

October 25, 2012

## OFFICIAL OPINION 2012-4

Ms. Anita Samuel  
General Counsel  
Office of the Governor  
200 W. Washington St.  
Indianapolis, IN 46204

### RE: Issuance of Driver's Licenses to Individuals in Deferred Action Status

Dear Counselor Samuel:

You requested an advisory opinion from the Attorney General's Office concerning the legality of the Bureau of Motor Vehicles ("BMV") issuing a driver's license<sup>1</sup> to an individual granted deferred action status pursuant to a recent policy of the United States Department of Homeland Security ("DHS"). Specifically, you posed this question because deferred action does not confer lawful status upon an individual for immigration purposes,<sup>2</sup> and you asked this office to analyze (1) whether the BMV **may** issue a driver's license to an individual in deferred action status; and the related question of (2) whether it **must** do so assuming that the individual meets other applicable requirements. We reviewed<sup>3</sup> these matters and, for the reasons set forth below, concluded that the BMV may and, in fact, must issue a temporary driver's license to a qualified applicant in deferred action status.

### BRIEF ANSWER

Under Indiana law, valid documentary evidence of "approved deferred action" status is sufficient to establish the requisite "lawful status" to be eligible for a driver's license. An applicant may demonstrate such status using documents a deferred action grantee would possess or would be able to obtain. If an applicant meets the applicable requirements to obtain a driver's license, issuance is mandatory under Indiana law. A driver's license or identification card issued to an individual in deferred action status, however, must be temporary, given that deferred action is limited to a two-year period. The conclusion that licenses must be issued to qualified applicants in deferred

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<sup>1</sup> Much of the same analysis applies to non-driver identification cards. Where relevant, applicable citations are provided, as a deferred action grantee may apply for an identification card rather than a driver's license.

<sup>2</sup> In a June 2012, memorandum, the Secretary of DHS directed its bureaus to use prosecutorial discretion in enforcing immigration laws against certain individuals who have no legal status in this country and who arrived as children. *See Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) (available at <http://www.dhs.gov/deferred-action>). Secretary Napolitano instructed the United States Citizenship and Immigration Services ("USCIS") to consider, beginning August 15, 2012, requests for deferred action by individuals meeting certain requirements. *Id.* A grant of deferred action allows an individual to remain in the United States for a renewable two-year period and to apply for work authorization. *Id.* The Secretary's memorandum "confers no substantive right, immigration status or pathway to citizenship." *Id.*

<sup>3</sup> Our examination of relevant authorities included a review of the BMV's analysis on these subjects, and as explained our ultimate conclusions are consistent with those reached by the Bureau.

action status is supported by decisions of state governments with similar statutory provisions to do the same, and it is not altered by contrary decisions of other states because those states' applicable provisions are distinguishable.

## ANALYSIS

### Applicable Indiana Provisions

The legal requirements for an Indiana driver's license are contained in Ind. Code Chpt. 9-24-9.<sup>4</sup> This statute provides that an application must contain either a valid Social Security number, or verification of an applicant's ineligibility to be issued a Social Security number, and proof of "identity and lawful status."<sup>5</sup> Concerning status, the statute lists categories that constitute "status of legal presence in the United States."<sup>6</sup> Relevant here, valid documentary evidence of "approved deferred action status" satisfies the lawful status requirement.<sup>7</sup> Thus, valid evidence of deferred action status, though insufficient under the immigration laws, establishes lawful status under the REAL ID Act, Indiana law, and, as discussed below, the law of other states for the purpose of obtaining a driver's license.

An applicant is permitted to present to the BMV a number of documents to establish lawful status. In the case of an individual wishing to demonstrate his or her approved deferred action status, those documents include the following: (1) an unexpired employment authorization document ("EAD") issued by the DHS; (2) both a Notice of Action, if it is possible to verify that the DHS has not denied the associated application, and documents that a federal agency issued to show lawful status and that pertain to the applicant's Notice of Action; and (3) other documents issued by a federal agency to show lawful status, assuming that the BMV can verify that the information contained therein is accurate and that the applicant has lawful status in the United States.<sup>8</sup> These

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<sup>4</sup> The provisions governing identification cards are contained in Ind. Code Chpt. 9-24-16.

<sup>5</sup> Ind. Code §§ 9-24-9-2 (b)(6)(A), (B) (driver's license); 9-24-16-2(a)(6)(A), (B) (identification card). An applicant in deferred action status may be able to present a Social Security card if one is obtained after receiving work authorization. *See* n. 2, *supra*.

