



Delivered electronically via regulations.gov

November 17, 2021

Ms. Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: DHS Docket No 2021-0006, Deferred Action for Childhood Arrivals

Dear Ms. Deshommes:

We write on behalf of Immigrants Rising to submit this comment letter in response to the U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS), Notice of Proposed Rulemaking (NPRM or proposed rule) Deferred Action for Childhood Arrivals (DHS Docket No. 2021-0006) published on September 28, 2021. We write to express our emphatic support for DHS's decision to enshrine Deferred Action for Childhood Arrivals (DACA) and associated procedures into regulation, offer our unqualified support for the continued existence and administration of DACA and encourage DHS to consider and implement the below recommendations related to DACA's administration, adjudication, and eligibility criteria.

Founded in 2006, Immigrants Rising empowers undocumented young people to achieve educational and career goals through personal, institutional, and policy transformation. We envision an America where all young people can pursue and complete an education with confidence and without constraint.

I. INTRODUCTION

Since its inception in 2012 by the Obama administration, Deferred Action for Childhood Arrivals (DACA) has enabled roughly 828,270 eligible young adults to attend school, work, plan their lives, and contribute to their communities without fear of deportation.¹ Estimates find that the average DACA recipient arrived in the United States in 1999 at seven years old, with more than a third arriving before five years old.²

¹ "Number of Form I 821D, Consideration of Deferred Action for Childhood Arrivals Requests by Intake and Case Status, by Fiscal Year," USCIS, accessed Oct. 25, 2021, https://www.uscis.gov/sites/default/files/document/reports/DACA_performancedata_fy2021_qtr2.pdf.

² "Deferred Action for Childhood Arrivals (DACA): An Overview," American Immigration Council, Sept. 30, 2021, accessed Oct. 21, 2021, <https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-daca-overview>.

DACA has a quantifiable, significant, and long-lasting impact on families, local communities, and our nation. Indeed, “the enactment of DACA . . . significantly increased high school attendance and graduation rates, reducing the gap in attendance and graduation by 40 percent between citizen and non-citizen immigrants.”³ Critically, DACA supports the financial and personal stability of the roughly 254,000 U.S.-born children with at least one parent with DACA and 1.5 million people belonging to mixed-status families with one or more DACA recipients.⁴ DACA recipients include 181,624 students enrolled in higher education and approximately 202,500 DACA recipients as “essential critical infrastructure workers”—a particularly timely and essential classification in light of the ongoing COVID-19 pandemic.⁵

DACA recipients are interwoven into our economy, and ensuring the stability of the DACA initiative is vital to our economic stability and growth. Of DACA recipients surveyed by the Center for American Progress, 6.1% started their own businesses (7% of those age 25 or above).⁶ Around 63% secured a better job, with 52.6% reporting their new job fits their education and training better.⁷ DACA recipients are homeowners, making \$566.9 million in yearly mortgage payments.⁸ DACA recipients significantly contribute to Social Security and Medicare; ending DACA would result in “\$39.3 billion in losses to Social Security and Medicare contributions over ten years, half of which represents lost employee contributions and half employer contributions.”⁹ The CATO Institute calculated that ending DACA would cost employers \$6.3 billion in employee turnover costs.¹⁰

II. LEGAL FRAMEWORK

A. DHS should make applications for employment authorization optional

USCIS currently requires that DACA applicants concurrently file for employment authorization, Form I-765, Application for Employment Authorization, along with their request for deferred action. DHS proposes to make filing for the I-765 optional and allow filing after an individual receives approval for a deferred action request while maintaining the current fee structure. We support DHS’s proposal to make filing for employment authorization optional while still allowing for a concurrent filing. The proposed change would enable initial requesters to apply for and confirm that they are eligible for DACA *before* spending an additional \$410 for an

³ “DACA’s Impact on Educational Outcomes,” Dartmouth Department of Economics, Aug. 20, 2021, <https://economics.dartmouth.edu/news/2021/08/dacas-impact-educational-outcomes>.

⁴ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

⁵ “Immigrant and International Students in Higher Education,” Higher Ed Immigration Portal, accessed Oct. 21, 2021, <https://www.higheredimmigrationportal.org/national/national-data/>; “A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response,” Center for American Progress, April 6, 2020, accessed Oct. 22, 2021,

<https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response/>.

⁶ Tom Wong et. al., “Results from Tom K. Wong et al., 2019 National DACA Study,” Center for American Progress, accessed Oct. 22, 2021,

https://cdn.americanprogress.org/content/uploads/2019/09/18122133/New-DACA-Survey-2019-Final-1.pdf?_ga=2.111149388.976030816.1634766021-2046380309.1632836415.

⁷ Tom Wong et. al., “Results from Tom K. Wong et al., 2019 National DACA Study,” Center for American Progress, accessed Oct. 22, 2021,

https://cdn.americanprogress.org/content/uploads/2019/09/18122133/New-DACA-Survey-2019-Final-1.pdf?_ga=2.111149388.976030816.1634766021-2046380309.1632836415.

