

June 26, 2012

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Madame Secretary:

We write to congratulate you on the new policy announced on June 15, 2012 providing deferred action to certain undocumented youth. This is a major initiative that could, if fully implemented, prevent the unjust and unnecessary deportation of hundreds of thousands of young people who have lived in the United States for years, are productive members of our communities, and call America home.

As the Department of Homeland Security (DHS) and its component agencies begin the enormous task of implementing this policy we offer our assistance and hope you will call upon us. Recognizing the massive scale of this initiative, we urge you to make every effort to meet the 60-day time frame you have set forth in the interest of maintaining credibility and making the program a success. If you have not already done so, we recommend that an interagency team be assembled immediately that includes the White House, DHS and its component agencies, and the Department of Justice and that is empowered to resolve questions and ensure uniformity across the government on the implementation of the deferred action policy. We also recommend that further guidance respond to the many questions that have arisen since the announcement to ensure consistent implementation and to avoid misunderstanding by the public.

In addition we offer the following policy and operational recommendations for your consideration:

1. Implementing Strong Confidentiality Provisions Is Critical to Robust Participation.

The overall success of this important initiative hinges on building trust within the community, particularly because the affirmative application process necessarily requires individuals subject to removal to come forward voluntarily. Gaining their trust requires implementing strong confidentiality protections throughout the deferred action process. To ensure robust implementation and high participation rates by eligible individuals, DHS should protect the confidentiality of the evidence submitted in support of requests for deferred action. Evidence submitted by individuals who request deferred action should be barred from use for the purposes of establishing removability or other prosecutorial purposes. DHS should only collect that information necessary to determine eligibility and should provide guidance to ensure that the information gained in the process is used only for the determination of the application and for no other purpose, and should communicate to the public that such information will remain confidential.

If confidentiality is not provided many eligible individuals will be reluctant to come forward and provide information about their case. This could result in poor participation levels and unsuccessful implementation. Confidentiality protections should also be extended to information pertaining to the family members of those who apply as well as those who accompany individuals to interviews or appointments. The bottom line is that eligible youth should not be forced to choose between obtaining relief for themselves and possibly endangering their loved ones.

2. Exclusionary factors, including criminal convictions, national security, and public safety threats should be clearly defined and narrowly interpreted to avoid illogical outcomes.

Many of the initial concerns regarding the June 15 announcement focus on the nature of eligibility exclusions, particularly those relating to criminal convictions. Based on public statements issued by DHS officials, the current definitions for “significant misdemeanor” and “minor misdemeanor” are overly broad and will result in the exclusion of individuals who should be eligible. As the June 15, 2012 FAQs state, the term significant misdemeanor includes convictions for which there is no possibility of jail time and low-level offenses like simple assault. Moreover the definition does not specify exactly what crimes constitute a significant misdemeanor and as a result the definition will require DHS personnel to interpret state criminal laws that vary significantly. Driving under the influence should not be an automatic bar to eligibility since many states have zero tolerance laws that mandate a DUI charge for young drivers (typically under 21) who have trace amounts of alcohol in their system that would not constitute DUI for adults in the state.

A juvenile delinquency adjudication should not qualify as a criminal conviction under the policy. Nationwide, delinquency adjudications are not typically considered “crimes” and accordingly should not be treated that way under the deferred action policy.

The June 15 FAQs state that three or more misdemeanors make someone ineligible. In some states driving without a license and other minor offenses (like fishing without a license or taking materials from a state forest) are treated as misdemeanors. Violations such as these should not count for the purposes of eligibility. Furthermore, these minor offenses are frequently used by law enforcement officers as a pretext to make stops of individuals who they suspect are undocumented. This would likely result in a high number of convictions for individuals who are deserving of deferred action and should not be excluded. In general, violations related to immigration status should be considered in the appropriate context and not treated as a disqualifying factor.

All cases should be reviewed under a “totality of the circumstances” standard enabling DHS officials to examine compelling and mitigating factors that would qualify an individual for deferred action despite the presence of unfavorable factors. Older criminal convictions and evidence of rehabilitation should mitigate the treatment of a criminal conviction and allow individuals to qualify for deferred action.

3. A streamlined and straightforward application process is critical to the success of the program.

DHS has long argued that any new programs that require the submission of thousands of applications should be simple, streamlined, and require a minimum of additional resources to implement. The affirmative deferred action program is well suited to these recommendations, as it has specific eligibility criteria that can be adjudicated without the need for elaborate interviews or new forms. We believe the following operational considerations can help to facilitate the application process.

- **Adjudication of applications should be based on submission of materials only.** Interviews should not be done unless required for a specific case. In most cases, the eligibility determination will be straightforward and clear from the submitted documentation and interviews would be time consuming and inefficient. Interviews should be reserved for cases where there are genuine issues about eligibility that cannot be resolved by internal consultation with a supervisor.

Quality Assurance standards should be vigorously enforced. Not only should supervisory review take place in each case where denial of deferred action is contemplated, but novel issues of fact or law should be identified and subject to quality assurance review at the headquarters level.

- **USCIS Field Operations** should receive applications and process them. Though we recommend interviewing applicants only on a limited basis, the interviews, when needed, would be better accomplished through the Field Operations directorate rather than Service Center Operations.
- **Use forms and processes that are currently in use.** Although there is no form specifically for a deferred action request, USCIS has in place forms that are well-suited to meet the current needs. The I-765 already anticipates deferred action as a basis for work authorization, and can be accompanied by a simple checklist, and/or by a form like the I-821. The June 15 memorandum defines the eligibility criteria and existing regulations provide sufficient guidance on the kinds of evidence needed to prove the elements.
- Applicants who may appear ineligible should be advised on what basis their eligibility is in question and be given a meaningful opportunity to respond, and if necessary, to supplement their files with additional information.
- Each request for deferred action should receive an acknowledgement of receipt and an answer granting or denying the request that cites the specific reasons for decision.
- **Data collection.** DHS should establish a robust data collection process to ensure transparency and consistency of implementation. Data should be provided frequently to stakeholders.