<sup>6</sup> Ind. Code §§ 9-24-9-2.5(9); 9-24-16-3.5 (1)(I). Notwithstanding the statutes' seemingly interchangeable use of the terms "legal presence" and "lawful status," "lawful status" refers to an individual who satisfies Ind. Code §§ 9-24-9-2.5 (driver's license) or 9-24-16-3.5(1) (identification card). 140 IAC 7.1.1-1(y)(1), (2). In any event, titles having little bearing on the meanings of the actual statutory provisions. *See* I.C. § 1-1-1-5(f); *Ind. Dep't of Environmental Management vs. Raybestos Products Co.*, 897 N.E. 2d 469, 475 (Ind. 2008) ("[D]escriptive headings of titles, articles, and chapters are intended for organization purposes only and 'are not intended to affect the meaning, application or construction of the state they precede.' Ind. Code § 1-1-1-5(f).").

<sup>7</sup> Ind. Code §§ 9-24-9-2.5(9) (driver's license); 9-24-16-3.5 (1)(I) (identification card). Indiana implemented the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005), which imposed new requirements on states for issuing driver's licenses and identification cards that can be accepted by federal agencies for official purposes. Ind. Code §§ 9-24-9-2.5, 9-24-16-3.5 (1) mirror REAL ID Act §202 (c) (2)(B)(viii). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L. 104-193, 110 Stat. 2268 (August 22, 1996), restricted certain immigrants from obtaining certain statutorily defined public benefits from the federal and state governments; driver's licenses are not so defined. *See* 8 U.S.C. §§ 1611, 1621.

<sup>8</sup> 140 IAC 7-1.1-3(b)(1)(E), (b)(2)(A)-(B), (D). A deferred action grantee with an EAD also may use that document to establish the statute's identity requirement. 140 IAC 7-1.1-3(b)(1)(E).

are documents that an individual in deferred action status would be able to obtain or would have received after being granted this status. For example, after deciding to grant an individual deferred action status, the DHS would send to him or her a letter approving the deferred action request.<sup>9</sup> Additionally, as set forth *supra* at n. 2, a deferred action grantee is eligible to apply for work authorization and, thus, would be able to obtain an EAD.

If an applicant for a driver's license – including an individual in deferred action status – meets all the legal requirements, Indiana law mandates that the BMV issue a license.<sup>10</sup> Given the temporary nature deferred action status, however, a license or an identification card issued to an individual in deferred action status must be temporary and clearly identified as such.<sup>11</sup> A temporary document may be renewed, but the applicant must be present “valid documentary evidence proving that [his or her] status has been extended.<sup>12</sup> Accordingly, the BMV must issue a temporary driver's license to a qualified applicant in deferred action status.

If the holder of a temporary driver's license loses his or her deferred action status, through expiration or other reasons, then that individual is not eligible for renewal of the temporary driver's license upon the license's expiration, unless and until the deferred action status is reinstated. If such an individual were to continue to drive in Indiana, then he or she would be subject to the same infractions and legal penalties as any other motorist found driving with an expired temporary license. The temporary license itself confers no additional or special legal privileges to motorists with deferred action status beyond those available to all motorists holding temporary licenses.

### **Comparable and Distinguishable Provisions of and Results Reached in Other States.**

The Commonwealth of Virginia and the State of Georgia, among others, have indicated through official or press statements that qualified individuals in deferred action status will be eligible to apply for a driver's license there. The legal conclusions set forth above are supported by the fact that the legal frameworks of Virginia and George are similar to that of Indiana. Under Virginia and Georgia law, an applicant presenting “valid documentary evidence” or “approved deferred action status” establishes eligibility for, and may be issued, a driver's license.<sup>13</sup> Like Indiana, a license issued to an individual in deferred action status must be temporary and tied to an applicant's authorized stay in the United States.<sup>14</sup> Applicants in Virginia and Georgia may use the same documents accepted by Indiana to establish identity and “legal presence” in the United States and also must provide proof of a valid Social Security number or a letter of ineligibility for a Social

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<sup>9</sup> See USCIS Consideration of Deferred Action for Childhood Arrivals Process (available at: <http://www.uscis.gov/portal/site/uscis/menuitem>).