⁸ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

⁹ “Draining the Trust Funds: Ending DACA and the Consequences to Social Security and Medicare,” Immigrant Legal Resource Center (ILRC), Sep. 28, 2017, accessed Oct. 21, 2021, <https://www.ilrc.org/report-daca-economic-cost>.

¹⁰ “Ending DACA Will Impose Billions in Employer Compliance Costs,” Cato Institute, Sep. 1, 2017, accessed Oct. 21, 2021, <https://www.cato.org/blog/ending-daca-will-impose-billions-employer-compliance-costs>.

employment authorization application—preventing them from losing the work permit fee if they had applied jointly. We appreciate that this separation supports DACA in the federal courts and that it would save money for requesters who do not need or want work authorization. In particular, the 181,000 DACA-eligible students in higher education may benefit from the ability to financially prioritize the separate applications, especially as many of these individuals may not necessarily need nor want work authorization during their enrollment in higher education.¹¹ Similarly, for mixed-status families with multiple DACA-eligible individuals, some of whom may be in school and not working, the ability to apply for deferred action only is a potential economic boon.

Finally, as DHS states in its notice, making employment authorization optional is also in part to further bolster DACA’s legality and potentially enable a scenario where a court strikes down the work permit authorization provisions of DACA while maintaining the availability of the underlying deferred action status. While we strongly believe that DACA, including the deferred action and employment authorization which it grants, is a lawful and constitutional use of the Executive’s immigration authority, we support making work permits optional to bolster the continued existence of DACA in whole or in part.

B. DHS should continue to consider DACA recipients lawfully present

DHS solicits comments on potentially promulgating a version of DACA where individuals with deferred action would not be considered lawfully present.¹² We strongly oppose this proposed formulation. Individuals with deferred action have always been considered lawfully present in our nation’s entire immigration history, law, and framework. Any other formulation would be an unacceptable break from legal precedent and lead to a complex, unworkable, and time-consuming adjudicatory framework.¹³

We support DHS formalizing the agency’s long-standing policy that DACA recipients are lawfully present. Changing the long-standing DHS policy regarding lawful presence would likely not be retroactive, causing significant adjudication problems for USCIS as the agency would need to discern which DACA recipients accrued unlawful presence relative to this regulatory change. If this change were retroactive, it would run counter to extensive precedent against retroactive laws, especially in the immigration context, and represent an adjudicatory nightmare.¹⁴

Additionally, carving out DACA as a form of deferred action that does not have lawful presence, while other forms of deferred action still maintain lawful presence, would very likely present equal protection clause implications. The Fourteenth Amendment states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁵ This clause is essentially a constitutional requirement that “all persons similarly situated should be treated alike”; if not, the government must have a sufficient rationale for that disparate treatment.¹⁶ While the constitution does not prevent the government from creating classifications, it does

¹¹ “Immigrant and International Students in Higher Education,” Higher Ed Immigration Portal, accessed Oct. 21, 2021, <https://www.higheredimmigrationportal.org/national/national-data/>

¹² Proposed DACA Rule, 53763.

¹³ See Memorandum from Johnny N. Williams to Regional Directors on Unlawful Presence (June 12, 2002), AILA Doc. No. 02062040, <https://www.aila.org/infonet/ins-says-deferred-action-is-lawful-presence>.

¹⁴ See *Yartelas v. Holder*, 566 U.S. 257 (2012) (ruling against applying a law retroactively “[g]uided by the deeply rooted presumption against retroactive legislation”); see also “212(c) Relief and Retroactivity,” Immigrant Defense Project, accessed Oct. 25, 2021, <https://www.immigrantdefenseproject.org/212c-relief-and-retroactivity/>.

¹⁵ U.S. CONST. AMEND. 14, § 1. Equal protection applies to the federal government through the Fifth Amendment Due Process Clause.

¹⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

serve to keep government actors “from treating differently persons who are in all relevant aspects alike.”¹⁷ Here, the federal government would be treating DACA recipients differently from other deferred action categories when they are in all relevant aspects alike.¹⁸

Another agency attempted to make a similar change and faced significant public opposition. HHS stripped lawful presence from DACA recipients for Affordable Care Act purposes, which led to worse health care outcomes and health care access discrimination for DACA recipients.¹⁹ This approach is opposed by 320 organizations and 94 members of Congress, who have called on HHS to restore lawful presence in the health care context.²⁰ HHS’s removal of lawful presence had significant and long-lasting negative impacts on DACA recipients in regards to health care access—removing lawful presence in the immigration sphere will undoubtedly have devastating consequences for DACA recipients in terms of future immigration relief.

