



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

December 12, 2014

León Rodríguez, Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., NW
Washington, DC 20529

Dear Director Rodríguez,

The American Immigration Lawyers Association is writing to express our concern with the adjudication of renewal Deferred Action for Childhood Arrivals (DACA) applications. We have observed serious delays in processing DACA renewal applications, which can cause deserving DACA recipients to lose employment, employer-provided health benefits, and access to driver's licenses. In addition, though it was specifically promised as a safety net when the DACA renewal process was rolled out, we are not aware of any DACA recipients who have been granted temporary work authorization, even when their renewal applications were filed at least 120 days prior to expiration of the initial DACA grant. Furthermore, by not publishing until recently DACA renewal time lines on the USCIS website, the agency has prevented renewal applicants and their attorneys from bringing these delays to USCIS's attention through the regular customer service channels, thus effectively ensuring that some applicants would suffer a lapse in deferred action status and work authorization.

The impact on DACA recipients is substantial: when they do not receive proper documentation of extended work authorization, employers are obligated to terminate their employment. As a result, many DACA recipients will lose their income and other employer-provided benefits like health insurance. Those who reside in a state where the validity of one's driver's license is tied to the validity an Employment Authorization Document (EAD) will also suffer the loss of driving privileges. Employers will lose valuable employees, and will have to expend resources to hire and train replacements. Moreover, absent a policy pronouncement from the agency, such individuals would continue to accumulate unlawful presence, which, for those who had not accumulated unlawful presence prior to their initial DACA grants of sufficient duration to trigger the unlawful presence bars, could harm their ability to someday acquire nonimmigrant or immigrant status.

To ensure the continued success of the DACA program, USCIS must take immediate interim steps to prevent these deserving young people from losing their jobs. First, USCIS should allow the renewal Form I-821D receipt notice to serve as temporary evidence of work authorization and deferred action until the renewal application is adjudicated. Second, USCIS should adhere to the regulatory 90-day processing timeline followed for all other Forms I-765, Application for Employment Authorization. In the alternative—and at a bare minimum—USCIS should issue interim work authorization to individuals who complied with the policy set forth in the USCIS

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DACA FAQ by filing their renewal requests more than 120 days before their DACA was set to expire.

Problems with the Renewal Process

AILA has seen a troubling number of DACA renewal applications adjudicated after the expiration of the EAD or just days before the expiration of the EAD. In a two-week period in October, we collected over 80 case examples of DACA renewal applications pending more than 75 days. Of these, 23 cases were pending more than 120 days before they were approved or are still pending more than 120 days.¹ Many of these cases were still pending well into December. Of the long-pending cases that were ultimately approved, 8 of the cases were approved after the prior EAD expired, and 3 were approved just days before the EAD expired.

Moreover, USCIS only posted separate, shorter processing times for renewal applications this week – almost 5 months after it began accepting renewal Forms I-821D. Previously, processing times for initial DACA applications were listed on the Nebraska Service Center processing time report as 6 months and there was no processing time listed for DACA renewal applications. As a result, the National Customer Service Center advised stakeholders that that the processing time for DACA renewal applications was 6 months and refused to accept an inquiry and issue a service request for cases pending less than 6 months. Without a service request, there is no way for applicants or attorneys to bring long-pending cases to the attention of USCIS. While the new posted processing time of 120 days is a step in the right direction, it is not enough to ensure that DACA recipients will receive renewal approvals in time to prevent job loss and prevent the accrual of unlawful presence. If applicants file for renewal the suggested 120 days in advance, the new processing time means that applicants can only inquire once their previous EAD has expired. Unfortunately, USCIS often does not respond to service requests in a timely manner. As a result, even if an applicant files for renewal the maximum 150 days in advance, they may not be guaranteed to receive a response from USCIS before their EAD expires.

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

In order to prevent further economic harm to DACA recipients and their employers, USCIS must allow the DACA renewal receipt notice to serve as temporary work authorization.² Forms I-765 can often take longer than the 90-day regulatory processing timeframe even outside of the DACA context. For example, AILA periodically sees the processing times for EADs extend

¹ See attached list of long-pending DACA renewals.

