New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Comment on Proposed Rulemaking on DACA; CIS No. 2691–21

Committee on Immigration Representation

November 29, 2021

Submitted Via Federal e-Rulemaking Portal: *https://www.regulations.gov*

Andria Strano
Acting Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20588-0009

Re: **Comment on CIS No. 2691–21; DHS Docket No. USCIS–2021–0006, Deferred Action for Childhood Arrivals, published at 86 Fed. Reg. 53736 (September 28, 2021).**

Dear Acting Chief Strano:

The New York State Bar Association Committee on Immigration Representation ("Committee") appreciates the efforts the Department of Homeland Security ("DHS") in the above-captioned Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule") to codify and preserve Deferred Action for Childhood Arrivals ("DACA") pursuant to President Biden's directive to United States Citizenship and Immigration Services ("USCIS") to take all appropriate action to "preserve and fortify DACA." Some of the provisions, such as the one codifying the longstanding policy on confidentiality to restrict use of information provided in a DACA request for immigration purposes, are welcomed. However, the Proposed Rule fails to take advantage of the opportunity that rulemaking affords to preserve access to DACA for its intended beneficiaries and expand its protections, to ensure fair and consistent implementation of DACA, and to protect DACA recipients and applicants from deportation. The Committee asks the Administration to substantially change the Proposed Rule to address our concerns.

I. Introduction

The Committee's mission is to examine the challenges faced by noncitizens and the courts in immigration matters and generate periodic reports and recommendations to improve the quality and availability of legal representation in immigration cases. Among other things, the Committee works to expand pro bono opportunities in immigration cases and works with NYSBA leadership

and staff to move forward the Association's goals of ensuring access to justice for all by focusing on challenges faced by immigrant communities.

New York State is home to the third highest number of active DACA recipients in the country—24,570 as of June 30, 2021[1]. In total, DACA has provided crucial benefits of deferred action and legal work authorization to almost 42,000 young New Yorkers. Loss of the DACA program would cost the state of New York approximately $2.6 billion in annual GDP.[2] It would further separate families, disrupt our economy, and destabilize communities by threatening immigrants who are part of the fabric of our state. This Proposed Rule thus disproportionally affects New York State, New Yorkers, and members of the Committee, many of whom represent DACA recipients.

For the reasons listed below, the Committee strongly opposes the Proposed Rule in its current state and cannot support it or a rule like it until our numerous concerns detailed below are addressed. It should be noted that the Committee's silence on a section of the Proposed Rule does not signify agreement with it. The Committee urges DHS to revise the current proposal immediately in accordance with the following objections.

II. The Proposed Rule Arbitrarily Maintains DACA's 2012 Eligibility Guidelines, Which Will Allow Fewer People to Benefit from DACA Each Year

The Proposed Rule codifies the original eligibility criteria for DACA, including the date by which a noncitizen must have been present in the United States and lived continuously thereafter—June 15, 2007—a date arbitrarily pegged to the day President Barack Obama first announced the DACA program: June 15, 2012. Relying on this outdated requirement will, among other harms, unreasonably burden applicants by requiring proof of at least thirteen years of continuous presence in the United States, and unjustifiably exclude an entire generation of young people who arrived in the United States after June 15, 2007. Instead, DACA protections must be strengthened by advancing the eligibility date and including a higher age limit of first-time applicants who have lived in this country for at least five years. These updates would better reflect President Biden's goal of fortifying the humanitarian benefits of the DACA program.

---

[1] United States Citizenship and Immigration Services, "Count of Active DACA Recipients as of June 30, 2021" Department of Homeland Security, United States Citizenship and Immigration Services, Office of Performance and Quality, ELIS and C3 Consolidated, queried 7/2021, TRK 7770, https://www.uscis.gov/sites/default/files/document/data/Active%20DACA%20Recipients%20%E2%80%93%20June%2030%2C%202021.pdf

[2] Nicole Prchal Svajlenka, Tom Jawetz, and Angie Bautista-Chavez, "A New Threat to DACA Could Cost States Billions of Dollars" (Washington: Center for American Progress, 2017), https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/