Importantly, lawful presence has implications on the accrual of unlawful presence. Consequently, we support DHS’s reiteration of the long-standing policy that a non-citizen who has been granted deferred action does not accrue “unlawful presence” for purposes of INA sec. 212(a)(9). This policy significantly reduces the long-term ramifications of decisions made when DACA recipients were children. At least 21% of DACA recipients surveyed by Immigrants Rising were eligible for family sponsorship.²¹ Half of the respondents became eligible for some other form of long-term relief because of changed life circumstances.²² Removing lawful presence from DACA would prospectively foreclose these paths to legalization and cement DACA recipients as a permanent underclass, preventing DACA recipients with immediate relatives from pursuing the stability of a green card.

III. ELIGIBILITY

A. DHS should rescind the unlawful status requirement for DACA eligibility

DHS proposes to continue the requirement that the applicant have unlawful status on June 16, 2012, to qualify for initial DACA. We urge DHS to remove this unfair and unjust requirement.

By removing this requirement, thousands of young people who grew up in the United States as dependents of nonimmigrant visa holders and had lawful status on June 15, 2012, would be afforded protection—individuals who fell out of status after aging out while waiting for an immigration petition. Due to decades-long green card backlogs and some visas having no pathways to citizenship, children age out of their status at 21, often with no clear path to citizenship. Approximately 5,000 young people, often referred to as “documented Dreamers,” age out of their status every year without protection.²³ Sumana is one of those “documented Dreamers,” and her story highlights why removing this requirement should be a priority:

¹⁷ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

¹⁸ See *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017), finding that there was no basis in federal law for treating DACA differently from other forms of lawful presence.

¹⁹ “#ACA4DACA Campaign,” Masa Group, LLC, accessed Oct. 22, 2021, <https://www.masadc.com/aca4daca>.

²⁰ *Ibid.*

²¹ “How Can I Get My Papers?” Immigrants Rising, 8, December 2019, 4, <https://immigrantsrising.org/resource/how-can-i-get-my-papers/>.

²² “How Can I Get My Papers?” Immigrants Rising, 8, December 2019, 4, <https://immigrantsrising.org/resource/how-can-i-get-my-papers/>.

²³ “100,000 Children in the Employment-Based Green Card Backlog at Risk of Family Separation,” Cato Institute, Nov. 20, 2021, accessed Oct. 22, 2021, <https://www.cato.org/blog/100000-children-employment-based-green-card-backlog-risk-family-separation>.

My name is Sumana, and I have lived in the U.S. since I was 2; I am currently 24 years old. I arrived in this country on an H4 visa, but I aged out of the system at 21 and had to switch to an F-1 visa. I only have nine months of status left. I may have to self-deport and leave the only country I have ever called home. Qualifying for DACA would have allowed me to live and work in the U.S. and stay united with the rest of my family, including my younger brother who is a citizen. My whole life and family are all in the United States. Obtaining DACA would be life-changing and grant me so many opportunities and the ability to truly call America Home.

Critically, this change is consistent with the original June 15, 2012 memorandum from Secretary Napolitano, as the original memorandum did not include criteria to have lawful status on the date of announcement of the memorandum.²⁴ The recent bipartisan bill H.R.6, the American Dream and Promise Act of 2021, that passed the House earlier this year included “documented Dreamers.” This removal of the lawful status requirement is estimated to help 190,000 people.²⁵

The proposed rulemaking affirms that this explicit guideline was not in the original memorandum but also states that “it is implicit in the memorandum’s reference to children and young adults who are subject to removal because they lack lawful immigration status.”²⁶ This claim ignores the memorandum’s key goal, which was to give consideration “to the individual circumstances of each case” and not “remove productive young people to countries where they may not have lived or even speak the language.”²⁷ “Documented Dreamers” meet these principles.

Additionally, there is precedent from previous deferred action initiatives. In 2009, USCIS created a deferred action initiative for certain widows of U.S. citizens through a policy memo similar to DACA, but unlike DACA, the application form instructions did not require applicants to lack legal status.²⁸ Addressing this gap in the proposed regulation would significantly benefit the above group of young people while remaining in line with both the proposed rulemaking and the original DACA memorandum’s key goals.²⁹

B. DHS should remove the age cap for DACA

DHS proposes to maintain the age cap in regulation. We urge DHS to revisit the original June 2021 memorandum and rescind the age cap for potential DACA requestors.

The current age restriction excludes those older than 31 on the announcement date (those born before June 15, 1981). DHS previously attempted to remove this age cap with the November 20, 2014 memorandum, rescinded following the 2016 *Texas v. United States* opinion, partially due

²⁴ Memorandum from Janet Napolitano to David V. Aguilar, Alejandro Mayorkas, and John Morton on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (hereafter “Napolitano memo”).

²⁵ “American Dream and Promise Act of 2021: Who Is Potentially Eligible?,” Migration Policy Institute, March 2021, accessed Oct. 27, 2021, <https://www.migrationpolicy.org/content/american-dream-and-promise-act-2021-eligibility>.