<sup>10</sup> See Ind. Code §§ 9-24-3-1 (“Except as otherwise provided in this article, the [BMV] shall issues an operator's license to an individual who meets the following conditions: (1) Satisfies the age requirement set forth in section 2.5 of this chapter [;] (2) Makes proper application to the [BMV] under IC 9-24-9 up a form prescribed by the [BMV].[...]; (3) Satisfactorily passes the examination and tests required for issuance for an operator's license under IC 9-24-10 [;] (4) Pays the fees prescribed by 9-29-9.” (emphasis added); 9-24-11-1 (“The [BMV] **shall** issue a permit or license to every applicant who meets the following [same] conditions[.]” (emphasis added).

<sup>11</sup> Ind. Code §§ 9-24-11-5(g)(4) (driver's license); Ind. Code 9-24-16-3(f)(4) (identification card).

<sup>12</sup> *Id.*

<sup>13</sup> Va. Code § 46.2-328.1; O.C.G.A. § 40-5-21.1(a)(5); see O.G.C.A. § 40-5-21.2.

<sup>14</sup> Va. Code § 46.2-328.1; O.C.G.A. § 40-5-21.1(a).

Security number.<sup>15</sup> Thus, the case for issuing a driver’s license to an individual in deferred action status in Indiana is supported by an analysis of the similar legal frameworks of Virginia or Georgia, where qualified deferred action grantees are eligible for a driver’s license under those state laws. Moreover, the Indiana statute has additional language mandating issuance to an applicant who meets the legal requirements.<sup>16</sup>

States other than Georgia and Virginia have indicated that individuals in deferred action status will be eligible to apply for a driver’s license. Uniquely, however, subsequent to the June 2012 memorandum issued by DHS referenced *supra* at n. 2, California enacted a provision adding to and amending its Vehicle and Civil Codes to expressly recognize that individuals in deferred action status are eligible for a driver’s license.<sup>17</sup> An analysis of California’s legal framework on this issue also supports the conclusions regarding the Indiana BMV set forth above. Under former section 12801.5 of California’s Vehicle Code, an applicant for a driver’s license was required to “submit satisfactory proof that the applicant’s presence in the United States is authorized under federal law.” The new provision provides that “[a]ny federal document demonstrating favorable action by the federal government for acceptance of a person into the deferred action for childhood arrivals program shall satisfy the requirements of section 12801.5.”<sup>18</sup> This is notable because, like Indiana, California law mandates the issuance of a driver’s license to an applicant who meets the legal requirements.<sup>19</sup>

Conversely, other states have concluded that individuals in deferred action status may not obtain driver’s licenses. However, those decisions by other states not to issue a driver’s license to an individual in deferred action status are based on distinguishable relevant authorities and do not alter the conclusions set forth above. In this regard, this office analyzed the law of Arizona and Nebraska. By statute, the Arizona Departments of Transportation (“ADOT”) is not authorized to issue a driver’s license to an individual who “does not submit proof satisfactory to the department that [his or her] presence in the United States is authorized by federal law.”<sup>20</sup> While Arizona has not adopted related rules and while its statutes and rules are silent as to the issue of deferred action status,<sup>21</sup> its governor issued an executive order stating the following:

1. The issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status and does not entitle them to any additional public benefit.

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<sup>15</sup> See Ga. Comp. R. & Regs. 375-3-1.02(3), (4), (6)(b); see also Obtaining a Virginia Driver’s License or Identification Card (ID) Card (available at: <http://dmv.state.va.us/webdoc/pdf/dmv141.pdf>).

<sup>16</sup> See n. 9, *supra*.

<sup>17</sup> An act to add section 1936.5 to the Civil Code, and to amend sections 12801 and 14608 of, and to add Section 12801.6 to, the Vehicle Code, relating to vehicles, 2012 Cal Laws ch. 862 (available at [http://www.legalinfo.ca.gov/pub/11-12/asm/ab\\_2151-2200/ab\\_2189\\_bill\\_20120930\\_chaptered.html](http://www.legalinfo.ca.gov/pub/11-12/asm/ab_2151-2200/ab_2189_bill_20120930_chaptered.html)).

<sup>18</sup> See n. 16, *supra*.

<sup>19</sup> Cal Veh. Code § 12811.

