



Implementing Deferred Action for Workers in Labor Disputes: Nuts & Bolts on How to File a Request

May 4th, 2023



1

Today's Presenters



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2

Today's Agenda

- *Welcome & Introductions*
- *Background & Context Setting: Winning This New Policy (Jessie Hahn)*
- *New Policy & Labor Organizing: Farmworkers in South Georgia (Alma Young)*
- *Nuts & Bolts of Applying for Deferred Action (Lynn Damiano Pearson & Lisa Palumbo)*
- *Updates & Q&A (Jessie Hahn)*

3



Background & Context: Winning this New Policy

Presented by Jessie Hahn

4

Lawsuit Alleges Employer Retaliated Against Undocumented Worker By Triggering ICE Arrest



For undocumented workers, demanding better work conditions could mean deportation



Undocumented Restaurant Worker Is Arrested by ICE During Deposition Against His Employer



Attorney tried deporting dairy worker during lawsuit; worker wins settlement



A worker injured when the New Orleans Hard Rock Hotel collapsed was detained by ICE two days later

By Antonio Martinez and Christina Martinez, CNN
Updated 12:44 PM EDT on October 20, 2019

Undocumented Workers Face Retaliation for Denouncing Labor Violations

- Workers are often afraid to report violations or cooperate in investigations due to fear of removal
- Labor and employment agencies rely on worker testimony and evidence in investigations
- Dynamic perpetuates labor exploitation and creates barriers to worker organizing & building power

5

Where did this new policy come from?

YEARS OF ORGANIZING & ADVOCACY!

- 2011 Morton "Victims Memo"**
 - Encouraging prosecutorial discretion for victims of & witnesses to crimes; plaintiffs in civil rights litigation; individuals involved in union organizing and labor disputes
- 2011 DHS-DOL Worksite Enforcement Deconfliction MOU**
 - "ICE agrees to consider DOL requests that ICE grant a temporary law enforcement parole or deferred action to any witness needed for a DOL investigation of a labor dispute..." ICE also refrains from enforcement at worksites with labor disputes.
 - EEOC and NLRB added in 2016
- 2021: Mayorkas Interior Enforcement Memo**
 - "A noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion."



6

Mayorkas Worksite Enforcement Memo, October 2021

- Acknowledged the "legitimate enforcement interests" of federal labor and employment agencies who had started requesting prosecutorial discretion in ongoing workplace standards investigations

Fundamental Principles

Our Department has a critical role in ensuring that our Nation's workplaces comply with our laws. To best achieve this goal, we must adopt immigration enforcement policies to facilitate the important work of the Department of Labor and other government agencies to enforce wage protections, workplace safety, labor rights, and other laws and standards.

Issue Date: 10/12/2021

Policy Statement 065-06

MEMORANDUM FOR: **Tae D. Johnson**
Acting Director
U.S. Immigration and Customs Enforcement

TO: **Mr. M. Jaddou**
Director
U.S. Citizenship and Immigration Services

FROM: **Tony A. Miller**
Acting Commissioner
U.S. Customs and Border Protection

SUBJECT: **Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual**

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7

DHS Announces Streamlined Process for Requesting Deferred Action, January 2023

- New process for immigrant workers to obtain deferred action and work authorization if they are involved in a labor dispute.
- To qualify, workers must receive a letter of support (sometimes called a "Statement of Interest" or "SOI") from a labor agency – including state and city labor agencies.
- The DHS website provides an FAQ section setting out specific instructions to labor agencies and to individuals for requesting deferred action under new process.
- Centralized processing in Montclair, CA, and concurrent filing of Deferred Action and Work Authorization



8

Benefits of Labor-Based Deferred Action

Work authorization for two years

Social Security Number

Access to apply for state ID or driver's license

Tolling of unlawful presence for two years

9

9



New Policy & Labor Organizing: Farmworkers in South Georgia

Presented by Alma Young

10



The story of a South Georgia Farm

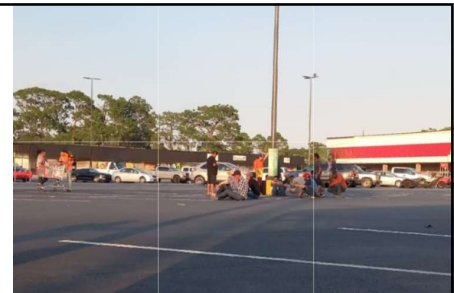
- Summer 2022
- Workers experienced wage theft, immigration threats, and labor abuse. Documents were confiscated and weapons were involved
- 300-500 H2A visa holders potentially affected
- Dangerous work conditions due to a 107-degree heat index.
- Labor contractors and farms investigated by DOL, OSHA, and DHS



