

## In-State Tuition Rates and Financial Aid for DACA Grantees Talking Points

### Background

On June 15, 2012, Secretary of the Department of Homeland Security (“DHS”) Janet Napolitano issued a memorandum announcing the DHS’s new policy to grant deferred action status to certain classes of childhood arrival illegal aliens.<sup>1</sup> On the same day, Director John Morton of ICE issued a memorandum directing all ICE employees to apply the Secretary’s policy.<sup>2</sup> The Morton Memo also detailed the criteria necessary for an illegal alien to qualify for the Deferred Action for Childhood Arrivals (“DACA”) program under this policy, which include:

- The illegal alien came to the United States under the age of sixteen;
- The illegal alien is not above the age of thirty;
- The illegal alien has continuously resided in the United States for at least five years preceding the date of the June 15, 2012 Morton memo and is present in the United States on the date of the June 15, 2012 Morton memo;
- The illegal alien 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;
- The illegal alien has not been convicted of a felony, a significant misdemeanor offense, or multiple misdemeanor offenses; and
- The illegal alien does not otherwise pose a threat to national security or public safety.<sup>3</sup>

Deferred action on this basis is granted for two years and may be renewed indefinitely or terminated by DHS at any time at the agency’s discretion.<sup>4</sup>

“Deferred action” is never defined in statute or regulation, but is defined by DHS as a discretionary determination “to defer removal action of an individual as an act of prosecutorial discretion.”<sup>5</sup> “An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an

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<sup>1</sup> Memorandum from Janet Napolitano, Secretary of DHS, to David Aguilar, Acting Commissioner, U.S. Customs and Border Protection (“CBP”), Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services (“USCIS”), and John Morton, Director, U.S. Immigration and Customs Enforcement (“ICE”), Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (the “Napolitano Memo”), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>2</sup> Memorandum from John Morton, Director, ICE, to all ICE Employees, Re: Secretary Napolitano’s Memorandum Concerning the Exercise of Prosecutorial Discretion for Certain Removable Aliens Who Entered the United States as a Child (June 15, 2012) (the “Morton Memo”), available at <https://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf>.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> Napolitano Memo, *supra* n. 1, at 2; see also DHS, *Deferred Action for Childhood Arrivals, Frequently Asked Questions*, Question 1, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Mar. 28, 2012).

<sup>5</sup> DHS, *Deferred Action for Childhood Arrivals, Frequently Asked Questions*, Question 1, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Mar. 28, 2012).

individual, nor does it excuse any previous or subsequent periods of unlawful presence.”<sup>6</sup>

Efforts are under way in several states to grant in-state tuition rates or financial aid to DACA grantees at public colleges and universities. This is bad public policy for the following reasons:

### **Granting In-State Tuition Rates or Financial Aid to DACA Grantees Hurts Taxpayers.**

As a result of the weakened economy, many colleges and universities are experiencing budget crises. “Class sizes have increased, courses have been cut and tuition has been raised. Fewer colleges are offering summer classes. Administrators rely increasingly on higher tuition from out-of-staters.”<sup>7</sup> The national average tuition rate per year for in-state students at public four-year colleges and universities is \$8,655 versus \$20,823 for out-of-state students.<sup>8</sup> Granting in-state tuition or financial aid to DACA grantees, who do not possess lawful immigration status, would only serve to further damage and strain delicate budgets and impose additional burdens on taxpayers, who heavily subsidize post-secondary public education, to make up the loss.<sup>9</sup>

It is not fair to constituents to continue to increase taxes, cut their benefits and mortgage against their children’s futures while expanding benefits for illegal aliens, including DACA grantees. States must not invite illegal immigration to their state and place the fiscal burden of providing education, health care and other services to illegal aliens on the backs of taxpayers. Legislators

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<sup>6</sup> USCIS, *Humanitarian, Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, Question 1, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD> (last visited Mar. 28, 2013). Indeed, Secretary Napolitano stated in her June 15, 2012 memorandum that DACA “confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.” Napolitano Memo, *supra* n. 1, at 2. Director Morton reiterated this point in his June 15, 2012 memorandum: “[T]his memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.” Morton Memo, *supra* n. 2, at 2.

<sup>7</sup> Jennifer Medina, *California Cuts Threaten the Status of Universities*, THE NEW YORK TIMES, June 1, 2012, available at [http://www.nytimes.com/2012/06/02/us/california-cuts-threaten-the-status-of-universities.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/02/us/california-cuts-threaten-the-status-of-universities.html?pagewanted=all&_r=0). “I’d be lying if I said what we offer students hasn’t been changed and that there hasn’t been a degradation of the learning environment,” said Timothy White, the chancellor of the University of California, Riverside, which has had record growth in recent years. Last year, plans to open a medical school on the campus were shelved after state budget cuts. While there are more students than ever, the number of academic advisers has dropped to 300, from 500 a few years ago, for more than 18,000 undergraduates. Courses that used to require four writing assignments now demand half that because professors have fewer assistants to help them with grading papers, something other campuses have implemented as well.” *Id.*

<sup>8</sup> COLLEGE BOARD ADVOCACY & POLICY CENTER, *Trends in College Pricing*, at 3 (2012), available at [http://advocacy.collegeboard.org/sites/default/files/college-pricing-2012-full-report\\_0.pdf](http://advocacy.collegeboard.org/sites/default/files/college-pricing-2012-full-report_0.pdf).