²⁶ “Deferred Action for Childhood Arrivals: A Proposed Rule by the Homeland Security Department on 9/28/2021,” Federal Register, <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>, 53767 (hereafter “DACA Proposed Rule”).

²⁷ *Ibid.*

²⁸ “DHS Establishes Interim Relief for Widows of U.S. Citizens,” DHS, June 9, 2009, accessed Oct. 22, 2021 <https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

²⁹ Immigrants Rising worked with Improve the Dream on the language of this section. <https://www.improvethedream.org/>

to failure to comply with the Administrative Procedure Act.³⁰ As DHS is currently going through notice and comment, nothing precludes the agency from removing this age cap through the ongoing proposed NPRM.

Removing this age cap will further the goal of DACA by addressing an arbitrary date that excludes many otherwise eligible DACA applicants. This removal will allow people who are already not enforcement priorities to receive lawful status and work authorization. A key example of an impacted individual is Jose Antonio Vargas, the Pulitzer Prize-winning journalist and author who missed the cut-off by only four months.³¹ Finally, this revision would particularly benefit older Dreamers who are more likely to have U.S. citizen children, providing access to DACA for these individuals would enable them to provide for their U.S. citizen families economically.

C. DHS should update the physical presence requirement to January 1, 2021

DHS proposes to maintain the physical presence date of June 15, 2012. Instead, we recommend that DHS should move the physical presence requirement to January 1, 2021.

DHS has not updated the physical presence date in nine years, and there is nothing that prevents DHS from moving the date in recognition that there are many Dreamers who arrived since the original physical presence date who are otherwise eligible for DACA. This date matches the date proposed in H.R.6, the American Dream and Promise Act of 2021.³² Furthermore, most individuals who would benefit from moving this date would not be enforcement priorities under the current administration. Enabling these Dreamers to access higher education and employment authorization through DACA will help them contribute to their communities and is in line with the intent of the original 2012 memo to not remove “productive young people to countries where they may not have lived or even speak the language.”³³ It will help people like 34-year-old Mayra, a psychotherapist with a Masters of Science in Clinical/Counseling Psychology who tried to come back to the United States “the right way” in 2012 and was not eligible for DACA once her visa expired. Mayra’s “existence revolves around my family, friends, and community. I am a guide/leader that provides mental health support and empowerment (via therapy as a volunteer and via workshops, presentations, support groups, and gatherings as an independent contractor) for my community to thrive.”

D. Criminal Background Requirements

In general, DHS should strive for flexible criminal restrictions because they disproportionately affect applicants of color, particularly Black applicants, due significantly to racial bias in the criminal justice system.³⁴ Furthermore, LGBTQ immigrants are also disproportionately impacted, as they may have more survival crime convictions. Nine percent of Immigration Legal Intake Service (ILIS) participants identified as members of the LGBTQ community, double the national average of 4.5%.³⁵

³⁰ Memorandum from Elaine C. Duke to James W. McCament et. al. on Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

³¹ Jose Antonio Vargas, “Why I Turned Myself in to DHS,” Politico, Sept. 8, 2014, accessed Oct. 22, 2021, <https://www.politico.com/magazine/story/2014/09/obamas-deferred-action-on-deportations-110737/>.

³² H.R.6 - American Dream and Promise Act of 2021, 117th Cong. (2021).

³³ Napolitano memo.

³⁴ See *infra* page 7 and footnote 39 for further discussion.

³⁵ “How Can I Get My Papers?” Immigrants Rising, 8, December 2019, <https://immigrantsrising.org/resource/how-can-i-get-my-papers/>.

1. DHS should narrow the definition of minor traffic offenses

DHS seeks input on its definition of “minor traffic offenses.” We propose that minor traffic offenses be explicitly excluded from triggering the misdemeanor and felony criminal bars, even under a totality of the circumstances analysis.

The proposed rule states for “minor traffic offenses” to be “considered under a review of the totality of the circumstances.”³⁶ Currently, USCIS’s DACA FAQ states, “a minor traffic offense will not be considered a misdemeanor for purposes of this process. However, an individual’s entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, they warrant an exercise of prosecutorial discretion.”³⁷

Minor traffic offenses should be defined to exclude any traffic-related infractions, misdemeanors, or felonies where there was no serious bodily injury to a third party. For offenses where there was serious bodily injury to a third party, adjudicators should continue using the “totality of the circumstances” analysis to determine if an individual warrants prosecutorial discretion. For example, due to the difficulties undocumented individuals can face in obtaining a license, driving without a license should be specifically noted as a minor traffic offense, regardless of any criminal implications on a state-by-state level. For example, in Florida, Georgia, Illinois, Indiana, Kentucky, and Missouri, individuals may receive felonies for driving without a license.³⁸

A totality of circumstances, including minor traffic offenses, will compound the racism perpetrated by local law enforcement. Consistently, officers are more likely to stop drivers of color than white drivers in a traffic stop.³⁹ Including this information in a totality of a circumstances analysis could quickly compound the racist impact such traffic stops have on communities of color, as those communities will likely have a higher incidence of traffic offenses than lighter-skinned immigrants.