4. Offers of deferred action should remain open even if initially declined.

If someone rejects the deferred action offer, the offer should not immediately expire or be given on an “exploding” basis but should remain available for the person to accept at a later date. The young undocumented individuals are a highly compelling population and, when DHS has determined that deferred action is appropriate, that determination should not change if the individual elects first to pursue other forms of relief.

5. Termination of removal proceedings upon grant of deferred action.

Respondents in proceedings who are granted deferred action should be allowed to continue to a decision on the merits of applications for relief from removal, or alternatively, request administrative closure or seek termination without prejudice, as appropriate.

6. Impact of deferred action on voluntary departure.

Individuals granted voluntary departure should not be precluded from participating under this policy or disadvantaged if they accept deferred action. Individuals who have already accepted voluntary departure should have the opportunity to have their cases reopened so they can be administratively closed or terminated without prejudice. In appropriate cases, ICE should either file a motion to reopen or join in a motion submitted by an eligible respondent.

7. DHS should continue to use deferred action for individuals who qualify for prosecutorial discretion as appropriate

While we applaud the decision to offer deferred action to undocumented youth, the need for careful and thoughtful use of prosecutorial discretion in all its forms does not end simply because a particular group may come forward affirmatively. We urge DHS to continue to promote and train its officers in the appropriate use of discretion and to utilize deferred action whenever circumstances dictate. Just as DHS has the legal authority to grant deferred action under the newly announced policy, DHS can and should continue to exercise that authority, on a case-by-case basis with respect to other individuals who merit prosecutorial discretion. Specifically, parents and family members of those granted deferred action under the new policy should also be considered for deferred action.

In the alternative, the fact that an individual is the parent or family member of someone granted deferred action under the new policy should be weighed as a strongly positive factor in favor of other exercises of prosecutorial discretion, such as administrative closure or stipulation to relief such as cancellation of removal.

DHS’s goal of enforcing the immigration laws in a “firm and sensible manner” will not be served by expending precious resources to deport family members of the young people granted deferred action. Deportation of family members would break families apart or

will result in the effective “self-deportation” of the very individuals for whom the policy seeks to provide temporary relief.

Again, we congratulate you for this forward-thinking new direction in immigration policy and enforcement and we look forward to working with you to see it fully implemented. Thank you for the opportunity to share these recommendations. We welcome the chance to meet with DHS officials to work together to make this effort a success. Please contact Greg Chen, Director of Advocacy at the American Immigration Lawyers Association, gchen@aila.org, 202/507-7615, with any questions.

Sincerely,

The Advocates for Human Rights
African & American Friendship Association for Cooperation & Development
(AAFACD), Inc.
Alliance for Immigrant Rights- Michigan
American Civil Liberties Union
Americans for Immigrant Justice, formerly Florida Immigrant Advocacy Center (FIAC)
The American Immigration Council
American Immigration Lawyers Association
America's Voice Education Fund
Asian American Justice Center, member of Asian American Center for Advancing Justice
Asian American Legal Defense and Education Fund
Brooklyn Defender Services
Casa Esperanza
CAUSA
Center for American Progress Action Fund
Center for Community Change
Centro de Ayuda Legal para Imigrantes (CALI)
Centro Legal de la Raza
Church World Service, Immigration and Refugee Program
Coalition for Humane Immigrant Rights of Los Angeles
Community Legal Services in East Palo Alto
Disciples Home Missions of the Christian Church
East Bay Community Law Center
The Episcopal Church
Farmworker Justice
Family Equality Council
Florida Immigrant Youth Network
Hebrew Immigrant Aid Society
Immigration Equality
Immigrant Defense Project
Immigrant Legal Resource Center (ILRC)
Immigration Legal Advocacy Project
Interfaith Coalition on Immigration (ICOM, MN)
International Institute of the Bay Area

IRATE & First Friends
Kids in Need of Defense (KIND)
The Leadership Conference on Civil and Human Rights
Legal Services for Children
Lutheran Immigration and Refugee Service
Massachusetts Immigrant and Refugee Advocacy Coalition
Mennonite Central Committee U.S. Washington Office
Mexican American Legal Defense and Educational Fund
Minnesota Immigrant Freedom Network
MIRA Coalition
New York Immigration Coalition
National Advocacy Center of the Sisters of the Good Shepherd
National Center for Transgender Equality
National Council of La Raza
National Employment Law Project
National Immigrant Justice Center
National Immigration Forum
National Immigration Law Center
National Korean American Service and Education Consortium
National Latina Institute for Reproductive Health
NAVIGATE MN
NC Immigrant Rights Project
Northwest Immigrant Rights Project
Pinos y Campesinos Unidos del Noroeste (PCUN)
Political Asylum/Immigration Representation Project
Post-Deportation Human Rights Project, Boston College
The Reformed Church of Highland Park, NJ, (RCHP)
Sanctuary for Families
Service Employees International Union
South Asian Americans Leading Together (SAALT)
Southeast Asia Resource Action Center
Student Working for Equal Rights
University of California, Davis- School of Law Clinical Programs
US committee for Refugees and Immigrants
Vermont Immigration and Asylum Advocates
Voces de la Frontera
Washington Defender Association's Immigration Project
Who Is My Neighbor? Inc. (WIMNI)
Wilco Justice Alliance
Women's Refugee Commission

cc: Noah Kroloff, Chief of Staff, DHS
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