² AILA has suggested this solution to USCIS multiple times prior to the implementation of the DACA renewal process, including in formal comments submitted on the revised I-821D. See *AILA and AIC Comments on Revised Form I-821D Following 30-Day Comment Extension* (posted 5/27/14), available at <http://www.aila.org/content/default.aspx?docid=48702>; *AILA and AIC Comments on Revised Form I-821D* (posted 2/28/14), available at <http://www.aila.org/content/default.aspx?docid=47589>. As our comments note, we recommended that the receipt notice serve as temporary work authorization precisely because we were concerned that a substantial number of DACA recipients would experience a temporary lapse in deferred action.

beyond 90 days at service centers, most recently in August of 2014.³ There have also been Temporary Protected Status (TPS) renewal periods where EADs were delayed because of high filing volume. Without a method to obtain interim work authorization or temporary deferred action, DACA recipients will lose their jobs due to USCIS's inability to consistently adjudicate these applications in a timely manner. Moreover, it should be noted that it is current USCIS practice to constantly assess its workload across service centers and field offices and transfer adjudications accordingly to keep up with shifting demands. With the implementation of the DACA expansion and the new Deferred Action for Parental Accountability program, along with other executive actions announced in November 2014, it is very likely that we will once again see processing times across product lines rise. Allowing the receipt notice for a DACA renewal application to serve as temporary work authorization would be a proactive step in avoiding an inevitable increase in DACA/work authorization lapses, and would reduce the number of inquiries on cases pending past the posted processing times, thus freeing up precious USCIS resources.

Allowing a receipt or other notice to serve as temporary proof of work authorization is not without precedent. The receipt for Form I-751, Petition to Remove the Conditions of Residence, clearly states that work authorization is extended for one year from the date of the receipt.⁴ Similarly, the I-821D receipt could indicate that deferred action and work authorization are extended while the application is pending, and clarify that unlawful presence does not accrue during the extension period.⁵ Additionally, in order to allow time for EADs with new validity dates to be issued, USCIS routinely automatically extends work authorization by notice in the Federal Register when TPS is extended, for those applicants who timely file for an extension of TPS status.

We suggest the following language for the DACA renewal receipt notice: "Your Deferred Action and work authorization are extended for a period of one year from the date of this notice. However, if your DACA renewal application is denied, your Deferred Action and work authorization are terminated as of the date of the denial. You will not accrue unlawful presence while your renewal request is pending."

Adhere to the Regulatory 90-Day Processing Timeline for Work Authorization

USCIS should also adhere to the regulatory 90-day work authorization timeline in processing DACA renewal I-765s. 8 CFR §274a.13(d) states that "USCIS will adjudicate the application within 90 days from the date of receipt of the application." The only exceptions to this regulatory processing time are initial applications by asylum applicants and certain adjustment of status

³ *AILA Notes from SCOPS Teleconference (8/27/14)*, page 6-7 (posted 9/2/14), available at <http://www.aila.org/content/default.aspx?docid=49943>.

⁴ See Form I-751 receipt notice ("Your conditional resident status is extended for a period of one year. During the one-year extension you are authorized employment and travel. (This extension and authorization for employment and travel does not apply to you if your conditional resident status has been terminated.)").

⁵ The agency has previously made pronouncements as to when unlawful presence does/does not accrue in the DACA context. See USCIS DACA Frequently Asked Questions, Q.5 under "About Deferred Action for Childhood Arrivals" ("If you are under 18 years of age at the time you submit your request, you will not accrue unlawful presence while the request is pending, even if you turn 18 while your request is pending with USCIS.").

applicants. The regulation also notes that the agency's failure to complete the adjudication in this time period "will result in the grant of an employment authorization document for a period not to exceed 240 days." We believe that USCIS should be adhering to this regulatory deadline in its adjudication of DACA-renewal-based I-765s.

We look forward to a continuing dialogue with USCIS on issues concerning this important matter. If you have any questions, please feel free to contact me at 202-507-7621 or blawrence@aila.org, or Kate Voigt, Associate Director of Liaison at 202-507-7626 or kvoigt@aila.org.

Sincerely,



Betsy Lawrence
Director of Liaison
The American Immigration Lawyers Association

cc: Maria M. Odom, Citizenship and Immigration Services Ombudsman