Migrant Center for Human Rights

Protecting the Persecuted

November 29, 2021

Submitted via Regulations.gov

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

RE: DHS Docket No. USCIS–2021–0006; RIN 1615–AC64; CIS No. 2691–21

Public Comment on Deferred Action for Childhood Arrivals

The Migrant Center for Human Rights ("Migrant Center") writes in response to the Department of Homeland Security's ("DHS") Notice of Proposed Rulemaking on *Deferred Action for Childhood Arrivals* ("Proposed Rule"), published in the Federal Register on September 27, 2021, which codifies the Deferred Action for Childhood Arrivals ("DACA") program and makes several changes, but which fails to consider several important factors.

The Migrant Center is a 501(c)(3) non-profit organization that provides *pro bono* and *low bono* legal services to immigrants appearing before DHS and EOIR. Our team's legal expertise includes more than ten years of immigration experience assisting several thousand individuals before all immigration agency components of the federal government. Additionally, as a non-profit organization serving low-income immigrants, we have extensive expertise in working with *pro se* immigrants and therefore are particularly aware of the unique challenges they face in trying to navigate our legal system.

On behalf of the immigrants we have worked with, and will work with in the future, we write to urge you to more deeply consider several provisions of the Proposed Rule that we have good reason to believe will negatively affect the both the people and the businesses in our community, thereby undermining the public interest in family welfare, improving the economy, and effectively prioritizing our limited enforcement budget.

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 12866, sec. (1)(b)(6) states that ''[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that

some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs''. Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Sections of the Proposed Rule not discussed below should not be taken as agreement with those sections. Furthermore, we request that the content of any hyperlinks included here be considered (all information referenced without hyperlinks, or otherwise cited without reference, is taken directly from the Proposed Rule).

USCIS and ICE Should Have the Power to Grant DACA to People in Detention

The Proposed Rule would give USCIS has exclusive jurisdiction over requests for DACA but require that individual are not in ICE custody. This is hugely problematic. Not only does the Proposed Rule offer no justification for treating detained individuals differently but, as a preliminary matter, ICE officers unfortunately often fail to execute ICE's mandate, do not review cases accurately, are unresponsive to counsel, and are not transparent or accountable in its decision making. For example, in a case this fall, ICE re-detained someone after a judge had given them bond despite the fact that they had not violated the conditions of their bond. Despite over a month of advocacy calls and e-mails and evidence submissions, and elevating the case to the Field Office, no decision was ever issued in the case. We eventually had to request a hearing with a judge, who lowered the bond in recognition of the *decreased* public danger and flight risk.

In our experience, ICE almost never grants deferred action (we have not seen a case since at least 2012), makes other types of release decisions in constantly shifting policies that are subject to the political whims of the time, and does not consistently apply the policies they do have. The Proposed Rule is not accompanied by any guarantee of an ICE directive that would direct officers to release DACA-eligible individuals, and this would not be a sufficient substitute to regulation as we see these regularly ignored. In fact, we are aware of at least one individual who is currently detained whose DACA elapsed due to lack of funds to renew during the COVID pandemic and who has no criminal convictions. Under the Proposed Rule, he would have no way of renewing his DACA and an Immigration Judge may be forced to order him removed if he does not qualify for another form of relief from removal, not to mention that he may be forced to remain multiple months in ICE detention at U.S. taxpayer expense without the ability to support his family.

ICE then would have complete discretion in deciding whether to execute this removal order or not. It would make more sense if ICE had the authority to grant DACA like USCIS in these situations. This would also avoid double adjudications as ICE could move straight to granting DACA instead of considering the same factors for a bond, release on an order of supervision, parole, or on his own recognizance. Avoiding duplicate adjudications is favored as it, among other things, lowers

time and costs for both the DACA individual and the U.S. taxpayer, allowing all parties to focus on processing cases that really matter.