11

THE IMPACT: Organizing Opportunity through Deferred Action

- Educate the workers about their rights
 - Many do not know!
- Deferred Action empowered workers to speak out
- Workers organize once they feel supported



12

THE LONG-TERM IMPACT:

- The legal aspect of deferred action is one part of the story
- Builds trust:
 - Worker is encouraging others to speak out
- Leadership development:
 - Worker traveled to Washington DC to tell his story to former Secretary of Labor, Marty Walsh



13

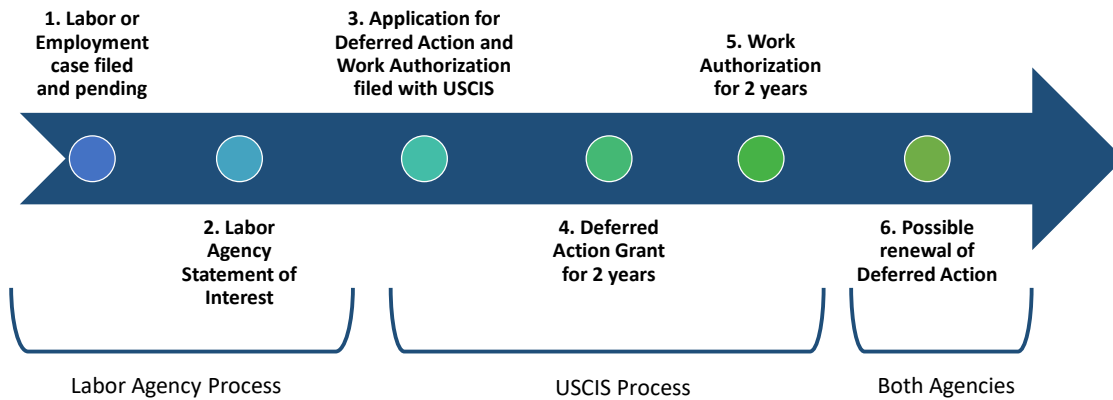
Labor-Based Deferred Action: Nuts & Bolts

1. The Statement of Interest

Presented by Lynn Damiano Pearson

14

The New Application Process: The Basics



15

Labor Agencies Involved in this Process



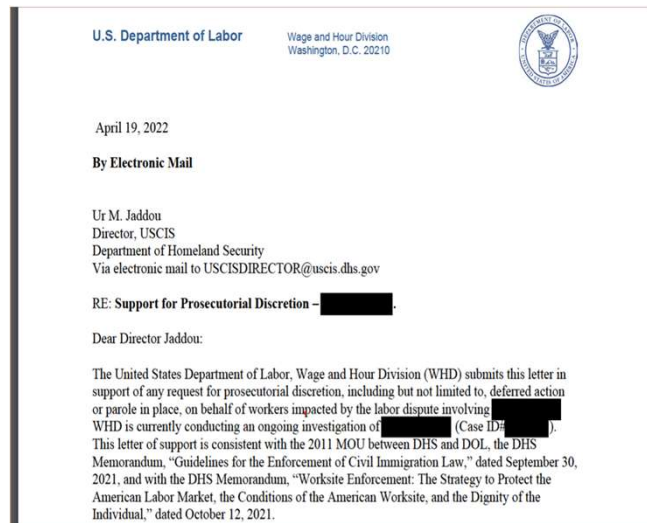
**ALL state & local
labor agencies!**

16

The Labor Agency Statement of Interest

• The Statement of Interest letter from the labor or employment agency is a required component of the application. Will include:

- The enforcement or jurisdictional interest of the labor agency and how it relates to the mission of the labor agency;
- The workers covered by the Statement of Interest (but avoiding names and PII), and
- Why DHS's consideration of prosecutorial discretion with respect to these specific workers supports the labor agency's interest.



17

The Statement of Interest (SOI)

****Required Document for the Deferred Action Application****

- **What is required to request an SOI?**
 - Labor case pending with federal, state, or local agency
 - With limited exceptions, Statements of Interest will not be granted absent an active labor investigation of an employer
- **Who is covered by an SOI?**
 - Typically, SOIs are issued for an entire worksite for a specified period of time
 - Scope of SOI will depend on facts underlying the labor dispute
 - The idea is that any/all workers could be potential victims or witnesses of labor abuse
- **Who can Request a Statement of Interest?**
 - Workers who are potential witnesses/victims in pending investigation
 - Doesn't have to be worker who filed complaint
 - Worker's representative (union, worker center, advocacy org, attorney)

NOTE FOR IMMIGRATION PRACTITIONERS!

- Most of these cases will be referred for deferred action representation AFTER an SOI has been issued.
- However, immigration advocates may identify signs of labor abuse and refer to worker rights orgs.

