

## Means, Steven P.

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**From:** Krieser, Steven - DOT [Steven.Krieser@dot.wi.gov]  
**Sent:** Thursday, September 06, 2012 10:54 AM  
**To:** Means, Steven P.  
**Cc:** Hitt, Andrew A - GOV; Gottlieb, Mark - DOT; Berg, Mike - DOT (EXEC); Judd, Lynne - DOT; Fernan, Patrick - DOT  
**Subject:** Request for Informal Opinion: DACA Program and Legal Presence for Driver License Eligibility  
**Attachments:** Legal Opinion Deferred Action for Childhood Arrivals 8.23.2012.pdf; Legal Opinion Deferred Action for Childhood Arrivals 8.23.2012.docx  
**Importance:** High

Dear Mr. Means:

Thank you for taking the time to talk to me by phone today about the process for requesting an **informal opinion** from Attorney General Van Hollen. I am writing to request such an opinion on an issue confronting the Department of Transportation's Division of Motor Vehicles (DMV).

As you may be aware, Wisconsin law includes provisions implementing various aspects of the federal REAL ID law, which was itself passed as a reaction to the September 11, 2001, terrorist attack. One of those provisions requires persons seeking original driver licensure or driver license renewal in Wisconsin to produce evidence of their legal presence in Wisconsin as a condition of issuance or renewal. The list of qualifying evidentiary credentials for the demonstration of legal presence for persons who are not citizens of the United States appears in ss. 343.14(2)(er)2, to wit:

If the individual is not a citizen of the United States, he or she shall provide documentary proof of his or her status as a legal permanent resident or conditional resident, a valid unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States, a pending or approved application for asylum in the United States, valid entry into the United States in refugee status, a pending or approved application for temporary protected status in the United States, **approved deferred action status**, or a pending application for adjustment of status to legal permanent resident status or conditional resident status. (emphasis added)

You may also be aware that President Obama recently entered an executive order that expands the existing federal Deferred Action program. This expansion, called the Deferred Action for Childhood Arrivals program (herein, DACA), may allow certain Wisconsin non-citizen residents who are presently undocumented to receive approved deferred action status for a period of up to two years.

Attorney Alex Mahfood, of the Department's Office of General Counsel, prepared a legal analysis (attached) for the DMV, after DMV sought guidance on whether or not it is *obligated under state law to issue driver licenses to persons presenting with deferred action credentials issued under the DACA program*. It is Mr. Mahfood's opinion that the DMV is obligated to issue driver licenses to these persons, and will continue to be obligated to do so after the remaining provisions of the Wisconsin REAL ID law become effective early next year. Please see Mr. Mahfood's opinion for a detailed analysis of this issue.

In order to ensure the lawful and orderly administration of the driver license laws of this state, the Wisconsin Department of Transportation respectfully requests an informal opinion from the Attorney General that addresses the following questions:

- \* Does Wisconsin law presently require the Division of Motor Vehicles to issue driver licenses to non-citizen residents of Wisconsin if they present with documentation of approved deferred action status under the DACA program, assuming that all other documentation is in order?
- \* Will Wisconsin law require the Division of Motor Vehicles to issue driver licenses to non-citizen residents of Wisconsin if they present with documentation of approved deferred action status under the DACA program, assuming that all other documentation is in order, once the remaining provisions of the state REAL ID law (2007 Wisconsin Act 20) become effective?
- \* Should the Attorney General advise that the DMV is obligated to issue driver licenses to DACA credential holders, does the Attorney General concur with Mr. Mahfood's assessment that the driver license expiration date be set to coincide with the expiration date of the approved deferred action credential?

Thank you, in advance, for your help on this. Please feel free to contact me if you have any questions.



**Steve Krieser**

Executive Assistant

Office of the Secretary

Wisconsin Department of Transportation

Phone: 608-266-1114

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**From:** Mahfood, Alex G - DOT

**Subject:** RE: new federal immigration law and impact on DL issuance

I've attached a legal opinion on the Deferred Action for Childhood Arrivals initiative.