<sup>9</sup> Before California’s current in-state tuition law was passed, a previous bill was vetoed by the state’s governor on the basis that it would impose an unmanageable financial burden on the state’s higher education system. “Based on Fall 1998 enrollment figures at the [U. of Cal. and Cal. State U.] alone, this legislation could result in a revenue loss of over \$63.7 million to the state,” according to the governor in 2000. See Gray Davis, A.B. 1197 Assembly Bill – Veto (Sept. 29, 2000), [http://info.sen.ca.gov/pub/99-00/bill/asm/ab\\_1151-1200/ab\\_1197\\_vt\\_20000929.html](http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_vt_20000929.html).

should not spend scarce resources by granting in-state tuition rates or financial aid to DACA grantees who are subject to immediate deportation by the very terms of DACA.<sup>10</sup>

### **Granting In-State Tuition Rates or Financial Aid to DACA Grantees Creates Competition for Scarce Resources.**

State universities across the country are increasingly limiting enrollment; increasing the intake of illegal aliens into these schools will necessarily deny opportunities to U.S. citizens and legal residents. With the cost of a college education skyrocketing, slots and financial aid at state-subsidized universities are becoming the only hope of a higher education for many American families. With a finite number of seats and amount of aid available, when public universities admit an illegal alien and provide subsidized tuition and financial aid, some other student who is also deserving is denied an opportunity. Admitting and subsidizing illegal aliens, in effect, punishes citizens and legal residents who have done nothing wrong themselves.

### **Granting In-State Tuition Rates to Illegal Aliens Is Illegal.**

Not only is giving in-state tuition rates to illegal aliens expensive, it's illegal. When Virginia's Attorney General studied the issue of in-state tuition rates for illegal alien students, he came to the conclusion that the expenditure of state resources for that purpose is illegal. This conclusion is based in part on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), which specified: "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less amount, duration, and scope) without regard to whether the citizen or national is such a resident."<sup>11</sup>

The existence of the Section 505 provision clearly puts states that provide illegal aliens in-state tuition rates at risk. It opens them up to lawsuits challenging the conferral of in-state tuition rates on illegal aliens if it is not similarly made available to U.S. citizens and legal residents from elsewhere in the country.

### **Granting In-State Tuition Rates or Financial Aid to DACA Grantees Promotes Illegal Immigration.**

State policies that offer the benefit of in-state tuition rates or financial aid to DACA grantees serve as a perverse incentive for illegal alien families to move to those states. Illegal immigration is a burden to every state as it results in higher costs of living, reduced job availability,<sup>12</sup> lower

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<sup>10</sup> What is more, if the current or a future Administration does not renew DACA, or Congress or the courts act to invalidate it (DACA is a nebulous immigration category neither authorized by Congress nor defined in federal statutes or regulations and is currently being challenged in federal court), DACA grantees will be subject to immediate deportation.

<sup>11</sup> Section 505 of IIRAIRA (PL 104-208; 110 Stat 3009-672; 8 U.S.C. 1623). Referring to this provision, House conference Report 104-828 reads "this section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education."

<sup>12</sup> There is no such thing as an "illegal alien job." Illegal aliens and natives compete for the same jobs, and

wages,<sup>13</sup> higher crime rates,<sup>14</sup> fiscal hardship on hospitals and substandard quality of care for residents,<sup>15</sup> burdens on public services, increasing their costs and diminishing their availability,<sup>16</sup> less security and safety in the community,<sup>17</sup> and a reduction on the overall quality of life.

### **Granting In-State Tuition Rates or Financial Aid to DACA Grantees Rewards Illegal Behavior.**

Granting in-state tuition rates or financial aid to DACA grantees, who are illegal aliens, undermines the rule of law and rewards illegal behavior. As a result, prospective immigrants have little incentive to pursue the legal paths to immigration when they can side step the process

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native workers are increasingly disadvantaged because employers have access to a steady supply of low-wage foreign workers. Less than 1 percent of the Census Bureau's 465 civilian job categories have a majority immigrant workforce. See Steven A. Camarota, *Immigration's Impact on U.S. Workers*, Testimony Prepared for the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, November 19, 2009, Center for Immigration Studies, November 2009, available at <http://www.cis.org/node/1582>. Illegal immigration has a disproportional impact on poor Americans. Because a large proportion of illegal aliens are low-skilled workers, they are more likely to compete with and undercut the wages of low-skill native workers. See Jeffrey S Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Research Center, April 2009, at 11-12, available at <http://pewhispanic.org/files/reports/107.pdf>.