18

Key Elements of an SOI Request

What should be included in the request?

- The name and address of the company in labor dispute
- Labor case info (case number and/or date of filing)
- Summarize facts giving rise to the labor case
- Government interest in enforcing the labor laws at issue
- Any threats of or actual retaliation and/or potential “chilling effect” of risk of immigration enforcement
- Contact information of the requester

• **NOTE: The request should NOT include names and/or PII of individual workers involved in the complaint**

19

Labor-Based Deferred Action: Nuts & Bolts

2. Screening & Advising Workers

Presented by Lynn Damiano Pearson

20

Screening Workers for Prior Immigration History

- **Case in Removal Proceedings or with Final Orders**
 - The new guidance states USCIS will “forward” their applications to ICE for adjudication.
 - FOIAs: Consider filing a USCIS/EOIR FOIA for prior immigration records, or FBI background check to adequately assess risk.
 - Fastest turnarounds for USCIS & FBI
- **Other Immigration History to Screen for:**
 - Turn backs, expedited removals (CBP FOIA), & executed orders
 - Denials of affirmative applications (especially involving fraud/misrep/crim history)



21

21

Screening Workers for Criminal History

- Workers with "egregious" public safety or national security convictions may be referred to ICE under 2011 NTA Memo PM-602-0050.
- **All other criminal history will go to USCIS's discretion**
 - Gather records from jurisdictions of conviction and FBI Background checks
 - Plan to submit dispositions but not police reports or other unhelpful records
- **Although no specific bars to applying, some convictions may require more strategic advocacy:**
 - Multiple convictions beyond traffic violations
 - Recent convictions
 - Convictions involving DV, violence, drugs, etc.

22

22

Advising Workers with Significant Negative Equities

- Greater likelihood of a denial
 - Loss of \$410 filing fee
 - Sharing address information with ICE
 - Potential prioritization in future enforcement
 - For workers whose cases will be forwarded to ICE, no clear guidance that enforcement action cannot be taken
- Additional Evidence
 - Balance negative equities with positive, mitigating evidence
- Potential Longer Processing Times & RFEs

23

23

Screening for other labor-based Immigration Remedies

OPLA PD

For Applicants in Removal Proceedings

Parole in Place

For Workers with USC Family Members

U Visa

For Worker-Victims of Qualifying Crimes

T Visa

For Worker-Victims of Labor Trafficking

24

24

Screening for Other Forms of Immigration Relief

- **Parole in Place:** Allows certain noncitizens who were not lawfully admitted to be "paroled" into United States without departing.
 - Some individuals may be eligible to adjust status through a USC family member and/or the Cuban Adjustment Act
 - Referenced as a type of prosecutorial discretion in the guidance and some labor agency letters but not part of the new streamlined DHS process
- **OPLA PD:** Workers in removal proceedings/prior orders may wish to separately request prosecutorial discretion from OPLA.
 - This has been successful in cases where a worker is covered by an SOI even before received deferred action
- **U Nonimmigrant Visa:** Provides a path to permanent status for victims (and derivatives) of certain qualifying crimes including some labor-related crimes.
 - Examples include witness tampering, obstruction, fraud in foreign labor contracting, trafficking
 - DOL (WHD & OSHA), EEOC, NLRB & some state labor agencies can provide required law enforcement certification
- **T Nonimmigrant Visa:** provide the same benefits as U to qualifying victims of labor trafficking, plus additional social services support
 - Same benefits but shorter processing time and no certification required
 - Some individuals involved in labor disputes may qualify for a T visa if their labor was given through force, fraud, or coercion

25

25

Financial Screening for EAD and/or Fee Waiver

Screening for	Form	Showing	Information from Client	Supporting Docs Required?
EAD	I-765 WS	Economic necessity to work	Annual Income and expenses	No—only brief statement of financial necessity
Fee waiver	I-912	1) Worker receives tested benefit 2) Worker is at/below 150% poverty level 3) Financial hardship	1) Proof of eligibility for state or federal public benefits 2) Tax returns, paystubs, bank statements other financials 3) Other costs like medical bills, child support, etc.	Yes—must show documentary evidence of one of the 3 grounds.