<sup>20</sup> Ariz. Rev. Stat. § 28-3153(D) (*emphasis added*)

<sup>21</sup> Arizona has not implemented the REAL ID Act, which requires states to accept valid evidence of deferred action status as proof of lawful status in the United States. REAL ID Act § 202(c)(2)(B)(viii).

2. State agencies that provide public benefits, as defined in 8 United States Code § 1621 shall conduct a full statutory, rule-making and policy analysis and, to the extent not prohibited by state or federal law, initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any tax-payer-funded public benefits and state identification, *including a driver's license*, so that the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer[-]funded benefits and state identification are enforced.<sup>22</sup>

Presumably in response to this executive order, ADOT indicated on an Internet-based list of identification requirements for obtaining a license that “[a]n Employment Authorization Document resulting from a Deferred Action Childhood Arrival” will not be accepted as proof of any legal requirement.<sup>23</sup> Because Arizona and Indiana law on this issue can be distinguished on the multiple grounds set forth above, Arizona law should not be seen as persuasive or based on a model that Indiana must follow.

Although the law of Nebraska is different than that of Arizona, it is also distinguishable from Indiana law in this context. Under Nebraska law, an applicant for a driver's license must present “valid evidence that he or she has legal status in the United States” and, while sufficient for identification purposes, certain documents, standing alone, “do not provide satisfactory evidence of lawful status.”<sup>24</sup> Those documents include an unexpired EAD, which may be the only document available to many individuals in deferred action status.<sup>25</sup> If an applicant is relying on an unexpired EAD or any other document on the statutory list that cannot stand alone, he or she must present a second document on the statutory list (which, as mentioned above, an individual in deferred action status is unlikely to have) or “documentation issued by [DHS] or other federal agencies demonstrating lawful status as determined by [USCIS].”<sup>26</sup> Because USCIS makes clear that deferred action does not confer upon an individual lawful status at the federal level for immigration purposes, the latter option is not available to an individual in deferred action status.<sup>27</sup> Accordingly, it appears unlikely that an individual in deferred action status would be able to obtain the requisite documents to be eligible to apply for a Nebraska driver's license.

By way of enforcing Nebraska law, the state's governor announced in August 2012 that deferred action “does not make [illegal immigrants] legal citizens” and vowed that Nebraska would “continue its practice of not issuing driver's licenses... to illegal immigrants unless specifically

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<sup>22</sup> Ariz. Exec. Order No. 2012-06 (August 15, 2012) (available at <http://www.azgovernor.gov/newsroom>) (emphasis added).

<sup>23</sup> See Arizona Motor Vehicle Division Identification Requirements (available at <http://www.azdot.gov/mvd>).

<sup>24</sup> Neb. Rev. Stat. 60-484.04(2), (3)(b).

<sup>25</sup> Neb. Rev. Stat. 60-484.04(2)(e). Other documents on that list include the following: documents only available to United States citizens (by naturalization and by birth) and permanent residents; “[a]n unexpired foreign passport with a valid, unexpired United States visa affixed accompanied by the approval I-94 form documenting the applicant's most recent admittance into the United States”; a driver's license or identification card issued in complaint with the standards established by the REAL ID Act”; and “[s]uch other documents as the director [of the Motor Vehicle Department] may approve.” Neb. Rev. Stat. 60-484.04(2)(a)-(d), (f)-(j).

<sup>26</sup> Neb. Rev. Stat. 60-484.04(3)(b).

<sup>27</sup> See n. 8, *supra*.

authorized by Nebraska statute.”<sup>28</sup> This statement seems consistent with Nebraska law but, in any event, neither it nor Nebraska’s statutory framework alter the above analysis on the Indiana BMV’s action under Indiana law because the legal frameworks are different.

## CONCLUSION

In sum, even though deferred action status does not constitute lawful status for immigration purposes, it is sufficient under Indiana law to establish eligibility for an Indiana driver’s license. If an applicant in deferred status meets the legal requirements for a driver’s license, the BMV must issue the license because the statute mandates it. Given the (renewable) two-year limit on deferred action status, however, the license must be temporary and must correspond with the expiration of an individual’s deferred action status. This conclusion is supported by the analysis conducted by this office of other state statutory frameworks addressing this issue.

Sincerely,

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Kristen Garn  
Deputy Attorney General

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<sup>28</sup> Governor Dave Heineman, Governor of Nebraska, Statement on President Obama’s Deferred Action Program (Aug. 17, 2012) (available at <http://www.governor.nebraska.gov/news/inenx.html>).