2. DHS should promulgate a fair and flexible expungement standard

We oppose the new definition of conviction proposed in the rule, which adopts, in the regulation, a definition of conviction that does not exclude expunged convictions (also known as convictions subject to post-conviction rehabilitation or relief). Additionally, DHS should explicitly exclude expunged convictions from its adjudication of DACA applications.

Currently and throughout the length of DACA, DHS reviews expunged convictions on a case-by-case basis to determine whether they warrant a denial of discretion.⁴⁰ Defining a conviction for DACA purposes by INA § 101(a)(48), which does not give effect to expungements,

³⁶ DACA Proposed Rule, 53769.

³⁷ Ibid.

³⁸ “Driving Without a License: Penalties by State,” *CarInsurance.com*, accessed Oct. 22, 2021, <https://www.carinsurance.com/Articles/driving-without-license-penalties-by-state.aspx>.

³⁹ “Findings,” The Stanford Open Policing Project, accessed Oct. 22, 2021, <https://openpolicing.stanford.edu/findings/>; Pierson, E., Simoiu, C., Overgoor, J. et al., “A large-scale analysis of racial disparities in police stops across the United States,” *Nat Hum Behav* 4, 736–745 (July 2020), <https://doi.org/10.1038/s41562-020-0858-1>; Frank R. Baumgartner et. al., “Suspect Citizens: What 20 Million Traffic Stops Tells us About Policing and Race,” (Nov. 2017), accessed Oct. 22, 2021, <https://fbaum.unc.edu/books/SuspectCitizens/SuspectCitizens-Overview.pdf> (finding that Blacks are 63 percent more likely to be stopped than whites by population, but drive 16 percent less); see also “New data shows Virginia police are more likely to stop and search Black drivers,” *Virginia Mercury*, May 19, 2021 accessed Oct. 22, 2021, <https://www.virginiamercury.com/2021/05/19/new-data-shows-virginia-police-are-more-likely-to-stop-and-search-black-drivers/>.

⁴⁰ DACA FAQ.

would represent a dramatic, unfair, and punitive departure from existing policy. This is a significant policy change that will have disastrous consequences on DACA applicants and potentially result in current DACA holders' inability to renew, e.g. for those DACA recipients whose convictions would now be disqualified under the new framework.

DHS should align its interpretation of conviction fully with the criminal justice system and should explicitly not consider expunged and sealed convictions when adjudicating DACA. Instead of deferring to state courts who have essentially erased these convictions for all purposes, DHS is needlessly re-adjudicating expunged convictions and wasting valuable agency time to do so. State and local authorities already examined the facts of the case and concluded that the conviction merited expungement. Furthermore, almost all states have expungement mechanisms that do not allow for the expungement of felonies, which means that most expunged convictions are not generally serious offenses.⁴¹ We strongly recommend that DHS exclude all expunged convictions from consideration of DACA, including variations where an adjudication or judgment of guilt has been dismissed, expunged, deferred, annulled, invalidated, withheld, sealed, vacated, or pardoned, an order of probation without entry of judgment, or any similar rehabilitative disposition. All of these are possible descriptors of an expunged conviction, and none of them should fall under the DHS definition of conviction for adjudicating DACA applications. In the criminal justice system, an expunged conviction is removed from the system entirely, including for housing, loan, employment, voting, and all other purposes. DHS must similarly abide by this standard.

3. DHS should implement a statute of limitations for convictions

The proposed rule does not address the length of time a conviction can be considered under DACA. We propose DHS establish an administrative "statute of limitations" for consideration of convictions in the DACA application process that occurred five or more years before the application date.

At its best, the criminal justice system is about second chances, the ability to rehabilitate oneself, and our commitment as a nation to reintegrate those who have received their due punishment back into society. DACA-eligible youth have developed deep ties to family and community in the United States, and they deserve the chance to re-enter society and contribute like anyone else. By disregarding old and stale convictions, DHS would expand DACA to individuals who have rehabilitated since their conviction and developed significant family ties and deep, long-lasting connections with their communities. This approach is also in line with the administration's current enforcement priorities, which lists how long the conviction occurred as one of the factors in deciding whether to exercise prosecutorial discretion.⁴²

4. Felony Convictions

DHS should use its authority to grant "extraordinary circumstances" waivers in cases of DACA applicants with felony convictions to avoid the unjust, disproportionate impact of the felony conviction bar on communities of color, including LGBTQ DACA-eligible individuals and communities of color.⁴³ While only one percent of ILIS survey respondents were convicted of a

⁴¹ "50-State Comparison: Expungement, Sealing & Other Record Relief," Restoration of Rights Project, accessed Oct. 22, 2021, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside>.