<sup>13</sup> In Georgia, where the illegal alien share of the labor force went from about 4 percent to 7 percent from 2000 to 2007, a study by the Federal Reserve found that the illegal labor caused a 2.5 percent wage drop overall and a 11 percent drop in construction wages over that time period. See Julie L. Hotchkiss and Myriam Quispe-Agnoli, *The Labor Market Experience and Impact of Undocumented Workers*, Federal Reserve Bank of Atlanta, February 2008, at 36, 39, available at <http://www.frbatlanta.org/filelegacydocs/wp0807c.pdf>. Harvard University's George Borjas concluded that immigration reduced wages for the poorest 10 percent of Americans by about 7.4 percent between 1980 and 2000 with even larger effects for workers with less than 20 years of experience. George J. Borjas, *Increasing the Supply of Labor through Immigration: Measuring the Impact on Native Workers, Background*, Center for Immigration Studies, May 2004, at 1, available at <http://www.cis.org/articles/2004/back504.pdf>.

<sup>14</sup> The Federal Bureau of Prisons reported that, although illegal aliens only make up an estimated 3.7 percent of the United States population, non-citizens account for 26 percent of the federal jail population. See United States Department of Justice, Federal Bureau of Prisons, *State of the Bureau* at 3 (2010), available at <http://www.bop.gov/news/PDFs/sob10.pdf>. DHS estimates that non-citizens nationally comprise 20 percent of inmates in prisons and jails. See Center for Immigration Studies, *Immigration and Crime: Assessing a Conflicted Issue* at 1 (November 2009), available at <http://www.cis.org/articles/2009/crime.pdf>. Even so, every crime illegal aliens commit in the United States was potentially preventable if the illegal alien had been identified, apprehended, and removed before they victimized anyone.

<sup>15</sup> The national annual state and local costs related to health care for illegal aliens is \$5.8 billion. See FAIR, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* (2010), available at <http://www.fairus.org/publications/the-fiscal-burden-of-illegal-immigration-on-u-s-taxpayers>.

<sup>16</sup> Illegal immigration costs United States taxpayers about \$113 billion a year at the federal, state and local level. See FAIR, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* (2010), available at <http://www.fairus.org/publications/the-fiscal-burden-of-illegal-immigration-on-u-s-taxpayers>. The bulk of the costs — some \$84 billion — are absorbed by state and local governments. *Id.*

<sup>17</sup> “More than half of the 48 Islamic radicals convicted or tied to recent terrorist plots in the United States over the past decade either were themselves illegal aliens or relied on illegals to get fake IDs. Immigration violators participated in the first attack on the World Trade Center, the Los Angeles Millennium bombing plot, and the New York subway bombing conspiracy. Three of the 9/11 hijackers were here illegally; two had previous immigration violations. Three 9/11 hijackers—Mohammed Atta, Hani Hanjour, and Ziad Jarrah—came into contact with state and local police before the attacks for speeding. Atta and Hanjour were visa violators.” Testimony of Michelle Malkin before the Senate Judiciary Subcommittee on Immigration, Border Security, and Citizenship (May 6, 2004), available at <http://www.vdare.com/articles/the-other-wall-michelle-malkins-senate-testimony>.

with the hopes of one day gaining the same benefits.

Granting in-state tuition rates or financial aid to illegal aliens also insults those legal immigrants who patiently waited for months and years for the State Department and Department of Homeland Security to approve their application and paid thousands of dollars in travel, legal and medical fees to abide by the entry, employment, health and processing laws and regulations.<sup>18</sup>

Some argue that DACA grantees are innocent young people who were brought to this country as children by their parents. Yes, many of the beneficiaries have been dealt a bad hand (by their parents). As difficult (even unfair) as it may be, upon reaching adulthood they have the responsibility to obey the law. When, for example, Jose Antonio Vargas proclaimed on the pages of *The New York Times Magazine*, that he knowingly engaged in illegal activities in order to remain and work in the United States illegally, he became culpable in his own right. While he, and others like him, may be more sympathetic than the people who committed the predicate offense, their situation does not excuse their own illegal acts. Granting in-state tuition rates or financial aid to DACA grantees only sends the message that if you violate United States immigration law, American society is responsible for fixing the mess you created for your kids.

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<sup>18</sup> See Michelle Malkin, *Amnesty Gang Throws Law-Abiders Under the Bus*, TOWNHALL, January 30, 2013, available at <http://townhall.com/columnists/michellemalkin/2013/01/30/amnesty-gang-throws-lawabiders-under-the-bus-n1500802/page/full/> (“President Obama and the bipartisan Gang of Eight in Washington who want to create a ‘pathway to citizenship’ for millions of illegal aliens have sent a message loud and clear to those who follow the rules: You’re chumps! Have you patiently waited for months and years for the State Department and Department of Homeland Security to slog through your application? You’re chumps! Have you paid thousands of dollars in travel, legal and medical fees to abide by the thicket of entry, employment, health and processing regulations? You’re chumps! Have you studied for your naturalization test, taken the oath of allegiance to heart, embraced our time-tested principle of the rule of law, and demonstrated that you will be a financially independent, productive citizen? You’re chumps!”).