# CORRESPONDENCE MEMORANDUM

Wisconsin Department of Transportation

DT1175 97

Date: August 23, 2012

To: Patrick Fernan, Deputy Administrator, Division of Motor Vehicles

From: Alex Mahfood, Assistant General Counsel, Office of General Counsel 

Subject: Deferred Action for Childhood Arrivals

## QUESTION PRESENTED

Whether documentary proof showing approved deferred action status granted under the Deferred Action for Childhood Arrivals initiative announced by the Secretary of Homeland Security on June 15, 2012 satisfies the application for license requirements provided under Wisconsin law.

## BRIEF ANSWER

Yes. The memorandum the Secretary of Homeland Security issued on June 15, 2012 announced additional criteria U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services should use in exercising prosecutorial discretion against apparently deportable aliens who came to the U.S. as children. This exercise of prosecutorial discretion may result in the granting of "deferred action" status to these aliens. This status defers removal action against certain individuals who are unlawfully present in the United States in order to devote scarce enforcement resources to the highest priority removal cases. The additional criteria the Secretary's memorandum announced merely refine existing executive policy with respect to a subset of aliens. Deferred action status does not confer a substantive right. Nevertheless, Wisconsin Stat. § 343.14(2)(er)2. currently provides that those aliens with approved deferred action status may use associated documentation to apply for a Wisconsin driver's license. Wisconsin Stat. §§ 343.(2g)(a)2.d. and 343.125(2)(a) and (b) provide a limited restriction for aliens seeking an "H" endorsement, which relates to the transportation of hazardous materials. Deportable aliens will still be permitted to apply for a Wisconsin driver's license with approved deferred action status documentation after the provisions of the federal REAL ID Act, as incorporated into 2007 Wisconsin Act 20, take effect.

## BACKGROUND

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (1996) *as amended by* Act of Oct. 11, 1996, Pub.L. No. 104-302, 110 Stat 3656. IIRIRA "amended the Immigration and Nationality Act ("INA") to impose a 4,000 personal annual limitation on the number of suspensions of deportation and adjustments of status that the Attorney General may grant in each fiscal year." *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1117 (9th Cir. 2001). IIRIRA also amended the INA to "provide that a person's accumulation of time toward the continuous physical presence requirement for suspension of deportation ends when he or she is served with a notice to appear." *Id.* The "illuminating philosophy" of IIRIRA is to "limit[] judicial review of decisions committed to the unfettered discretion of the INS." *Id.* (citing *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997)). In fact, "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (emphasis in original).

The judicial review provision of IIRIRA, codified at 8 U.S.C. § 1252(g), "applies only to actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *American-Arab*, 525 U.S. at 482. Alternatively, "[t]he Executive may elect to forego prosecution of a removal proceeding, to *defer action*, to grant asylum, or to refer the asylum claim to an [immigration judge] for formal adjudication." *Barahona-Gomez*, 236 F.3d at 1119 (emphasis added). Section 1252(g) "seems clearly designed to give some measure of protection to 'no *deferred action*' decisions and similar discretionary determinations, providing that if they are reviewable at all, they

at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process the Congress has designed." *Arab-American*, 525 U.S. at 485 (emphasis added).

"Deferred action is an exercise of . . . prosecutorial discretion to defer removal action against certain individuals who are unlawfully present in the United States in order to devote scarce enforcement resources to the highest priority removal cases, including individuals who pose a danger to national security or public safety or have been convicted of specific crimes." Privacy Impact Assessment for the Deferred Action for Childhood Arrivals (DACA), Aug. 15, 2012, [http://www.dhs.gov/sites/default/files/publications/privacy/privacy\\_pia\\_uscis\\_daca.pdf](http://www.dhs.gov/sites/default/files/publications/privacy/privacy_pia_uscis_daca.pdf) (last visited August 23, 2012). "There is no statutory basis for deferred action, but the regulations . . . [reference this form of relief and describe it as] 'an act of administrative convenience to the government which gives some cases lower priority . . .'" Recommendation from the CIS Ombudsman to the Director, USCIS, Apr. 6, 2007, [http://www.dhs.gov/xlibrary/assets/CISOmbudsman\\_RR\\_32\\_O\\_Deferred\\_Action\\_04-06-07.pdf](http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf) (last visited August 23, 2012) (quoting 8 C.F.R. § 274a.12(c)(14)).