⁴² Memorandum from Alejandro N. Mayorkas to Tae D. Johnson on Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), accessed Oct. 27, 2021, <https://www.ice.gov/doclib/news/guidelines-civil-immigration-law.pdf>.

⁴³ INA § 212(h)

felony (with only 7% having been convicted of a misdemeanor), far below the national average, 82% were either Hispanic or Latino, seven percent were Black or African, and nine percent of respondents identified as members of the LGBTQ community.⁴⁴ Criminal convictions are not reasonable measures of actual conduct, as the following story from Karen, an Immigrants Rising community member, demonstrates:

I was arrested for PC 245-Assault with a Deadly Weapon and later convicted of PC 245. They also added Penal Code 273.5 PC-Corporal Injury to Spouse or Cohabitant. I was coping with the death of my 12-year old son Jonathan, self-medicating, and using drugs with my partner when he and I got in an altercation. He was being violent, and I accidentally stabbed him when I was defending myself. My defense lawyer pressured me into taking a plea deal because she said it wouldn't get better and, no matter what, it would affect my immigration status. So I felt forced to take the offer and didn't fight it. I was able to get released on bond and had the opportunity to re-enter society, go to community college and obtain an AA degree. Now I'm attending a four-year university, studying Political Science, and working on campus to help undocumented students like myself. I have been in the United States since I was seven years old.

IV. ACCESSIBILITY

A. DHS should expand fee waiver access

DHS does not address a fee waiver in its proposed rule. DHS should include DACA applications on the list of applications eligible for an I-912 fee waiver. The Migration Policy Institute found that the current renewal fee “remains a barrier to DACA renewal.”⁴⁵ A majority of DACA holders described the \$495 filing fee as “a financial hardship on themselves or their families.”⁴⁶ Nearly half of DACA holders can only afford these fees through financial assistance from family or others, with almost half of applicants delaying applying for DACA while they saved the funds.⁴⁷ Given that 35% of DACA eligible individuals live in families with incomes less than 100% of the federal poverty level and two-thirds live in households with incomes less than 200% of the federal poverty level, the data demonstrates that the filing fee is a significant financial burden on individuals already facing poverty.⁴⁸ And yet, DHS continues to exclude DACA recipients from being eligible to request a fee waiver in the DACA context.

Moreover, DHS should consider using its transfer and reprogramming authority to transfer money from its enforcement arms (ICE and CBP) to fund fee waivers and reallocate funds from DHS to provide application financial assistance to fund the use of the existing fee waivers for DACA applicants.

⁴⁴ “How Can I Get My Papers?” Immigrants Rising, 8, December 2019, 4, 7, 8, 16, <https://immigrantsrising.org/resource/how-can-i-get-my-papers/>.

⁴⁵ Angelo Mathay and Margie McHugh, “DACA at the Three-Year Mark: High Pace of Renewals, But Processing Difficulties Evident,” Migration Policy Institute, Aug. 8 2015, <https://www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident>.

⁴⁶ Ibid.

⁴⁷ Ibid. (“Paying for DACA is a family and community expense with just over half (51%) of respondents reporting that they paid for their fees on their own”).

⁴⁸ Jeanne Batalova, Sarah Hooker, and Randy Capps, “Deferred Action for Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants,” Migration Policy Institute, Aug. 2013, <https://www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and?>.

B. DHS should waive biometrics collection for renewals

DHS proposes to maintain current biometrics requirements while removing the discrete biometrics fee. We urge DHS to utilize existing biometrics for DACA renewals rather than requiring new biometrics every two years upon renewal.

There is no clear rationale for requiring new biometrics, as fingerprints do not change without significant plastic surgery or scarring.⁴⁹ Given that biometrics are unlikely to change, requiring new biometrics is a costly waste of government time and resources. Recent Application Support Center (ASC) closures for COVID-19 and the successful re-use of prior biometrics during this time demonstrate that resubmission is not necessary for the adjudication of a DACA renewal application and that DHS does have this capacity.

Furthermore, ASCs often involve hours of driving for a DACA recipient, necessitating time off of work and transportation arrangements. Once at the ASC, they must sit in a crowded waiting room during the ongoing global pandemic. Given that DHS has shown that it can re-use prior biometrics and that fingerprints do not generally change on a two-year interval, the burden and health risk to a DACA recipient does not outweigh any adjudication benefit DHS has in requiring new biometrics every two years.

C. DHS should continue to accept affidavits

DHS requests comments on whether affidavits should be considered acceptable evidence of the start of the continuous residence period for new initial requestors for DACA who may have been very young at the time of entry to the United States and may have difficulty obtaining primary or secondary evidence to establish this threshold requirement. We affirm and support the use of affidavits in initial DACA applications.

Given that the average age of DACA recipients when they entered the country is only seven years old,⁵⁰ and the length of time since then, primary evidence documenting physical presence may be impossible even in situations where applicants were continuously present. Additionally, to date, DHS has not publicly expressed any fraud-related concerns with affidavits.

