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ISSUE BRIEF:

Deferred Action for Childhood Arrivals (DACA) Recipients Are “Legally Present” Under Michigan and Federal Law

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The Michigan Secretary of State has taken the position that Deferred Action for Childhood Arrivals (DACA) beneficiaries are not "legally present" in the United States under Michigan law, and therefore are ineligible for driver's licenses (and state identification cards) under Michigan law. However, the denial of licenses to DACA grantees is inconsistent with state and federal law. With the single exception of DACA beneficiaries, Michigan considers all other individuals who have been granted deferred action to be lawfully present in the United States and therefore eligible for driver's licenses and personal identification cards. DACA grantees are also the only individuals holding federally issued Employment Authorization Documents ("EADs" or "work permits") who are currently denied drivers licenses by the Michigan Secretary of State.¹ DACA grantees receive the same "deferred action" that other deferred action grantees receive, and are similarly "legally present" under Michigan law.

I. Michigan Law Requires Issuance of Driver's Licenses to Individuals who are Legally Present.

Under Michigan law, a license applicant who is not a citizen of the United States must "provide . . . documents demonstrating his or her **legal presence** in the United States." M.C.L. § 257.307(1)(b) (emphasis added).² The legislative history makes clear that this definition includes deferred action recipients. When the Michigan legislature initially adopted the "legal presence" language in 2008, it listed examples of individuals who are legally present, stating: "A person legally present in the United States includes, but is not limited to, a person authorized by the United States government for employment in the United States . . ."³ As part of a series of amendments to the Motor Vehicle Code in 2011, the list of examples of "legal presence" was removed. However, the "legal presence" requirement remained unchanged. Although the legislature streamlined the language, the legislature did not intend to change the meaning of the term "legal presence." If anything, by removing the non-exhaustive list of examples, the legislature was reemphasizing that driver's licenses should be issued to all those deemed legally

¹ See e.g. http://www.michigan.gov/documents/sos/Applying_for_lic_or_ID_SOS_428_222146_7.pdf.

² That section further provides: "Nothing in this act shall obligate or be construed to obligate this state to comply with title II of the real ID act of 2005, Public Law 109-13. The secretary of state may adopt rules under the administrative procedures act of 1969, 1969 PA 306, M.C.L. §§ 24.201 to 24.328, as are necessary for the administration of this subdivision. A determination by the secretary of state that an applicant is not legally present in the United States may be appealed under section 631 of the revised judicature act of 1961, 1961 PA 236, M.C.L. § 600.631." This language is mirrored in M.C.L. § 28.291(5) for personal identification cards. M.C.L. § 257.307(1)(b).

³ Public Act 7, Sec. 307(1)(b) (2008).



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present as a matter of federal immigration law. All deferred action recipients, including DACA grantees, are eligible to receive employment authorization under federal law upon a showing of economic necessity,⁴ and thus should be similarly eligible for Michigan drivers' licenses.

II. DACA Beneficiaries are “Legally Present” Under Federal Law and Therefore Eligible for Michigan Driver’s Licenses.

DACA beneficiaries are authorized under federal law to be present in the United States, and are therefore “legally present” for purposes of Michigan law. In granting deferred action, the federal government has made an affirmative decision to allow the individual DACA beneficiary to remain in the country on a renewable, two-year basis. All deferred action recipients, including DACA grantees, are eligible to receive employment authorization under federal law upon a showing of economic necessity.⁵ The Board of Immigration Appeals — the highest federal administrative body for interpreting and applying the immigration laws — has long recognized that “deferred action status is...permission to remain in this country.”⁶ The federal courts have likewise recognized that the grant of deferred action is an “authorization” by the federal government to remain in the United States.⁷ Consistent with this understanding, deferred action recipients are also considered to be present during a “period of stay authorized by the Attorney General,” and are not considered to be “unlawfully present,” with respect to determining whether someone is inadmissible under certain circumstances set forth in the Immigration and Nationality Act (INA).⁸ Finally, DACA recipients may obtain work authorization upon a showing of economic necessity.¹⁹ It follows logically that such authorization for employment entails authorization to live in the United States, for DACA grantees can only work in the United States if they are present here.