DHS Should Eliminate the Arbitrary Age Cap, Make DACA Available to All Childhood Arrivals, and Advance the Continuous Residence Date

Since June 15, 2012, when DHS issued a memo exercising prosecutorial discretion for individuals who came to the U.S. under 16 years of age, had continuously lived in the U.S. for five years before this date, and were under the age of 31 on this date,[1] more than 825,000 people have successfully applied for deferred action. On January 20, 2021, President Biden directed DHS, in consultation with the Attorney General, to take all appropriate actions to preserve and fortify DACA.[2] DHS is losing an important opportunity in not using this Proposed Rule to fully fortify DACA.

To begin, having an upper age limit is arbitrary and contrary to the purposes of the DACA program. For example, someone brought to the U.S. as a two-year-old in 1980 who has lived their whole life in the United States would not be eligible for DACA because they would have been over 30 years old on June 15, 2012. Discrimination against people based on the day they were born (on or after June 16, 1981) without well-reasoned justification is discriminatory and against the goal of providing protection to those brought to the United States as children who grew up in this country. In fact, the expanded DACA initiative announced on November 20, 2014 would have eliminated the age ceiling (in addition to advancing the continuous residence date).[3]

It is also arbitrary to not allow DACA deferred action for those who came to the United States as 16-year-old or 17-year-old children. U.S. law by and large considers that someone becomes an adult at age 18 or 21, not at age 16. This is because, importantly, most laws consider that a child under age 18 does not have the mental capacity / knowledge / wisdom to be held fully culpable for certain actions. For the same reason, there is no reason to hold a child of 16 or 17 mentally culpable for coming to the U.S. At this age it may be difficult for them to fully measure and understand the consequences for their actions. It is unclear why these children would be treated as adults for DACA purposes.

[1] To be eligible, individuals must also meet two other criteria: 1) are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and 2) ave not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety.

[2] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/

[3] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf

The Proposed Rule must offer some justification for this age cutoff, and not just parrot back the policy from the 2012 memo without explanation of why DHS is choosing this approach in the Proposed Rule. There is no way to determine that this decision is not capricious and the public must have an opportunity to present evidence to the contrary of any unstated justification. As no justification is provided, we can assume that age 18 would be a more appropriate cutoff. As things currently stand, DACA is not available to all those legally classified as children despite the Proposed Rule stating this as a goal.

DHS is also losing an important opportunity to change the continuous presence date, as the Executive found made sense in the November 20, 2014 expanded DACA announcement, without explanation. While we recognize that DHS may be concerned about pull factors – although DHS states there is no evidence of this[4] – it stands to reason that anyone here in the U.S. before the 2012 memo creating the policy would not have come because of the memo so advancing the date to at least June 15, 2012 makes sense. Many people who came to the US as children after 2007 but before 2012 have been unnecessarily excluded. Notably, the Proposed Rule gives little justification for using the more restrictive date, making the choice of 2007 arbitrary and capricious (DHS only states that there are reliance interests for not going *back* in time).

Additionally, it is worth noting that when applicants applied in 2012 they had to gather five years of evidence of continuous residence, whereas now they must look for 14 years of evidence, an often difficult task that will only become worse over time. Furthermore, asking USCIS adjudicators to review this extra evidence imposes an administrative burden that is unnecessary. We believe that DHS should consider finalizing a rule that would require initial DACA applicants to prove continuous physical presence for the five-year period prior to the date of filing the initial application rather than from June 15, 2007.

These three rather conservative changes would help maintain the initial goal of DACA – preserving DHS' limited enforcement resources by not deporting individuals who came to the United States as children. Expanding the eligible pool of DACA recipients would also increase the invaluable economic and societal contributions DACA recipients make to the United States. DACA has allowed its recipients to access education, obtain higher-paying jobs, start businesses, purchase homes and vehicles, and pay an estimated $8.7 million in taxes each year. This has contributed to job creation and enhanced economic prosperity for all United States residents.[5]

---

[4] "DHS does not perceive DACA as having a substantial effect on volumes of lawful and unlawful immigration into the United States. (412) DHS is not aware of any evidence, and does not believe that, DACA acts as a significant material "pull factor" (in light of the wide range of factors that contribute to both lawful and unlawful immigration into the United States).(413) "

[5] What We Know About the Demographic and Economic Impacts of DACA Recipients: A National and State-by-State Look, Center for American Progress (April 6, 2020), https://www.americanprogress.org/article/knowdemographic-economic-impacts-daca-recipients-spring-2020-edition/

