



June 3, 2013

Alejandro Mayorkas
Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Re: Proposed Modifications to DACA FAQ

Dear Director Mayorkas:

Thank you for your ongoing commitment to the success of the Deferred Action for Childhood Arrivals (“DACA”) program. We applaud you and your team for the fair and transparent administration of this important initiative.

We write to respectfully request several modifications to the DACA Frequently Asked Questions (“FAQ”) that was last updated on January 18, 2013. Our proposals address the following topics:

- Broadening the exceptional circumstances exception
- Clarifying that DACA recipients may establish domicile inside the U.S.
- Permitting SRMT review for certain additional types of erroneous DACA denials
- Allowing duration of status visa holders who violated status before June 15, 2012 to be considered for DACA, without being subject to a final order of removal
- Specifying that home schoolers may satisfy the “currently in school” requirement

For your convenience, we have italicized changes to the existing FAQ. Thank you in advance for your thoughtful consideration.

I. EXCEPTIONAL CIRCUMSTANCES

The FAQ currently allows individuals disqualified from DACA on national security and public safety grounds to be considered for DACA “where DHS determines there are exceptional circumstances.” This “exceptional circumstances” language appears nowhere else in the FAQ. In the spirit of ensuring DACA is available to the largest number of deserving young people, we propose that you broaden the reach of the exceptional circumstances exception to the age ceiling, the continuous residence guideline and the age-based entry requirement.

Extending the reach of the exceptional circumstances exception to the aforementioned guidelines does not represent a significant departure from current policy. Presently, the FAQ provides that individuals who do not meet all of the DACA guidelines may “request deferred action from

USCIS or ICE in certain circumstances, consistent with longstanding practice.” While a generous policy in theory, few are aware that USCIS is empowered to bestow deferred action outside the DACA context and fewer still are familiar with the often “informal” and “ad hoc” local district office procedures for making such requests.¹ As a consequence, many individuals who meet virtually all of the DACA guidelines -- and may therefore be excellent candidates for deferred action -- do not affirmatively approach USCIS to request deferred action outside of the DACA process. Expanding the applicability of the exceptional circumstances exception would provide some of those individuals with an opportunity to apply for DACA, a deferred action program with which they are more familiar and for which they substantially qualify. These proposals would have the added benefit of generating revenue for the agency it would not otherwise receive.²

Proposal No. 1a: Age Ceiling

Q__ : How old must I be in order to be considered for deferred action under this process?

A__ :

- If you have never been in removal proceedings, or your proceedings have been terminated before your request for consideration of deferred action for childhood arrivals,

¹ Ombudsman Recommendation, “Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process” (July 11, 2011); <http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf> (accessed May 20, 2013) (finding “stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request” and “[t]here is no formal national procedure for handling deferred action requests.”); *see also* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 Univ. New Hampshire L. Rev. 1, 4 (2011) (The deferred action program “currently operates as a secret program accessible only to elite lawyers and advocates.”). On October 27, 2011, USCIS issued a response to the Ombudsman’s recommendation, committing to the issuance of internal standard operating procedures to ensure consistency in the processing and determination of deferred action requests. USCIS Memorandum, “Response to Recommendation 48, Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process” (Oct. 27, 2011); <http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response-48.pdf> (accessed May 20, 2013). To our knowledge, apart from the initiation of the DACA program, no new internal standard operating procedures or application processes have been implemented to accept deferred action requests. We respectfully urge you to take steps to publicize and standardize the deferred action program, particularly so that it is not supplanted by the more circumscribed DACA program.

² Deferred action requests are not filed on a standardized application form and no fee is collected to defray the costs associated with processing deferred action requests. Ombudsman Recommendation, “Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process” (July 11, 2011); <http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf> (accessed May 20, 2013). By contrast, in the DACA context, USCIS will not consider requests lacking a completed Form I-765 and the accompanying \$465 filing fee, absent a previously granted fee exemption.

you must be at least 15 years of age or older at the time of filing and meet the other guidelines.

- If you are in removal proceedings, have a final removal order, or have a voluntary departure order, and are not in immigration detention, you can request consideration of deferred action for childhood arrivals even if you are under the age of 15 at the time of filing and meet the other guidelines.
- In all instances, *except where DHS determines there are exceptional circumstances*, you cannot be the age of 31 or older as of June 15, 2012, to be considered for deferred action for childhood arrivals.

Summary. This proposal, which would modify question 2 under “Guidelines for Requesting Consideration of Deferred Action for Childhood Arrivals,” would allow otherwise eligible individuals who were over the age of 31 on June 15, 2012 to be considered for DACA, provided DHS determines there are exceptional circumstances. This proposal would preserve the age ceiling, but give adjudicators limited flexibility to grant DACA requests where there are exceptional circumstances.

Proposal No. 1b: Continuous Residence

Q__ : Do brief departures from the United States interrupt the continuous residence requirement?

A__ : A brief, casual and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States, your absence will be considered brief, casual and innocent if it was on or after June 15, 2007, and before Aug. 15, 2012, and:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;
2. The absence was not because of an order of exclusion, deportation or removal;
3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation or removal proceedings; and
4. The purpose of the absence and/or your actions while outside the United States were not contrary to law.

If your continuous residence from the United States was interrupted, you will not be considered for deferred action under the new process *except where DHS determines there are exceptional circumstances*.

Summary. This proposal, which would modify question 1 under “Travel,” would allow otherwise eligible individuals whose continuous residence from the United States was interrupted to be considered for DACA, provided DHS determines there are exceptional circumstances. Current policy permits an individual who overstayed voluntary departure or declined to depart under an order of removal to be considered for DACA, while an individual who departed or was deported by ICE is barred. This proposal would preserve the continuous

residence requirement, but give adjudicators limited flexibility to grant DACA requests where there are exceptional circumstances.

Proposal No. 1c: Age at Entry

Q__: *Can I request consideration of deferred action for childhood arrivals under this process if I came to the United States after reaching my 16th birthday?*

A__: *No. If you came to the United States after reaching your 16th birthday, you will not be considered for deferred action for childhood arrivals under the new process except where DHS determines there are exceptional circumstances.*

Summary. This proposal would add a new question and answer to the FAQ. Currently, only individuals who entered prior to reaching their 16th birthday may be considered for DACA. Individuals who entered even a single day after turning 16 are barred. This proposal would preserve the age-based entry requirement, but give adjudicators limited flexibility to grant DACA requests where there are exceptional circumstances.

II. DOMICILE CLARIFICATION

We have continued to hear reports from several states of officials concluding erroneously that federal law precludes DACA recipients from establishing domicile, and thus makes them ineligible for resident tuition rates. This is so even though DACA does not require that DACA recipients maintain a residence abroad, or otherwise preclude them from establishing a fixed and permanent home in their state.

In New Jersey, for example, Rutgers University in Newark has taken the position that, under the terms of Secretary Napolitano’s memorandum of June 15, 2012, DACA recipients cannot show that they are domiciled in the state. As a result, they are barred from resident tuition.³ Similarly, in North Carolina, both the University of North Carolina and the North Carolina Community College System have denied DACA recipients resident tuition on the ground that they cannot establish domicile.⁴ These entities have not changed their positions despite USCIS’ January 18, 2013 FAQ clarification that “[a]n individual who has received deferred action is authorized by the [DHS] to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.”

³ See N.J. Admin. Code § 9A:5-1.1 (defining domicile for tuition purpose as “the place where a person has his or her true, fixed, permanent home and principal establishment, and to which, whenever he or she is absent, he or she has the intention of returning”)

⁴ See N.C. Gen. Stat. § 116-143.1(b) (requiring that a “resident for tuition purposes . . . establish[] legal residence (domicile) in North Carolina”).

In light of these restrictions, we request clarification from USCIS that federal law does not preclude DACA recipients from establishing domicile.

Proposal No. 2

Q__: *Does deferred action for childhood arrivals require me to maintain a residence abroad (that I have no intention of abandoning), or otherwise preclude me from establishing domicile in the United States?*

A__: *No. Although state residence is determined by the law of your state, deferred action for childhood arrivals does not preclude you from establishing domicile in the United States.*

Summary. This proposal would add a new question and answer to the FAQ. It would clarify that DACA does not require that DACA recipients maintain a residence abroad, or otherwise preclude them from establishing a fixed and permanent home in their state.

III. EXPANSION OF SRMT REVIEW PROCESS

Through our networks, we have become aware of numerous erroneous denials flowing from administrative errors. Currently, the Service Request Management Tool (SRMT) review process is circumscribed to two specific factual scenarios of administrative error. We believe the SRMT review process should be expanded to cover situations similar in nature to those identified in the FAQ but not presently covered therein.

Proposal No. 3

Q1: Can I appeal USCIS's determination?

A1: No. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of deferred action for childhood arrivals. USCIS will not review its discretionary determinations. You may request a review using the Service Request Management Tool (SRMT) process if you met all of the process guidelines and you believe that your request was denied due to *an error such as the following*:

- USCIS denied the request for consideration of deferred action for childhood arrivals based on abandonment and you claim that you did respond to a Request for Evidence within the prescribed time;
- USCIS mailed the Request for Evidence to the wrong address, even though you had submitted a Form AR-11, Change of Address, or changed your address online at www.uscis.gov before the issuance of the Request for Evidence; or
- *USCIS denied the request for consideration of deferred action for childhood arrivals based on abandonment and you claim that you provided USCIS with your correct mailing address but did not receive a Request for Evidence or a Notice of Intent to Deny.*

Summary. This proposal, which would modify question 1 under “Decisions and Renewals,” would bring about two policy changes. First, it would make clear that the list of errors

susceptible to SRMT review is not exhaustive. At the same time, this proposal would retain the requirement that a case involve administrative error for it to receive SRMT review. Second, this proposal would expressly allow for SRMT review where (i) the DACA request is denied based on abandonment; (ii) the requester did not change his or her address after filing; (iii) the requester provided his or her correct mailing address to USCIS; and (iv) the requester did not receive an RFE or a NOID. This particular fact pattern has arisen on multiple occasions within the past month. In at least one circumstance, USCIS failed to serve the RFE or NOID on the requester as well as on the requester's counsel, who had duly filed a Form G-28.

IV. DURATION OF STATUS

As currently written, the FAQ excludes individuals who were admitted for duration of status or for a period of time that extended past June 14, 2012, but who violated status before June 15, 2012, unless the Executive Office for Immigration Review terminated the individual's status by issuing a final order of removal before June 15, 2012. This overly harsh policy prevents deserving young people from applying for DACA. For example, the FAQ would bar a student here on an F-1 visa whose expected period of study (as indicated on the Form I-20) expired well before June 15, 2012, or an exchange visitor here on a J visa whose program end date (as indicated on the DS-2019) has long since passed. Preventing these individuals from applying for DACA would exclude many young people whom the DACA program was designed to embrace.

Proposal No. 4a

***Q__:** I was admitted as a nonimmigrant (or as a dependent of a nonimmigrant) for a period of time that extended past June 14, 2012, but violated my immigration status (e.g., by engaging in unauthorized employment, failing to report to my employer, or failing to pursue a full course of study) before June 15, 2012. May I be considered for deferred action under this process?*

***A__:** Yes, if you can show by a preponderance of the evidence that you, or the principal nonimmigrant through whom you derive status, violated status before June 15, 2012.*

Summary. This proposal, which would modify both the question and the answer to question 2 under "Miscellaneous," would clarify that an individual admitted for a specific period of time who violated such status before June 15, 2012 may be considered for DACA. The requester must establish by a preponderance of the evidence that he or she meets these requirements.

Proposal No. 4b

***Q__:** I was admitted for duration of status, but I violated my immigration status, or the principal nonimmigrant through whom I derive status violated his or her nonimmigrant status, before June 15, 2012. May I be considered for deferred action under this process?*

A__: Yes, if you can show by a preponderance of the evidence that you violated your status, or the principal nonimmigrant through whom you derive status, violated his or her status, before June 15, 2012. For example, if you were admitted for “duration of status” (D/S) as an F-1 nonimmigrant student, you may be considered for deferred action under this process if, prior to June 15, 2012:

- you violated your nonimmigrant status by failing to pursue a full course of study at the educational institution that issued your Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, if the school which issued you an I-20 has record that you did not pursue a full course of study, and you have not been reinstated to F-1 status; or,
- you remained beyond the anticipated completion date indicated on your I-20, where that anticipated completion date was on or before June 15, 2012; or
- you engaged in unauthorized employment in violation of your student status.

If you are the F-2 dependent of an F-1 nonimmigrant student, you may be considered for deferred action if you can show, by a preponderance of the evidence, that the F-1 student through whom you derive status violated his or her status as set forth above, or that you violated your F-2 status, such as by engaging in unauthorized employment.

If you were admitted for “duration of status” (D/S) as a J-1 exchange visitor, you may be considered for deferred action under this process if, prior to June 15, 2012:

- you violated your exchange visitor status by failing to comply with the conditions of the exchange program that issued your Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status (or the prior version, Form IAP-66), if the exchange program which issued you an DS-2019 (or IAP-66) has record that you did not comply with the conditions of the exchange program, and you have not been reinstated to J-1 status; or
- you engaged in unauthorized employment in violation of your exchange visitor status.

If you are the J-2 dependent of a J-1 exchange visitor, you may be considered for deferred action if you can show, by the preponderance of the evidence, that the J-1 exchange visitor through whom you derive status violated his or her status as set forth above, or you violated your J-2 status, such as by engaging in unauthorized employment.

Summary. This proposal would add a new question and answer to the FAQ to clarify that an individual admitted on a duration of status nonimmigrant visa, such as an F-1 student or J-1 exchange visitor (or as a dependent of an F-1 or J-1), who violated such status before June 15, 2012 may be considered for DACA. The proposal specifies that the requester must establish the status violation by a preponderance of the evidence.

V. HOME SCHOOL

Presently, the FAQ and the Form I-821D instructions are silent on whether home school students meet the guideline of being “currently in school.” Nevertheless, it is agency policy that such individuals indeed satisfy the “currently in school” guideline.⁵ We respectfully request that the FAQ be amended to expressly provide that home school students meet the education guideline.

Proposal No. 5

Q2: Who is considered to be “currently in school” under the guidelines?

A2: To be considered “currently in school” under the guidelines, you must be enrolled in:

- a public or private elementary school, junior high or middle school, high school, or secondary school;
- an education, literacy, or career training program (including vocational training) that is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; or
- an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a General Educational Development (GED) exam or other equivalent state-authorized exam.

Home school students are also considered to be “currently in school.”

Such education, literacy, or career training programs include, but are not limited to, programs funded, in whole or in part, by federal or state grants. Programs funded by other sources may qualify if they are administered by providers of demonstrated effectiveness, such as institutions of higher education, including community colleges, and certain community-based organizations. In assessing whether such an education, literacy or career training program not funded in whole or in part by federal or state grants is of demonstrated effectiveness, USCIS will consider the duration of the program’s existence; the program’s track record in assisting students in obtaining a regular high school diploma or its recognized equivalent, in passing a GED or other state-authorized exam, or in placing students in postsecondary education, job training, or employment; and other indicators of the program’s overall quality. For individuals seeking to demonstrate that they are “currently in school” through enrollment in such a program, the burden is on the requestor to show the program’s demonstrated effectiveness.

Summary. This proposal, which would modify question 2 under “Education,” expressly provides that home school students satisfy the “currently in school” guideline. This proposal

⁵ U.S. Department of Homeland Security National Standard Operating Procedures, “Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)” (Sep. 13, 2012) pg. 55; http://law.psu.edu/file/2013-HQFO-00305_Document.pdf (accessed May 21, 2013).

would not represent a shift in policy. It would merely add further transparency to the DACA program. We do not believe that it is necessary to address evidentiary matters for home schoolers because the FAQ currently provides a non-exhaustive list of documentation sufficient to demonstrate that a requester is currently in school. Furthermore, the instructions accompanying Form I-821D permit requesters to submit “[a]ny...relevant document” to meet the education guideline.

We look forward to discussing these proposals at our meeting on June 3, 2013. Should you have any questions or would like further information, please contact Lorellea Praeli of United We Dream (tel. 203-417-1436; lorella@unitedwedream.org) or Patrick Taurel of the American Immigration Council (tel. 202-507-7526; ptaurel@immcouncil.org).

Thank you for your attention to this matter and your openness to our ongoing dialogue on the DACA program.

Sincerely,

American Immigration Council

American Immigration Lawyers Association

Immigrant Legal Resource Center

National Council of La Raza

National Immigration Project of the National Lawyers Guild

United We Dream