III. The Secretary of State Confused the Distinct Concepts of Legal Presence and Lawful Status in Concluding that DACA Beneficiaries are not “Legally Present” Under Michigan Law.

In determining that DACA beneficiaries are not eligible for driver’s licenses, the Secretary of State apparently relied on a statement on the USCIS website that “[d]eferred action does not

⁴ 8 C.F.R. § 274a.12(c)(14).

⁵ 8 C.F.R. § 274a.12(c)(14).

⁶ *Matter of Quintero*, 18 I. & N. Dec. 348, 349 (BIA 1982). See also, e.g., *Matter of Pena-Diaz*, 20 I. & N. Dec. 841, 846 (BIA 1994) (explaining that by granting deferred action status, the Immigration and Naturalization “Service has affirmatively permitted the alien to remain”) (emphasis added).

⁷ See, e.g., *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1258-59 (11th Cir. 2012) (concluding that a non-citizen “currently classified under ‘deferred action’ status ... remains permissibly in the United States” “[a]s a result of this status”); *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-CV-2484, 2011 WL 5516953, at *20 (N.D. Ala. Sept. 28, 2011), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012) (noting that non-citizens “whom the federal government has granted ... deferred action” are persons “whom the federal government has authorized to remain in the United States”).

⁸ See 8 U.S.C. § 1182(a)(9)(B); Memorandum of Johnny N. Williams, Exec. Assoc. Commissioner, INS Office of Field Operations on Unlawful Presence, Dec. 1998, at 1-2.

⁹ In that context, Congress provided that “[f]or purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” 8 U.S.C. § 1182(a)(9)(B).

provide an individual with lawful status.”¹⁰ As an initial matter, the standard for eligibility for a Michigan driver’s license or personal identification card is not “lawful status,” but rather “legal presence” in the United States. *See* M.C.L. § 257.307(1)(b); § 28.291(5). There is a significant legal difference between an authorized legal presence in the U.S. (which is determined by DHS) and lawful immigration status (which is granted in accordance with laws passed by Congress).¹¹ The fact that an individual lacks a formal immigration status does not mean she lacks legal presence in the country under federal law.

To the contrary, in the federal immigration system, many groups of individuals are legally entitled or permitted to remain in the country even though they lack a formal immigration status.¹² Deferred action grantees are one example,¹³ and DACA itself is but one of many instances in which the federal government has used deferred action to authorize non-citizens to live and work in the United States. For example, deferred action has been made available to certain victims of human trafficking and sexual exploitation;¹⁴ to certain relatives of victims of terrorism;¹⁵ to surviving family members of a legal permanent resident member of the armed forces;¹⁶ to spouses and children of U.S. citizens or lawful permanent residents who are survivors of domestic violence;¹⁷ to certain surviving spouses of U.S. citizens;¹⁸ to foreign students impacted by Hurricane Katrina;¹⁹ and to applicants for certain types of visas.²⁰ In addition,

¹⁰ USCIS, Consideration of Deferred Action for Childhood Arrivals Process, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

¹¹ *Id.*

¹² Federal immigration *status* is generally understood to refer to a specific set of federal immigration classifications—those admitted as “non-immigrants,” or temporarily for certain purposes set forth by statute; those admitted as “immigrants,” or permanent residents; and other limited classifications established by federal law, such as temporary protected status.

¹³ *See Lozano v. Hazleton*, 620 F.3d 170, 222 (3d Cir. 2010), *judg. vacated and cause remanded for further consideration in light of Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011).

¹⁴ News Release, U.S. Citizenship and Immigration Services, USCIS Will Offer Protection for Victims of Human Trafficking and Other Violations (Mar. 11, 2011), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=6e7bf0a4017ae210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

¹⁵ USA PATRIOT Act, Pub. L. 107-56, section 423(b) (2001); Stuart Anderson, Office of Policy and Planning, Immigration and Nationality Service, *Procedures for Preservation of Immigration Benefits for Victims of Terrorism (Title IV, Subtitle C (Sections 421-428), of the USA PATRIOT Act) P.L. 107-56 (October 26, 2001)*, (Jan. 31, 2002), at 9 (providing that such relatives “may request” deferred action), available at http://www.uscis.gov/files/pressrelease/Patriot_Trans.pdf.