"Deferred action status is granted as a matter of prosecutorial discretion; such authority has not been delegated to immigration judges or to the [Board of Immigration Appeals]." *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992). "Deferred action does not confer lawful status upon an individual. In addition, although an individual whose case is deferred will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect, deferred action does not excuse individuals of any previous or subsequent periods of unlawful presence." Privacy Impact Assessment for the Deferred Action for Childhood Arrivals (DACA), *supra*. Further, "an alien who has been granted deferred action" must apply for work authorization. 8 C.F.R. § 274a.12(c)(14). "If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document." *Id.* § 274a.12(c)(intro.).

"On June 15, 2012, Secretary of Homeland Security Janet Napolitano issued a Department of Homeland Security memorandum entitled, 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.' The Secretary addressed the memorandum to the Acting Commissioner of U.S. Customs and Border Protection and the Directors of U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement." *Id.* "The Secretary's memorandum sets forth how prosecutorial discretion may be exercised in cases involving certain people who arrived in the United States as children. The Secretary emphasized that generally, this population lacked the intent to violate the law, and that her memorandum would ensure enforcement resources would not be expended on these low priority cases." *Id.*

The Secretary's memorandum states: "[t]he following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to [the memorandum]: (1) came to the United States under the age of sixteen; (2) has continuously resided in the United States for a least five years preceding the date of [the] memorandum and is present in the United States on the date of [the] memorandum; (3) is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; (5) and is not above the age of thirty." Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, Jun. 15, 2012, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (last visited August, 23, 2012).

Following the issuance of the Secretary's memorandum, California is now considering passing legislation that would permit "young people who receive federal deferrals [to] be eligible for California driver's licenses." Jim Sanders, *California poised to grant driver's licenses to young illegal immigrants*, The Sacramento Bee (Aug. 22, 2012) <http://www.sacbee.com/2012/08/22/4746634/california-poised-to-grant-drivers.html>. However "it remains uncertain whether clarifying legislation will be necessary" because "[California] state regulations allow only certain types of federal immigration documents to support the issuance of a driver's license." *Id.* The media attention surrounding the possible amendments to California's regulations has prompted WisDOT's Division of Motor Vehicles to seek an opinion from the Office of General Counsel assessing whether any documentation issued pursuant to the

Secretary's memorandum satisfies current Wisconsin law enumerating those acceptable forms which must accompany an application for a driver's license.

## DISCUSSION

Wisconsin Stat. § 343.14, titled "Application for license.," establishes the procedure with which individuals seeking to apply for a driver's license must comply. In particular, Wis. Stat. § 343.14(1) states that "[e]very application to [WisDOT] for a license or identification card or for renewal thereof shall be made upon the appropriate form furnished by [WisDOT] and shall be accompanied by all required fees." *Id.* Wisconsin Stat. § 343.14(2) states "[t]he forms for application shall be determined by [WisDOT] and shall include" various pieces of information, such as date of birth and eye color. Of import, Wis. Stat. § 343.14(2)(er)1. requires the application contain "[d]ocumentary proof that the individual is a citizen of the United States or documentary proof that the individual is legally present in the United States." However, Wis. Stat. § 343.14(2)(er)2. provides:

If the individual is not a citizen of the United States, he or she shall provide documentary proof of his or her status as a legal permanent resident or conditional resident, a valid unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States, a pending or approved application for asylum in the United States, valid entry into the United States in refugee status, a pending or approved application for temporary protected status in the United States, *approved deferred action status*, or a pending application for adjustment of status to legal permanent resident status or conditional resident status.