Fee Exemptions Should Be Expanded and Applicants Should Be Allowed to Request Fee Waivers

A 2014 study found that more than 43 percent of DACA-eligible non-applicants indicated they could not afford the application fee.[6] Although DACA recipients enjoy an increased ability to pursue higher education, obtain valuable skills, and increase their earning potential, their average income is still significantly lower than the average worker in the United States.[7] According to a 2014 study, 36% of respondents reported that the costs associated with their first DACA application caused a delay in applying for the program—the average length of this delay was three months. 51% said that a $465 fee to renew DACA would impose a financial hardship on themselves or their families.[8] As stated by the Proposed Rule: "Many DACA recipients are young adults who are vulnerable because of their lack of immigration status and may have little to no means to pay the fee for the request for deferred action."

As a result DHS plans to add a $85 processing fee for DACA, which is below the estimated full cost of adjudication, while simultaneously allowing applicants to not pay the $410 to get an EAD. While we believe that applicants should have the option of not seeking a work permit (which forces them to claim an economic necessity to work when they may not be legally old enough to work, currently be full-time college students, or otherwise not be in a position to work), DHS' estimate that 30% of DACA applicants will not want the EAD identity card is much higher than our experience suggests. Our office will always recommend applying for an EAD to have a form of government-issued identity, be eligible for the associated benefits like driver's licenses, and to have the employment option without needing to wait months for approval (during which time they will likely lose any employment offer they were able to get).

We certainly believe that DHS should recoup its costs wherever possible, and in fact would support a higher fee to better allocate U.S. taxpayer dollars to truly needy cases (such as covering EAD processing costs for indigent applicants) *if* those who have the economic necessity for a fee waiver or exception can get it. As things stand, the taxpayer is subsidizing cases of individuals who can pay more than the $85 or $495 while USCIS is forcing many who cannot pay for the $495 to work legally like they need to, to go into the informal labor market – pushing down wages for everyone in the community – or risk their U.S. citizen children going onto public benefits and otherwise suffering unnecessarily. This is the opposite of a desirable outcome.

---

[6] Roberto G. Gonzales and Angie M. Bautista-Chavez, Two Years and Counting: Assessing the Growing Power of DACA, American Immigration Counsel (June 16, 2014) https://www.americanimmigrationcouncil.org/sites/default/files/research/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf

[7] What Ending DACA Could Cost the Economy, PBS News Hour (Nov. 12, 2019), https://www.pbs.org/newshour/economy/making-sense/what-ending-daca-could-cost-the-u-s-economy

[8] Tom K. Wong, In Their Own Words: A Nationwide Survey of Undocumented Millennials (Working Paper 191, May 20, 2014), https://ccis.ucsd.edu/_files/wp191.pdf

No fee waiver is currently available for DACA or an EAD, despite DACA applicants currently needing to prove the economic need to work. This must change. There is no reason that USCIS cannot or should not have the option of granting a fee waiver. Currently there are several narrow exemption categories in the USCIS DACA FAQs[9] but this is not sufficient. The Proposed Rule should allow applicants to request a fee waiver, as well as expand the exemptions. These could include, for example, those who are homeless or live below 150% of the poverty guideline, are unable to care for themselves because they suffer from a serious disability or have significant medical expenses (especially important in situations like the COVID pandemic), or live in households with multiple family members applying for DACA.

Deferred Action and Work Authorization Should Be Granted for a Period that is More than Two Years

Under the 2014 Expanded DACA initiative, DHS would have extended DACA and accompanying EADs for three-year increments, which would have provided DACA recipients, their employers, and families with greater stability and alleviated the financial burden of frequent renewals to them and USCIS (the cost of the I-821D is currently 100% covered by the U.S. taxpayer and will similarly be subsidized by the taxpayer under the Proposed Rule – only the $85 cost of biometrics is covered[10]).