¹⁶ USCIS, *Amended Guidance pertaining to Posthumous Immigration Benefits under Section 1703 of Public Law 108-136, National Defense Authorization Act for Fiscal Year 2004 (AFM Update AD05-34)* § 4, 2006 WL 1213109 (INS) at 6 (Apr. 3, 2006) (providing that certain relatives are “eligible” for deferred action), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/posthimmben040306.pdf.

¹⁷ USCIS, *Battered Spouse, Children & Parents*, (April 7, 2011), available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b85c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=b85c3e4d77d73210VgnVCM100000082ca60aRCRD>.

¹⁸ USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* (June 15, 2009), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf>.

¹⁹ USCIS, Press Release: *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), at 1, available at http://www.uscis.gov/files/pressrelease/F1Student_11_25_05_PR.pdf.

federal immigration authorities may grant deferred action on an individual basis: for example, where the person's continued presence is desired by law enforcement for an ongoing investigation.²¹ As a further example, persons with pending applications to adjust to lawful permanent resident status, such as survivors of domestic violence, asylum applicants and others, are also permitted to remain (be "lawfully present") in the country without formal status.²² Likewise, several categories of non-citizens may receive federal permission to work, and implicitly to stay, in the country even though they may lack a formal immigration status.²³ There are also numerous individuals working for U.S. employers in Michigan with pending applications to adjust status pursuant to 8 C.F.R. § 245.1(a), who previously held a valid nonimmigrant status but no longer hold such status; these persons are in a period of stay authorized by the Attorney General and are considered legally present in the United States.

IV. The Federal REAL ID Act Considers Individuals in Deferred Action to Be Lawfully Present for the Purpose of Receiving Drivers Licenses.

The United States Congress has also specifically indicated its intent that recipients of deferred action receive driver's licenses, providing in the REAL ID Act that "approved deferred action status" constitutes "a period of ... authorized stay in the United States" for driver's license purposes.²⁴ Regulations implementing the REAL ID Act specifically state that an individual with approved deferred action has "valid documentary evidence that the applicant is lawfully present in the United States."²⁵ The Real ID Act regulations are the clearest statement the federal government has made about how deferred action should be viewed in determining legal presence for the purpose of issuing drivers licenses. The Michigan Secretary of State appears to have failed to consider or has rejected these regulations.

²⁰ See Memorandum of William R. Yates, USCIS, *Centralization of Interim Relief for U Nonimmigrant Status Applicants*, 2003 WL 24228602 (Oct. 8, 2003), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf; 8 C.F.R. § 245.24(a)(3) (defining "U Interim Relief" as "deferred action and work authorization benefits provided by USCIS or the Immigration and Naturalization Service to applicants for U nonimmigrant status deemed prima facie eligible for U nonimmigrant status prior to publication of the U nonimmigrant status regulations"); Stuart Anderson, Office of Policy and Planning, Immigration and Naturalization Service, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (May 8, 2002), available at http://www.legalmomentum.org/assets/pdfs/deferred_action_for_alien_with_bona_fide_app_for_t-stat.pdf.

²¹ Immigration and Naturalization Service, Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X, Meissner, Comm., Memo, HQOPP 50/4 (Nov. 17, 2000).

²² See 8 U.S.C. §§ 1254a; 1255(i), (m); 8 C.F.R. § 274a.12(c)(8, 9, 19).

²³ See 8 C.F.R. §§ 274a.12(a)(10-13), (c)(8-11, 14, 18-20, 22, 24). Most notably, individuals previously approved for certain nonimmigrant work visa statuses (such as H-1B, E-1, E-2, L-1 and O-1 workers) whose status has expired but who have filed a timely application for an extension of stay with USCIS "are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of authorized period of stay." 8 C.F.R. § 274a.12(b)(1)-(20).

²⁴ REAL ID Act, 49 U.S.C. § 30301, note, Sec. 202(c)(2)(C)(i)-(ii).

²⁵ Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5273, 5274, Final Rule (January 29, 2008) (to be codified at 6 C.F.R. pt. 37).