions provided below for other individuals seeking a renewal of DACA.

IV. Make DACA More Affordable for both Initial and Renewal Requestors

One of the biggest, if not *the* biggest, obstacles to applying for DACA is the filing fee. We frequently hear reports that individuals are unable to afford the filing fee and unable to qualify for the overly-stringent fee exemption. As a result, DACA-eligible individuals are foregoing or delaying filing for DACA.

Recommendation: USCIS should consider a range of options to make DACA and DACA Renewal more accessible to eligible individuals, including lowering the initial filing fee, making the renewal filing fee less than the initial filing fee, and instituting a less stringent fee exemption policy.

V. Clarify That Departing and Returning To The United States Consistent With Advance Parole Generally Will Not Interrupt Continuous Residence

Some DACA recipients who have left the United States under a grant of advance parole may have been outside of the country for a significant period of time. For example, individuals with DACA may be granted advance parole to travel for a study abroad program or for temporary work purposes. These departures can often last several months. As a result, some DACA Renewal requestors may fear that USCIS will consider their departures to have interrupted their required period of continuous residence.

Recommendation: USCIS should clarify on the Instructions that a DACA Renewal requestor has not interrupted his or her continuous residence if he or she traveled abroad and returned to the United States consistent with his or her advance parole authorization and engaged in no criminal or other activity implicating public safety or national security while abroad.

VI. Provide Additional Guidance in Requests for Evidence, Notices of Intent to Deny, Notices of Denial, and Notices of Intent to Terminate DACA

The current process fails to provide an opportunity for requestors or their attorneys to rebut findings that a requestor presents a public safety or national security risk before a denial is issued. In most cases, a requestor does not have an opportunity to present evidence demonstrating “exceptional circumstances.” Notably, the template Notices of Intent to Deny related to public safety concerns found in USCIS’ SOP manual does not include information on how a requestor might demonstrate exceptional circumstances.

Further, requestors receive a “checkbox” form denial or template Request for Evidence (RFE) with no explanation about what information led to the disqualification. As a result, requestors have no way to know what information led to a denial or RFE, or how to correct erroneous information. A person without any prior criminal history may receive a denial of DACA with very limited information about the reasons for the denial, merely a checked box providing, “You have not established that you warrant a favorable exercise of prosecutorial discretion.” We have also seen denials under the broad category of national security and public safety, which currently provides, “You have been convicted of a felony or a significant misdemeanor, or you have been convicted of three or more misdemeanors, or you do not warrant a favorable exercise of discretion because of public safety concerns, or exercising prosecutorial discretion in your case would not be consistent with the Department of Homeland Security's enforcement priorities.” Requestors have no way of knowing what specific national security ground or criminal bar to DACA is the basis for their denial. This also significantly limits their ability to challenge what might be an erroneous denial.

Recommendations: To allow requestors to address public safety or national security concerns, USCIS should provide an explanation of what allegations or incidents formed the basis of a Request for Evidence, Denial, Notice of Intent to Deny, or Notice of Intent to Terminate DACA. USCIS should provide more information to the requestor explaining why he or she did not warrant a favorable exercise of prosecutorial discretion. USCIS also should break up the broad national security and public safety category for denials so as to clearly identify which public safety, national security or criminal bar to DACA is the basis of the denial and what evidence supported that denial.

CONCLUSION

We encourage USCIS to consider our proposals outlined above and to make corresponding changes to the DACA Form and Instructions. We appreciate the opportunity to comment on Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and the accompanying instructions and thank you in advance for your consideration.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL