

# Citizenship and Immigration Services Ombudsman

## DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS

July 11, 2011

Transparency and consistency are the primary objectives of these recommendations. The Federal Government, including the Department of Homeland Security, has, in recent years, steadily made efforts to provide more information to the public, and to enhance the efficient administration of government services. Here, U.S. Citizenship and Immigration Services (USCIS) is encouraged to carry these objectives into the administration of deferred action requests.

These recommendations focus on how USCIS processes deferred action requests and the steps that can be taken to ensure that an individual in compelling circumstances, whether or not represented, knows how to submit a deferred action request, receives a decision in a timely manner, and can be assured that the request will be processed in a consistent manner.

The recommendations do not delve into who should receive deferred action. Every day, USCIS officers and leadership apply their expertise and experience to make decisions that impact both individual lives and the public as a whole. As past administrations have acknowledged, along with this authority comes the responsibility to appropriately exercise discretion when compelling needs arise.

Above all, these recommendations are about good government. Building accessible, uniform, and transparent processes is critical to effective government services. In fact, these recommendations echo recommendations that this office made in 2007. While deferred action requests are a minute fraction of the millions of decisions USCIS makes every year, they warrant the same transparency and consistency that the Federal Government strives for across the board.

Most Sincerely,



January Contreras  
Citizenship and Immigration Services  
Ombudsman

### RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1. Issue public information describing deferred action and the procedures for making a request for this temporary form of relief with USCIS;
2. Establish internal procedures for accepting and processing deferred action requests in order to promote consistency and assist local offices in responding to urgent, periodic increases in the demand for deferred action;
3. Inventory all pending deferred action requests to verify that each request received a confirmation of receipt with estimated processing timeframes and USCIS contact information; and
4. Consistently track data related to deferred action requests and make available statistics identifying the number of requests received and the numbers of requests approved and denied.

### REASONS FOR THE RECOMMENDATIONS

- Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request.
- There is no formal national procedure for handling deferred action requests.
- When experiencing a change in the type or number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods.
- Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.



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## DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS

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*The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.*

### Executive Summary

For decades the U.S. Immigration and Naturalization Service (INS), followed by the Department of Homeland Security (DHS), has used deferred action to provide limited relief to foreign nationals who do not qualify for other immigration benefits that are typically available to individuals in exigent circumstances.<sup>1</sup> Upon creation of the DHS in 2003, the power to grant deferred action was formally delegated to U.S. Citizenship and Immigration Services (USCIS), as well as U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP).<sup>2</sup>

When accorded deferred action, an individual is able to remain, temporarily, in the United States: USCIS declines to exercise its authority to issue a Notice to Appear and does not place the individual in removal proceedings. USCIS has granted deferred action to individuals suffering serious medical conditions and to persons temporarily prevented from returning to their home country due to a natural disaster, among others. The employment authorization regulations briefly describe this form of administrative relief, classifying deferred action as, “an act of administrative convenience to the government which gives some cases lower priority.”<sup>3</sup>

Over the past year, stakeholders have expressed concerns to the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman’s Office) regarding long pending deferred action requests submitted by Haitian nationals following the earthquake in January 2010.<sup>4</sup> These Haiti-related concerns led to broader conversations among stakeholders about the way USCIS processes deferred action requests at local offices.

Based on an analysis of USCIS’ handling of deferred action requests, the Ombudsman’s Office has made the following findings:

- Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request.
- There is no formal national procedure for handling deferred action requests. Accordingly, it is difficult to track deferred action processing, in order to determine who receives deferred action, and under what circumstances.

<sup>1</sup> INS Commissioner Doris Meissner, *Exercising Prosecutorial Discretion*, HQOPP 50/4 (Nov. 17, 2000).

<sup>2</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002); Department of Homeland Security (DHS) Secretary Tom Ridge, *Delegation to the Bureau of Citizenship and Immigration Services* (Mar. 1, 2003) (delegating authority to grant voluntary departure under section 240B of the INA, 8 U.S.C. § 1229c, and deferred action); See U.S. Department of Justice, *Immigration Naturalization Service Fact Sheet, Prosecutorial Discretion Guidelines* (Nov. 28, 2000).

<sup>3</sup> 8 C.F.R. § 274a.12(c)(14) (2011).

<sup>4</sup> Information provided by stakeholders (Mar. 28 and 29, 2011).

- When experiencing a change in the type or number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods.
- Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.

In response to its findings, the Ombudsman's Office recommends that USCIS take the following actions to improve the processing of requests for deferred action:

- 1) Issue public information describing deferred action and the procedures for making a request for this temporary form of relief with USCIS;**
- 2) Establish internal procedures for accepting and processing deferred action requests in order to promote consistency and assist local offices in responding to urgent, periodic increases in the demand for deferred action;**
- 3) Inventory all pending deferred action requests to verify that each request received a confirmation of receipt with estimated processing timeframes and USCIS contact information; and**
- 4) Consistently track data related to deferred action requests and make available statistics identifying the number of requests received and the numbers of requests approved and denied.**

## BACKGROUND

A grant of deferred action indicates that the government has, temporarily, declined to exercise its authority to remove a particular individual from the United States. As such, the named individual may remain, provisionally, in the United States. Deferred action is a form of relief that is typically granted to individuals whose cases raise compelling humanitarian concerns and to individuals whose removal is not in the best interests of the U.S. government. It does not provide a pathway to permanent residency.

Factors considered for this form of relief include: humanitarian issues, the likelihood of eligibility to gain legal status, family ties to the United States, criminal history, and immigration concerns.<sup>5</sup> USCIS has granted deferred action to individuals suffering from serious medical conditions and to those temporarily prevented from returning to their home country due to a natural disaster, among others.

While ICE and CBP also are provided with authority to grant deferred action, this review focuses solely on USCIS' communication about and processing of deferred action.

**Legal Framework.** For decades INS, followed by DHS, has used deferred action to provide limited relief to foreign nationals who do not qualify for other immigration benefits that are typically available to individuals in

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<sup>5</sup> Meissner Memo, HQOPP 50/4 (Nov. 17, 2000) (the memorandum provides a more comprehensive list). USCIS reported that the Meissner memo is used as informal guidance for local offices reviewing a deferred action request. (Apr. 15, 2011). *See also Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures)*, Part X.; Deferred action is "an act of administrative choice to give some cases lower priority and in no way an entitlement..." former O.I. §242.1(a)(22) (withdrawn June 24, 1997).

exigent circumstances.<sup>6</sup> However, prior to 2000, neither the legacy INS, nor its predecessor agency had published any significant guidance regarding the use of this power.<sup>7</sup>

On November 17, 2000, INS Commissioner Doris Meissner issued a memorandum entitled, “Exercising Prosecutorial Discretion.”<sup>8</sup> That memo set forth guidance on the exercise of prosecutorial discretion by immigration officials and described the process to be followed in making and monitoring discretionary decisions. The memo states:

The favorable exercise of prosecutorial discretion means a discretionary decision not to assert the full scope of the INS enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an [Notice to Appear]...detaining an alien placed in proceedings and approving deferred action.<sup>9</sup>

In 2003, Secretary of DHS Tom Ridge formally delegated to USCIS the authority to grant deferred action.<sup>10</sup> USCIS continues to rely on the Meissner memo as guidance on exercising this and other forms of discretionary authority.<sup>11</sup>

**Methodology.** In preparing this review, the Ombudsman’s Office met with stakeholders. To determine the USCIS deferred action process, the Ombudsman’s Office also conducted meetings and conference calls with local and regional USCIS offices<sup>12</sup> and requested statistical data from USCIS Headquarters regarding deferred action requests.<sup>13</sup>

**Individual Deferred Action Requests and USCIS Processing.** USCIS processes two types of deferred action requests: 1) those submitted by individuals who qualify based on a USCIS decision to use deferred action as a pre-adjudication form of temporary relief for those who have filed certain petitions or applications (*e.g.*, widows of U.S. citizens, qualified victims of a crime or abuse); and 2) those submitted by individuals in exigent circumstances (*e.g.*, extreme medical cases, victims of the September 11<sup>th</sup> terrorist attacks), who may, or may not, have an application for immigration benefits pending.<sup>14</sup> This study examines only USCIS processing of the latter type of request.

Currently, there are no official, national standard operating procedures for how to process a deferred action request. Nevertheless, most USCIS offices follow some sort of informal, standard process, rather than proceeding in an *ad hoc* fashion.<sup>15</sup> Typically, an individual can submit a deferred action request in-person, or

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<sup>6</sup> *Supra n. 2.*

<sup>7</sup> Meissner Memo, HQOPP 50/4 (Nov. 17, 2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Secretary DHS Tom Ridge, *Delegation to the Bureau of Citizenship and Immigration Services* (Mar. 1, 2003).

<sup>11</sup> Information provided by USCIS (Mar. 30, 2011; Apr. 15, 2011).

<sup>12</sup> Information provided by USCIS (Mar. 29, 30, Apr. 19 and 20, 2011).

<sup>13</sup> The Ombudsman’s Office received basic submission statistics, but the information was incomplete, providing information on grants of requests but not the actual submission and denial numbers. Information provided by USCIS (Apr. 15, 2011).

<sup>14</sup> USCIS memorandum from William Yates, *Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings*, HQOPRD 70/6.2 (May 6, 2004); USCIS memorandum from Stuart Anderson, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status*, HQADN 70/6.2 (May 8, 2002).

<sup>15</sup> Information provided by site visits and teleconference calls with USCIS district offices. (Mar. 29, 2011; Apr. 19 and 20, 2011). The North Eastern Regional Office has an SOP that went into effect on February 17, 2011. Other local offices have guidelines on how to review a deferred action request.

by mail, to a local USCIS office.<sup>16</sup> USCIS does not have a nationwide process for acknowledging the receipt of deferred action requests, but many USCIS offices have implemented a local method for logging submissions and acknowledging their receipt. Other offices do not issue a written acknowledgement of receipt for deferred action requests.

Normally, a deferred action request is reviewed at the local office. A summary sheet explaining the positive and negative equities associated with the deferred action request is completed.<sup>17</sup> The district director reviews the summary and makes a recommendation. That recommendation is forwarded to the regional director. The regional director issues a decision on the recommendation and returns the final decision to the district director so that he/she may deliver it to the requestor.<sup>18</sup> 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.

Once granted deferred action, the requestor is eligible to apply for employment authorization.<sup>19</sup> When USCIS does grant deferred action, it is usually valid for one to two years.<sup>20</sup>

**Local Offices Responding to Increases in Deferred Action Submissions.** The number of deferred action requests received by local offices can vary greatly.<sup>21</sup> Certain local offices have evolved new processes when experiencing a rise in submissions.<sup>22</sup> Nevertheless, there is no mechanism to hold local offices accountable for issuing decisions within a certain timeframe, and USCIS did not report any coordinated efforts across districts to share locally developed solutions for managing a significant deferred action workload.

Recently, USCIS Headquarters began tracking deferred action requests. USCIS Headquarters has instructed district directors to send data on deferred action decisions to the National Benefits Center for tracking.<sup>23</sup> In addition, USCIS devised a template acknowledgement letter for local offices to issue in response to requests for deferred action. However, not all local offices use the template letter.<sup>24</sup> Stakeholders have reported that some local offices do not issue any type of written acknowledgement that a deferred action request has been received.

Furthermore, the template letter includes a statement that the applicant will receive a response to the request within 60 days. Stakeholders and USCIS officials report that many cases remain pending without a decision well beyond 60 days.<sup>25</sup>

**Prior Ombudsman's Office Recommendations.** On April 9, 2007, the Ombudsman's Office published recommendations on deferred action.<sup>26</sup> The recommendations were: 1) post general information on the USCIS website; 2) maintain deferred action statistics; and 3) designate a USCIS Headquarters official to review decisions to help ensure consistency in decision making.

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<sup>16</sup> Information provided by USCIS site visit (Mar. 29, 2011).

<sup>17</sup> Form G-312, *Deferred Action Case Summary*, outlines the individual's biographical information, familial history, grounds of inadmissibility and deportability and physical and mental conditions requiring treatment in the United States.

<sup>18</sup> Information provided by USCIS (Mar. 29, 2011 and Apr. 15, 2011).

<sup>19</sup> 8 C.F.R. §274a.12(c)(14) (2011).

<sup>20</sup> Information provided by USCIS (Mar. 30, 2011).

<sup>21</sup> Information provided by USCIS (Mar. 29, 2011; Apr. 15, 19 and 20, 2011).

<sup>22</sup> *Id.*

<sup>23</sup> Information provided by USCIS site visit (Mar. 29 and 30, 2011).

<sup>24</sup> Field offices report issuing decisions from a time range of two weeks to indefinitely pending. Information provided by USCIS (Mar. 29, 2011) and stakeholders (Mar. 28, 2011).

<sup>25</sup> Information provided by USCIS teleconference calls and site visits (Mar. 29-30 and Apr. 19-20, 2011).

<sup>26</sup> CIS Ombudsman Recommendation #32, *Deferred Action* (Apr. 9, 2007).

USCIS responded that deferred action requests are reviewed on a case-by-case basis and that published guidance would not be a meaningful addition to USCIS' website.<sup>27</sup> USCIS committed to collecting deferred action statistics on a quarterly basis. USCIS did not find it necessary to review deferred action decisions at USCIS Headquarters.

**Stakeholder Concerns.** Over the past year, stakeholders expressed concerns to the Ombudsman's Office regarding the delayed processing of numerous deferred action requests submitted by Haitian nationals following the earthquake in January 2010. In public meetings, stakeholders from across the country repeatedly requested USCIS guidance and information regarding the handling of these deferred action requests.<sup>28</sup> Stakeholders reported to the Ombudsman's Office that some individuals have waited for more than seven months for decisions on their requests.<sup>29</sup> Recently, an extension and re-designation of Haiti Temporary Protected Status (TPS) provided certain individuals affected by the earthquake with relief; many of whom had requested deferred action. In the process of waiting for USCIS to act on their deferred action requests, many individuals accrued unlawful presence, which may impact their eligibility for future immigration benefits. These Haiti-related concerns led to broader conversations among stakeholders about the way that USCIS is processing deferred action requests.

Stakeholder meetings and inquiries have highlighted that USCIS is not communicating essential information on how to make or renew a deferred action request.<sup>30</sup> While stakeholders acknowledge that a grant of deferred action by USCIS is a discretionary decision, they have expressed that general guidance from USCIS would be helpful to determine whether clients should be advised to step forward and seek this relief. Stakeholders explain that preparing a deferred action request requires a significant investment of time and effort. Due to the level of staff resources needed to submit requests, representatives and attorneys who assist people in seeking deferred action note that directions and guidance are especially critical.

**CASE PROBLEM:** The United States Army medically evacuated an individual to the United States for a life-saving operation that was not available in her home country. The individual had been in the care and custody of U.S. military personnel for many years due to her situation and had received deferred action from USCIS. The U.S. Army identified that she needed continued medical treatment. Military personnel could not find information on how the patient could renew her request for deferred action. After contacting various resources, the Ombudsman's Office was contacted. The Ombudsman's Office, in turn, worked with USCIS and the individual to submit a new request for deferred action and to file an employment authorization application. USCIS granted the request, and the individual was permitted to remain temporarily in the United States to continue to receive life-saving treatment.

Stakeholders report difficulties in obtaining status updates on pending requests. After filing the initial request, many individuals are not provided a USCIS point of contact or a written acknowledgement that the request has

<sup>27</sup> USCIS Response to Recommendation #32, Deferred Action (Aug. 7, 2007).

<sup>28</sup> Information provided by stakeholders (Mar. 28, 2011).

<sup>29</sup> Information provided by stakeholders (Mar. 29, 2011).

<sup>30</sup> Recent publications have highlighted the need for public guidance on how to submit a deferred action request to USCIS and to expect subsequent to the submission. See Penn State Law School, Duane Morris & Maggio+Kattar, *Private Bills & Deferred Action, Toolkit* (May 17, 2011), [http://law.psu.edu/file/PBDA\\_Toolkit.pdf](http://law.psu.edu/file/PBDA_Toolkit.pdf) (accessed on July 5, 2011); Mary Kenney, *Prosecutorial Discretion: How to Advocate for Your Client* (June 24, 2011), <http://www.legalactioncenter.org/practice-advisories/prosecutorial-discretion-how-advocate-your-client> (accessed on July 5, 2011); Donald M. Kerwin, Doris Meissner & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better* (Mar. 2011), <http://www.migrationpolicy.org/pubs/administrativefixes.pdf> (accessed on July 5, 2011).

been filed. This makes it difficult to submit additional supporting documentation or to obtain information regarding the processing of the request.

## ANALYSIS & RECOMMENDATIONS

The Ombudsman's Office makes the following recommendations to USCIS:

**(1) Issue public information describing deferred action and the procedures for making a request for this temporary form of relief with USCIS.**

Although most local offices appear to follow a basic process, there is little public information explaining how to request deferred action and what type of supporting documentation should be submitted with a request. USCIS posts humanitarian notices for victims of natural disasters, but does not always include information on deferred action.<sup>31</sup> Some USCIS offices have provided local guidance, but this is often only visible to community-based organizations or legal representatives, and not to individuals who lack access to such aid networks, leaving the most vulnerable individuals – those who are not represented – without knowledge of how to be considered for this temporary form of relief.

**LOCAL PRACTICE:** The Miami Field Office published a checklist outlining the basic documentation that should be included in a deferred action request, which reduces the number of requests for additional evidence.

Public guidance would ensure that individuals in need of relief are aware of deferred action and know how to make a request. Informative guidance would include: 1) information explaining what deferred action is and what it is not; 2) instructions for submitting a request for deferred action to a local office; 3) an explanation of what information and documentation should be included in the request; and 4) an indication of what to expect following the submission of a request for deferred action, including a point of contact able to provide processing updates and other relevant information.

Issuing public guidance would not impact USCIS' discretionary authority to decide a deferred action request.

**(2) Establish internal procedures for accepting and processing deferred action requests in order to promote consistency and assist local offices in responding to urgent, periodic increases in the demand for deferred action.**

**LOCAL PRACTICE:** When an individual submits a deferred action request, officers in the Boston Field Office immediately determine the individual's previously assigned A-number, or generate a new A-number, as necessary. This ensures that the individual leaves the office with a unique identifier that can be used to track the request and can be referenced when inquiring as to case status, required follow-up, etc.

<sup>31</sup> USCIS New Release, *Haiti Relief Measures: Questions and Answers*; <http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=855260f64f336210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>) (accessed on May 6, 2011); USCIS Reminds Japanese Nationals Impacted by Recent Disaster, *Questions and Answers*; <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9c6ac337ab5ce210VgnVCM10000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD>) (accessed on May 6, 2011).

Establishing nationwide USCIS procedures to guide local offices in responding to submission increases would optimize resources and ensure that individuals requesting deferred action are not subjected to unnecessary delays due to manpower shortages and other administrative impediments.

**(3) Inventory all pending deferred action requests to verify that each request received a confirmation of receipt with estimated processing timeframes and USCIS contact information.**

Many USCIS offices have a backlog of deferred action requests which have been pending for extensive periods of time.<sup>32</sup> Establishing a comprehensive national inventory of deferred action requests would identify cases that have been long pending and assist in the implementation of a national process for timely, consistent processing of deferred action requests.

Additionally, USCIS Headquarters should verify that pending deferred action requests were issued receipt confirmation with an estimated processing time from the responsible local office. In recent months, USCIS Headquarters has started to track deferred action requests received at local field offices. However, USCIS must be more proactive in providing the public with information obtained through its tracking activities.

**(4) Consistently track data related to deferred action requests and make available statistics identifying: the number of requests received and the numbers of requests approved and denied.**

Tracking and releasing to the public data on the number of deferred action request submissions (*i.e.*, approvals, denials, pending requests, etc.) would help provide transparency demonstrating how often and in what types of circumstances deferred action is granted.

**LOCAL PRACTICE:** When regional directors started receiving an increase in deferred action requests from district offices due to the earthquake in Haiti, they met to discuss recent trends and attempted to facilitate consistent deferred action decisions coming from the four USCIS regions. While the coordination so far does not appear to have resulted in the development of a centralized national process, the discussion was a positive step towards coordinating deferred action processing at the regional level.

## CONCLUSION

Issuing public guidance on the procedures for making a request for deferred action would ensure that those who may merit humanitarian relief know how to seek it, whether they are represented or not. Establishing a standardized and responsive national procedure, as well as conducting an inventory of pending deferred action requests to verify that each individual who has made a request has received confirmation of receipt, would improve customer service, agency accountability, and help ensure consistency in deferred action decisions. Finally, tracking submissions and releasing the data to the public would improve management of the deferred action process and provide transparency to the public.

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<sup>32</sup> Stakeholders report that most deferred action requests remain pending without explanation. Information provided at stakeholder meeting (Mar. 28, 2011). Information provided at USCIS site visit (Mar. 29, 2011).