

TO: DHS Deputy Secretary Alejandro Mayorkas

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RE: Driving without license Felonies and Deferred Action Eligibility

Secretary Johnson's memoranda (Nov. 20, 2014) recognize that state convictions flowing from immigration status should not disqualify applicants from deferred action. Yet the Johnson memorandum (Nov. 20, 2014) on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants"¹ appears inadvertently to disqualify deserving applicants from relief. Most prominently, several states make driving without a license a felony, and until 2013 nearly all undocumented immigrants throughout the country were categorically barred from obtaining driver's licenses. Many people otherwise eligible for deferred action will have these felony convictions because of the impossibility of living in most states without driving and because of local policing practices which have subjected immigrants to enhanced scrutiny. To avoid this problem, DHS should interpret the language in Priority 1, subsection (d) -- "a state or local offense for which an essential element was the alien's immigration status"² -- to cover at a minimum, felony convictions for driving without a license. Otherwise the implementation of deferred action will validate racially discriminatory local enforcement practices and conflict with DHS's prioritization of serious criminal offenders.

While we did not undertake a 50-state survey, we believe that numerous states impose felony punishments for driving without a license after multiple misdemeanor convictions. In general, this is captured under felony statutes relating to "Driving while license revoked or suspended." From what we have been able to gather through quick research, most states require drivers to be licensed and "revoke" that privilege when that person is caught without a license the first time, in this way capturing people who drive but were never licensed. In some states (e.g., TN), lawyers have notified us that when a motorist is caught for driving without a license, the state will issue a driver's license number just so it can be revoked or suspended (in other words, the state creates a legal fiction to deal with the logical dilemma).³

¹ Jeh Charles Johnson, Secretary of Department of Homeland Security, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," (Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

² Johnson memo, Priority 1, subsection (d).

³ In one case from Tennessee, a police officer testified that "if the Defendant had been stopped and cited for not having a driver's license, the department may have assigned the Defendant a driver's license number in order to document that the Defendant's privilege to drive had been suspended." (*State v. Maxwell*, No. M2009-02323-CCA-R3CD, 2011 WL 345872, at *1 (TENN. CRIM. APP. Feb. 1, 2011), *available at* <http://www.tncourts.gov/sites/default/files/maxwellcharlesphillipopn.pdf>). Knox County's (TN) website on "Traffic & Citation Court" also references this practice, stating that "Even if you've never had a driver's license, the

The felony driving while license revoked/suspended statutes do not list immigration status or alienage as an essential element of the offense—and so would appear to be excluded on a narrow reading of the immigration status crimes exception—even though immigration is central to the arrest practices leading to these state prosecutions.

There are compelling reasons to believe that these convictions exist in significant numbers throughout the country. Most regions of the country are impossible to negotiate without a car, and until very recently, nearly all undocumented people were ineligible for driver's licenses.

I. Examples of state felony driving without license laws

A. Georgia

Georgia does not grant drivers' licenses to people lacking lawful presence. In Georgia the first conviction of driving without a valid driver's license is a misdemeanor punishable by imprisonment for two days to a year. However, the fourth or subsequent conviction for driving without a license within five years is a felony, punishable by imprisonment for one year to five years in addition to fines ranging from \$2500-\$2499.⁴

Some Georgia counties have a history of conducting traffic stops that disproportionately target people of color, and Latino motorists are routinely pulled over for reasons that are not clear and then are arrested or given a citation for a traffic violation, such as driving without a license.⁵ Several of the most notorious Georgia counties also happen to be counties that have [active jail partnerships with the ICE 287\(g\) program](#).⁶

B. Missouri

In Missouri driving without a license is a misdemeanor. A third or subsequent conviction of driving without a license is a felony. Missouri does not grant driving privileges to undocumented immigrants and also does not honor driver's licenses issued to undocumented immigrants from other states (V.A.M.S. 302.063 states that "the State of Missouri hereby declares that granting driver's licenses to illegal aliens is repugnant to the public policy of Missouri and therefore Missouri shall not extend full faith and credit to out-of-state driver's licenses issued to illegal aliens."). Missouri's refusal to honor Illinois driver's licenses issued to

Department of Safety will assign you a license number and your license then can be suspended." (Knox County, Tennessee, "Traffic & Citation Court," available at http://www.knoxcounty.org/gsjudges/traffic/license_suspension.php.

⁴ GA. CODE ANN., § 40-5-121 (2009).

⁵ See ACLU of Georgia, *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)* (March 2010), available at http://www.acluga.org/download_file/view_inline/1504/392/; and ACLU of Georgia, *Terror and Isolation in Cobb: How Unchecked Police Power Under 287(g) Has Torn Apart Families and Threatened Public Safety* (Oct. 2009), available at http://www.acluga.org/download_file/view_inline/1505/392/.

⁶ As of January 2015, ICE maintains active 287(g) jail agreements with four Georgia counties: Cobb, Gwinnett, Hall, Whitfield. The first two counties have been subject of ACLU of Georgia reports.

undocumented immigrants⁷ is highly problematic, given that St. Louis sits on the MO-IL border and the two states share a vast interstate border.

II. Felony driving conviction problems in pro-immigrant states

The problem of felony driving without license convictions is not limited to states with current felony driving while license revoked/suspended statutes on the books. This may be a problem even in states where undocumented status is no longer a disability with respect to driving privileges. Prior to 2013, nearly all the undocumented population lived in states that did not grant driving licenses or privileges to people lacking lawful immigration status. Starting in 2013, a number of states passed laws to issue drivers' licenses to the undocumented population. As of January 2015, eight states, the District of Columbia, and Puerto Rico have passed such laws.⁸

Thus even in pro-immigrant states there may be a population of longtime undocumented who could be disqualified from deferred action because of felony driving convictions under the prior state licensing regime. This species of driving without a license felony seems likely to come up, as the executive action memoranda are implemented in the next two years.

Policy Recommendations

DHS should take steps to avoid disqualifying deserving applicants who meet the deferred action criteria but have a felony driving conviction based on conduct incident to immigration status:

- The simplest and most administrable measure would be to exclude from consideration under Priority 1, subsection (d) of the Johnson memo all felonies relating to driving with a revoked or suspended license where the underlying offense conduct was solely the failure to have a valid license.
- An alternative would be to interpret the language from Priority 1, subsection (d) exclude from prioritization felony convictions where an "essential element was the alien's immigration status," to include convictions resulting from state restriction of a legal privilege to those with lawful status (including but not limited to offenses with an element that the defendant lacked a government-issued license or permit requiring lawful immigration status).

⁷ 625 ILCS 5/6-105.1

⁸ National Immigration Law Center, "State Laws & Policies on Driver's Licenses for Immigrants" (January 2015), available at <http://www.nilc.org/driverlicenseemap.html>.