There is no reason not to grant DACA for three years or longer, and no justification in the Proposed Rule for why the program should stick with two years. The costs and humanitarian concerns mitigate against a shorter timeframe. In addition to the real economic costs to the individuals, their families, their employers, the government, and the community at large, the humanitarian costs of a shorter timeframe require consideration, including the threat of being placed into immigration detention sooner, being deported, losing their job, or otherwise having their life disrupted looming over them.

EAD Renewals Should Extend from the Date of the Prior EAD's Expiration, Not from the Date the New I-765 is Approved

According to USCIS statistics, the median processing time for Form I-821D and an accompanying Form I-765 can be less than two months (USCIS has suspended calculations). Many applicants

[9] 8 CFR § 106.3(a)(2); USCIS DACA Frequently Asked Questions, Question 8, (last visited Nov. 16, 2021) https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-askedquestions

[10] Under the Proposed Rule, where an applicant applies for an EAD with their DACA the EAD biometrics fee is waived, effectively equalizing the total cost.

apply for renewal earlier than the recommended period in order to avoid a gap in deferred action and work authorization due to possible processing delays (currently at historically high levels), and to ensure that they can remain in their jobs, so they can be relied on by their employers and are able to continue supporting themselves and their families. Uncertainty about whether the program will be halted has also led some DACA recipients to reapply early. USCIS dates the renewal EAD for two years from the date of renewal so, when someone has applied early, there could be several months overlap with their current EAD. This means that they will then need to reapply that many months earlier for their next EAD, increasing the burden on them and on USCIS. For these reasons, it is more logical to date the new EAD starting from the date of the current EAD's expiration.

DACA Recipients Who File Renewal Applications Prior to the Expiration of Their Deferred Action Should Receive a 180-Day Automatic Extension

A gap in work authorization harms employers, as well as DACA recipients and their families. When a DACA recipient loses their job, the employer must seek and train a replacement. This disruption in authorization may lead employers to view DACA recipients as being less stable and reliable employees. Some DACA renewal applicants may be unable to apply several months before the deadline due to lack of funds to pay the fees or lack of legal assistance. Additionally, even when the applicant submits their paperwork many months before the deadline, USCIS may be affected by the high processing delays the agency is currently experiencing. Those who submit renewal applications before their deferred action and EADs expire should not be penalized because of processing backlogs. Nor should those who, for economic reasons, could not apply with weeks or months to spare. These are likely the individuals who need their work authorization to arrive quickly the most.

Since DACA's inception, USCIS has approved 88% of the DACA renewal applications it has accepted[11] so we are not asking for extensions for large numbers of ineligible individuals. Additionally, USCIS has precedent in extending EAD authorization *per se* to groups of people, such as Temporary Protected Status (TPS) recipients, refugees and asylees, and adjustment of status applicants.[12]

[11] Number of Form I 821D, Consideration of Deferred Action for Childhood Arrivals Requests by Intake and Case Status, by Fiscal Year, USCIS (Aug. 15, 2012 – Jun. 30, 2021), https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr3.pdf.
[12] 8 CFR § 274a.13(d); Automatic Employment Authorization Document (EAD) Extension, https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automaticemployment-authorization-document-ead-extension.

A Departure from the U.S. without Advance Parole Should Not Result in the Automatic Termination of DACA

The proposed regulations at 8 CFR § 236.23(d)(2)(ii) provide that DACA is terminated automatically without notice upon "[d]eparture of the noncitizen from the United States without advance parole." USCIS should provide all DACA recipients with notice and an opportunity to respond prior to any termination, including a termination based on travel without advance parole. The Notice of Intent to Terminate ("NOIT") should give the DACA recipient at least 30 days to respond with evidence of exigent circumstances, such as needing to depart in an emergency without sufficient time to first obtain advance parole (typically six months, with expedite requests difficult to obtain), it was "brief, casual, and innocent" (the standard used for continuous presence), or where a third party takes them across the border without their consent or they accidently miss a freeway exit through little or no fault of their own. It is a more humane approach to consider the totality of the circumstances of the individual DACA recipient's departure.