*Id.* (emphasis added). Additionally, the pertinent provisions of Wis. Stat. § 85.515(2) state "[i]f the [Secretary of WisDOT] determines that [WisDOT] will not be ready to complete full implementation of the provisions of the federal REAL ID Act, as incorporated into 2007 Wisconsin Act 20, by May 11, 2008, the [Secretary of WisDOT] shall do all of the following:

(b) As soon as [WisDOT] is ready to complete full implementation of the provisions of the federal REAL ID Act, as incorporated into 2007 Wisconsin Act 20, send a notice to the legislative reference bureau for publication in the Wisconsin Administrative Register that states the date on which the provisions of 2007 Wisconsin Act 20 related to implementation of the federal REAL ID Act will become effective.

*Id.* When fully implemented, the provisions of the federal REAL ID Act, as incorporated into 2007 Wisconsin Act 20, will consolidate Wis. Stat. § 343.14(2)(er)1. – 2., renumber them Wis. Stat. § 343.14(2)(es) (intro.), 2., 3., 5., 6., and 7., and further amend them to read as follows:

(es) Subject to sub. (2g) (a) 2. d. and s. 343.125 (2) (a) and (b), valid documentary proof that the individual is a citizen or national of the United States or an alien lawfully admitted for permanent or temporary residence in the United States or has any of the following:

1. Conditional permanent resident status in the United States.
2. A valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States.
3. An approved application for asylum in the United States or has entered into the United States in refugee status.
4. A pending application for asylum in the United States.
5. A pending or approved application for temporary protected status in the United States.
6. *Approved deferred action status*.
7. A pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

*Id.* (emphasis added). Currently effective Wisconsin Stat. § 343.14(2g)(a)2.d. further requires that those applicants seeking an "H" endorsement, "which authorizes the driver to operate vehicles transporting hazardous materials requiring placarding or any quantity of a material listed as a select agent or toxin under 42 C.F.R. § 73" be "a U.S. citizen who has not renounced that citizenship, or [be] lawfully admitted for permanent residence to the United States. If the applicant is lawfully admitted for permanent residence to the United States, the applicant shall provide the applicant's alien registration number issued by the federal department of homeland security." *Id.*; Wis. Stat. § 343.17(3)(d)1m. Wisconsin Stat. § 343.125 (2)(a) and (b) enumerate those forms of documentation WisDOT will accept in processing an "H" endorsement application. *Id.* This list, however, does not include documentation relating to approved deferred action status. Therefore, besides for those aliens seeking to further obtain an "H" endorsement, documentation relating to approved deferred action status satisfies the driver's license application requirements under Wis. Stat. § 343.14(2)(er)2. *Id.*; see Wis. Stat. §§ 343.14(2g)(a)2.d.

## CONCLUSION

The Secretary's memorandum establishes additional criteria federal government officials and agencies should use in exercising their prosecutorial discretion against apparently deportable aliens who came to the U.S. as children. These criteria merely refine existing executive policy with respect to a subset of apparently deportable aliens. Deferred action status confers no substantive rights. Rather, it defers removal actions against those aliens who generally lack the intent to violate the law. The Secretary's memorandum refines the evaluation of and presumably expands this category of individuals. Wisconsin Stat. § 343.14(2)(er)2. has authorized those aliens with documentation associated with approved deferred action status to apply for a driver's license and will permit those granted deferred action status under the Secretary's memorandum to do so as well. Documentation associated with deferred action status will not, however, satisfy the requirements for a driver seeking to obtain an "H" endorsement. Aliens with documentation of their approved deferred action status will be able to apply for a driver's license when the provisions of the federal REAL ID Act, as incorporated into 2007 Wisconsin Act 20, take effect as well.