26

26

Labor-Based Deferred Action: Nuts & Bolts

3. Filing the Application

Presented by Lisa Palumbo

27

Deferred Action Application Documents

REQUIRED FORMS

- **G-325A**
 - 1-pager with biographic information
- **I-765**
 - Use category (c)(14) for deferred action
- **I-765WS (Worksheet)**
 - Requires annual income and expenses, but no supporting docs
 - Brief statement of financial need to work
- **I-912 Fee Waiver (if client cannot pay \$410 filing fee)**
 - Unless client receives a means-tested benefit, they will need to submit substantial support financial info and even then may risk denial and return of application.
- **G-28**
 - If worker is represented by counsel

**Applicants must file
Deferred Action and
Work Authorization
jointly with \$410 filing
fee or a fee waiver.**

28

Application Documents Cont'd

- **OTHER REQUIREMENTS**
- **Statement of Interest from the Labor Agency**
 - Most important evidence—app will be rejected without it.
- **Cover letter**
 - Not explicitly in guidance but should be included to argue why there is a governmental interest in granting deferred action, along with any other positive equities.
- **Proof of identity and nationality**
 - Passport or birth certificate (with translation)
- **Entry documents to U.S., if applicable**
- **Brief signed statement of applicant**
 - See next slide
- **Proof of employment at worksite in the SOI**
 - Pay stubs, W-2, timecards, contracts
 - Name on documents related to labor case
 - Declaration of client may be sufficient if no other records.



29

“Signed Statement” Requirement

- **Option 1: Simple Attestation**
 - *“I, _____ request deferred action as a witness to a labor investigation with support from the [Agency] and this application is submitted on my behalf by [Attorney] . I authorize [Attorney] to represent me in this matter.”*
- **Option 2: Short Statement or Declaration**
 - Worker can affirm request for deferred action and employment at worksite covered by the SOI
 - Worker can state any actual or feared retaliation by employer
 - Statement can still be brief unless client needs to explain negative history
- **Option 3: Worker Signs Cover Letter**
 - DHS allows worker to sign the cover letter alongside the advocate
 - Should include a certificate of translation/interpretation as needed

30

Optional Application Documents

- **Favorable discretionary evidence (minimal)**
 - USC family members' birth certificates
 - Support letters showing family/community ties and good character
 - Investment in community (volunteering; educational pursuits; church involvement)
 - Homeowner, Taxpayer, etc.
 - These are generally only necessary to balance negative equities
 - Evidence of participation in the labor case (if available)
 - But no need to include extensive records regarding the labor case
- **IF Criminal History**
 - DO include certified dispositions of arrests/convictions
 - Do NOT include police reports or other related unhelpful docs
 - DO include statement or declaration from client explaining mitigating factors
 - DO try to balance negative with positive, good character evidence

31

Filing and Processing

Submit all materials to:

**USCIS
Attn: Deferred Action
10 Application Way
Montclair, CA 91763-1350**

32

The Decision

- 1-3 months after filing
- One-Page Decision granting Deferred Action (generally, for two years)
- Followed by adjudication of work authorization application
- Issuance of EAD and SSN

33

Practice Tips

- **Aiming for presumptive relief**
 - Simple cover letters and only essential supporting favorable evidence
 - ***Unless*** there is a need to mitigate client's negative history.
- **Working with multiple clients involved in the same case**
- **After Approval**
 - Advising clients on updating documents with employers once work authorization granted & client receives an SSN



**Avoiding
Misinformation!**

Less is More!

34

Renewals ("Subsequent Requests")

"If approved and after two years..."

"The recipient may also be eligible to make subsequent requests for deferred action, which will be adjudicated on a case-by-case basis when a labor agency provides a basis for such a request as it relates to the labor agency's ongoing investigative or enforcement interests."

- No cases have reached this point yet, but it appears renewals will involve action by both the labor agency *and* USCIS.

35

Working with Workers Centers, Organizers & Labor/Employment Advocates

- Labor/Employment Attorney, Worker Center advocate, or Union, may be obtaining the Statement of Interest first, and then come to you seeking immigration assistance
- Communicate with attorney/advocate about pathway and timeline for case
 - Will dictate time needed to file application
- Your client may be providing statements in Labor/Employment case, or even responding to subpoenas

36

Latest Implementation Updates

Presented by Jessie Hahn

37

First Four Months of Implementation – Deferred Action for Workers

- Hundreds of applications have been filed, most volume coming from handful of large cases
- Dozens of cases in development in 25+ states, some of which include labor agency letters that cover thousands of workers (e.g., PSSI letter), most are smaller worksites
- Large need for immigration practitioners – many people who are currently covered by letters but unable to file for DA because can't access immigration representation or assistance
- Development of *pro se* clinic models & robust local worker rights/immigration partnerships
- Processing times at USCIS are as fast as 6 weeks, may take 2-4 months for more complicated cases
- DA packets approved with bare bones approach – 40-50 pages total
- Advocacy with state and local labor agencies – beginning to issue letters of support
- Employers are challenging DA in underlying labor proceedings, hiring union-busting firms, feeding workers false information that this effort is fraudulent, etc.

38



QUESTIONS?

For technical assistance:
daforworkers@nilc.org