V. RENEWALS

A. DHS should consider all requests from previous DACA recipients as renewal requests

We encourage DHS to expand which applicants qualify for renewal to mean any individual who has held DACA, regardless of the length of time since DACA expired. Currently, DHS policy is that DACA applications only qualify for renewal if the applicant files within one year after their last period of deferred action expired.⁵¹ There are numerous reasons for delays in refiling for DACA, including financial, and there is currently no stated reason for this policy.

Given that initial DACA requests are no longer authorized, someone attempting to file after one year has passed can no longer request DACA, despite meeting the qualifying criteria of an initial

⁴⁹ “Fingerprints,” Interpol, accessed Oct. 22, 2021, <https://www.interpol.int/en/How-we-work/Forensics/Fingerprints>. (stating “[n]either do fingerprints change, even as we get older, unless the deep or ‘basal’ layer is destroyed or intentionally changed by plastic surgery.”)

⁵⁰ “What We Know About DACA Recipients in the United States,” Center for American Progress, Sept. 5, 2019, accessed Oct. 22, 2021,

<https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states>.

⁵¹ “Instructions for Consideration of Deferred Action for Childhood Arrivals,” USCIS, Aug. 31, 2021, accessed Oct. 22, 2021, <https://www.uscis.gov/sites/default/files/document/forms/i-821dinstr.pdf>.

DACA application. This policy arises from the instructions and the FAQ and *not* the original memorandum.⁵² Through this policy update, DHS would be able to accept additional numbers of DACA applicants under the current injunction in place by Judge Hanen, who limited DHS to only accept renewal and not initial requests.⁵³

B. DHS should issue automatic EAD extension for DACA renewals

DHS does not include an automatic employment extension for DACA renewals in its proposed rule. DHS should automatically renew employment authorization for DACA grants. As an alternative, DACA should be added to the list of employment authorization categories that receive an automatic 180-day extension of their timely filed employment authorization renewal.

An approved I-821D, even with an expired employment authorization document, could be sufficient for I-9 authorization for DACA renewals, much as it is for Temporary Protected Status (TPS) holders. Other EAD categories that require resubmission upon expiration, such as pending asylum, F-1 OPT, and withholding of removal (WOR), require USCIS to re-verify the underlying status to confirm they're eligible for employment authorization (for example, that their asylum or WOR cases are still pending or that they're still a student). For DACA renewals, USCIS verifies the underlying status with the I-821D approval, making the I-765 adjudication an unnecessary step. Issuing an automatic employment authorization for DACA renewals would free up valuable USCIS time and resources in adjudicating an unnecessary application.

The alternative 180-day automatic extension of a timely filed employment authorization renewal is the existing process that currently includes TPS grantees.⁵⁴ Doing so would be in line with DHS's rationale for the rule that implemented these 180-day extensions, which states that the automatic extension "provide[s] additional stability and certainty to U.S. employers and individuals eligible for employment authorization in the United States, this final rule changes several DHS regulations governing the processing of applications for employment authorization."⁵⁵

Issuing automatic employment authorization extensions will help people like Ju, who serves on the Immigrants Rising Leadership Council and faces significant repercussions due to delays in adjudication. Ju reports that this past July he was "let go from my job with Alameda County and lost my health insurance because my DACA expired. Although I submitted my DACA application in March, well within the renewal window, I learned that USCIS has not even assigned an adjudications officer to review my application. It remains pending at this time. My loved ones depend on my livelihood, and I have a chronic illness that requires regular care. If left untreated, I have a high risk of developing life-threatening complications."

C. DHS should issue consecutive grants of DACA

DHS should issue sequential, consecutive periods of DACA validity instead of overlapping time periods. For example, if a requester currently has DACA, the renewal would begin on the day

⁵² DACA FAQ.

⁵³ Ibid.

⁵⁴ "Automatic Employment Authorization Document (EAD) Extension," USCIS, Feb. 1, 2017, accessed Oct. 21, 2021, <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension>.

⁵⁵ Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82398 (Jan. 17, 2017), <https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled>.

their current DACA expires. Furthermore, USCIS should offer optional backdating for delayed applications.

Current practice is when USCIS approves a request for DACA renewal, the renewal begins on the date of approval, instead of the date that a requestor's current grant expires. Under this practice, individuals with DACA lose months of DACA eligibility where it overlaps. Over multiple renewals, these periods of "lost" DACA eligibility can add up to significant periods of time. This is an inefficient use of agency time and can cost DACA applicants more in filing fees throughout their DACA periods. Additionally, the applicant can accrue unlawful presence under this practice if their current grant expires while the application is being adjudicated. The Obama administration piloted a program (which the Trump administration ended) making this change. This program should be resumed and expanded.