We also believe that DHS should grant advance parole more broadly as we have seen multiple DACA recipients who have compelling reasons to travel briefly abroad that do not clearly fit into the narrow FAQ categories of furthering "a humanitarian, educational or employment purpose." For example, it would meet our humanitarian goals to allow travel to attend a wedding or baptism (as opposed to a funeral), visit a close relative who is neither ill nor elderly (such as a mother or father).

USCIS Should Provide DACA Recipients with Notice and an Opportunity to Respond Before Termination

At a bare minimum, due process requires that USCIS provide a reasoned explanation of the basis for termination, as well as evidence of any allegations forming the basis for the termination. Except in very discrete cases of fraud, a threat to national security, or public safety concerns, which should be clearly enumerated in regulation,[13] USCIS should also provide an NOIT with this information and the opportunity to respond within 30 days.[14] This would: (1) decrease the risk of erroneous DACA terminations; (2) decrease the potential for racially discriminatory decision-making arising from race-based arrests that have not resulted in a conviction but may remain pending; (3) honor

[13] In other words, for example, the regulation should specific what constitutes a public safety concern. The terms as they stand are overbroad and constitutionally vague. It should also be clear that relying on arrests or charges, where there has been no trial or conviction, should be strongly disfavored and only permitted with extensive supervisory review.

[14] The *Inland Empire* injunction currently prohibits USCIS from terminating a class member's DACA except, in relevant part, if they: (1) Have a criminal conviction that is disqualifying for DACA; (2) have a charge for a crime that falls within the EPS grounds referenced in the USCIS 2011 NTA policy memorandum; (312) (3) have a pending charge for certain terrorism and security crimes described in 8 U.S.C. 1182(a)(3)(B)(iii) and (iv) or 8 U.S.C. 1227(a)(4)(A)(i).

the deeply-held reliance interests that DACA recipients possess; and (4) help ensure that the public interest in guaranteeing that USCIS is deciding cases correctly is upheld.[15] This would help ensure that no DACA recipient is unjustly deprived of DACA.

For similar reasons, the final rule should instead explicitly prohibit USCIS from terminating DACA based solely on the filing of an NTA unless specific findings of fraud, a threat to national security, or public safety concerns are made by ICE (supported by evidence and subject to mandatory supervisory review, with an opportunity to respond prior to termination). Because the discretionary actions of any individual ICE officer to initiate removal proceedings automatically overrides USCIS's reasoned, deliberative decision to grant DACA, this renders meaningless USCIS's authority to grant DACA. The proposed NTA termination provision essentially gives ICE a DACA veto based on the mere filing of an NTA, regardless of whether DHS can ultimately sustain the charges, including when the NTA is based only on a charge of being present without admission or parole (the only exception in the Proposed Rule is for asylum NTA referrals).

We also recommend that DHS add a provision to the Proposed Rule stating that removal orders should be deemed cancelled upon a grant of DACA. There is no reason to have two conflicting decisions from the same agency, and later decisions should control. At a minimum, the Proposed Rule could allow for DACA applicants to request that USCIS consider vacating a prior DHS removal order during the review of their application. This would eliminate future review of the same issues and simplify our immigration case processing system.

Conclusion

We appreciate the commitment of DHS to preserve and strengthen DACA. We believe that the DACA program can be further fortified in line with President Biden's memorandum by adopting the above proposals to ensure the "protection of equity, human dignity, and fairness." It is important to modernize and expand DACA through the notice and comment rulemaking process to provide the protection and security that these young people need to reduce fear and anxiety for them and their families, raise their sense of acceptance and belonging in the community, and increase their sense of hope for the future. These changes will help advance DHS's important enforcement mission of prioritizing its use of limited resources in line with the public interest and uphold the strong policy considerations in supporting those who contribute meaningfully to their families, their communities, their employers, and the United States as a whole.

[15] A federal court concluded that the agency's termination of Daniel's DACA based on unsupported gang allegations likely violated due process and called the agency's gang allegations against Daniel "troubling" given that it had "offer[ed] no evidence . . . to support its assertions." 313 F. Supp. 3d at 1250-51.

Migrant Center for Human Rights

Protecting the Persecuted

Sincerely,

//s// Sara Ramey

Sara Ramey
Executive Director & Immigration Attorney
sara.ramey@migrantcenter.org