VI. BENEFITS

A. DHS should expand grounds for advance parole travel

DHS should expand the grounds for advance parole to include any reason for travel, similar to TPS. Currently, DACA recipients may request advance parole only on employment, educational, or humanitarian grounds, despite no such statutory or regulatory restriction of advance parole for others. This creates a significant documentary barrier to advance parole and can result in heartbreaking delays or denials. For example, getting medical records from a foreign country to demonstrate a relative is ill can take months. Similarly, the sudden death of a relative may not provide DACA recipients with enough time to apply for and get approved to travel on advance parole:

I am Marisol Montejano and I am a DACA recipient. On September 8, 2021, my father passed away due to Covid-19. I applied for advance parole in hopes that I would be able to attend my father's funeral and take care of his last wishes and affairs. Unfortunately, my request was denied because the immigration officer determined that my request was not an emergency. I was devastated to hear this. The pain of losing my father and not being able to see him again was heartbreaking. The last time I saw my father was 15 years ago, and I was hoping that one day I would get to hug him again.

Alternatively, advance parole is a common avenue for DACA recipients to pursue lawful permanent residence through their spouse, yet a DACA recipient must still cite other grounds for travel. Pew estimates that less than half of undocumented immigrants generally enter with a visa (e.g. an admission), which means that an estimated more than half of the 76,000 DACA recipients that adjusted status likely required advance parole to do so.⁵⁶ Of DACA recipients ILIS surveyed, 53% initially entered without inspection and have lived in the United States for an average of 10 years.⁵⁷ Advance parole is critical not only to travel but to enter lawfully in order to access existing legalization paths. Existing legalization paths have been previously approved and codified by Congress. Requiring DACA recipients to have narrowly defined reasons for pursuing advance parole not only places an unnecessary barrier unique to DACA recipients but creates additional work and time for the adjudicator. There is no statutory, regulatory, or practical reason for the narrow grounds of advance parole available to DACA recipients.

⁵⁶ "Modes of Entry for the Unauthorized Migrant Population," Pew Research Center, May 22, 2006, <https://www.pewresearch.org/hispanic/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/>.

⁵⁷ "How Can I Get My Papers?" Immigrants Rising, 8, December 2019, 4, <https://immigrantsrising.org/resource/how-can-i-get-my-papers/>.

B. DHS should codify the domicile language from the DACA FAQ

DHS should codify into this regulation the language present in the DACA FAQs related to domicile. This language currently states, “[i]ndividuals granted deferred action are not precluded by federal law from establishing domicile in the United States.”⁵⁸ Codifying this language will ensure that states know an individual who holds DACA can establish domicile in the United States, which some states require when determining whether an individual is eligible for in-state tuition and other benefits. This is particularly significant for the 181,624 DACA-eligible higher education students.⁵⁹ Eighty-three percent of these DACA recipients attend public institutions, making accessibility to in-state tuition and financial aid of vital importance.⁶⁰

VII. CONFIDENTIALITY

A. Juvenile records

DHS should stop requiring and requesting juvenile records in its adjudication of DACA applications for receipts from all states. Of ILIS participants, 3.4% had a record of juvenile delinquency.⁶¹ While juvenile records “will not count towards the felony, significant misdemeanor, or three or more non-significant misdemeanors criminal bars to DACA, as long as the young person was not convicted as an adult,” USCIS continues to require these records as part of its totality of the circumstances approach.⁶² Requiring these records is a breach of the confidentiality afforded to juveniles due to their age and, in some states, may be contrary to the law. For example, in California, not only are juvenile case files confidential, but the *information* within the case files is confidential.⁶³ As a result, not only are California-based DACA applicants barred from submitting their juvenile records to USCIS, but if they disclose the information to USCIS, they violate state law.

DHS should refrain from requesting information from juvenile records across all states to ensure a consistent, fair standard nationwide. It does not make sense that juvenile adjudications in one state can be used to deny DACA when it cannot be used in another state.

We appreciate the opportunity to comment on the proposed DACA regulation. For any questions, please contact Denia Pérez, Esq., Legal Services Manager, at denia@immigrantsrising.org.

Sincerely,



Immigrants Rising

⁵⁸ DACA FAQ.

⁵⁹ “Immigrant and International Students in Higher Education,” Higher Ed Immigration Portal, accessed Oct. 21, 2021, <https://www.higheredimmigrationportal.org/national/national-data/>.

⁶⁰ Ibid.

⁶¹ Katharine Gin to Organizational Partners, May 14, 2019.

⁶² “DACA and Juvenile Delinquency Adjudications & Records: FAQs,” Immigrant Legal Resource Center, May 27, 2021, accessed Oct. 22, 2021, <https://www.ilrc.org/daca-and-juvenile-delinquency-adjudications-records-faqs-o>.

⁶³ “Confidentiality of Juvenile Records in California: Guidance for Immigration Practitioners in Light of California’s New Confidentiality Law,” Immigrant Legal Resource Center, April 25, 2016, accessed Oct. 22, 2021, <https://www.ilrc.org/confidentiality-juvenile-records-california-guidance-immigration-practitioners-light-california%E2%80%99s>.