III. Separating Deferred Action from Work Authorization Undermines the Purpose of DACA

DACA's central benefit has been to allow undocumented individuals who entered as children to enter the formal labor market, allowing them access to "new jobs and spaces"[3] previously unavailable to them. According to a study conducted by Harvard Professor Roberto Gonzales, access to work authorization allowed previously undocumented youth to feel "more confident to make investments in educational and degree programs."[4] DACA recipients can now obtain drivers' licenses, open bank accounts, obtain jobs that provide financial independence, and support their families and communities.[5] The average hourly wage of DACA recipients increased by 86 percent after receiving DACA, from $10.46 to $19.45 per hour.[6] These benefits extend beyond the individual and their households: DACA recipients contribute an estimated $42 billion in annual GDP and their households annually pay $5.7 billion in federal taxes and $3.1 billion in state and local taxes.[7] DACA's twin benefits of deferred action and work authorization—inextricably linked under the current program—thus have allowed recipients the chance to prosper and thrive, gain financial independence, and support their families and communities.

The Proposed Rule decouples the DACA application on Form I-821D from the application process for the employment authorization on Forms I-765 and I-765WS, thereby eliminating the automatic grant of the work authorization accompanying a DACA approval. This change would cause confusion and deny many DACA applicants the ability to work. Applicants without access to legal counsel may fail to understand that their DACA applications no longer provide automatic access to work authorization, which would result in mistakes and a chain of costly remedial actions by both the applicant and USCIS. A grant of deferred action without the accompanying work authorization would undermine access to crucial benefits for DACA recipients, including access to bank accounts, school registrations for children, driver's licenses, and home utilities.

Additionally, automatically linking deferred action with work authorization is widely present in other areas of immigration law, including humanitarian remedies such as the Violence Against Women Act ("VAWA") Self-Petition and the Petition for U Nonimmigrant Status. Recipients of deferred action in these and other cases receive automatic work authorization and are exempt from a discretionary analysis in the adjudication of their applications for employment authorization.[8]

---

[3] Grace Tatter, "Why DACA Works: Immigrant Students with DACA status have an easier transition to adulthood, study finds.", Ed. Harvard Ed. Magazine, (Winter 2019), available at https://www.gse.harvard.edu/news/ed/19/01/why-daca-works

[4] Liz Mineo, "Rise of social mobility of DACA Recipients: study tracks program's benefits and limitations for undocumented young immigrants", The Harvard Gazette (November 12, 2019), https://news.harvard.edu/gazette/story/2019/11/study-tracks-dacas-benefits-limitations-for-undocumented/

[5] *Id.*

[6] "Deferred Action for Childhood Arrivals (DACA): An Overview", American Immigration Council (September 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred_action_for_childhood_arrivals_daca_an_overview_0.pdf

[7] "The Case for Protecting DACA Recipients", Home Is Here, https://comment-wp.homeishere.us/wp-content/uploads/sites/2/2021/09/210908_HomeIsHere_ResearchSummary_v2.pdf

[8] "Noncitizens Granted Deferred Action", Part 10, Chapter 3, Policy Manual, United States Citizenship and Immigration Services (Current as of November 19, 2021), https://www.uscis.gov/policy-manual/volume-10-part-b-chapter-3

The continuation of the policy of approving employment authorization as part of DACA is therefore consistent with and supported by law and USCIS practice.

IV. The Proposed Rule Allows USCIS to Terminate DACA without Notice or Opportunity to Respond, Violating USCIS's Obligation to Adjudicate DACA Based on the "Totality of the Circumstances."

According to the Proposed Rule, USCIS "may terminate a grant of DACA at any time if it determines that the recipient did not meet the threshold criteria; there are criminal, national security, or public safety issues; or there are other adverse factors resulting in a determination that continuing to exercise prosecutorial discretion is no longer warranted." The Proposed Rule would permit the agency to terminate DACA immediately—without providing a Notice of Intent to Terminate (NOIT) or opportunity to respond—in any case.

Such termination without notice contravenes USCIS's stated goal of gathering full information to allow for a "totality of the circumstances" determination of DACA eligibility. USCIS should modify its Final Rule to provide for notice of the proposed grounds for termination and fair opportunity to respond. Notice and an opportunity to respond would benefit and ensure due process for all DACA recipients as well as provide the agency an early opportunity to correct errors.

V. The Proposed Rule Would Allow ICE and CBP to Force USCIS to Automatically Terminate DACA by Issuing and Filing an NTA or Prevent Renewal by Continuing to Detain an Individual

As discussed *supra*, the Proposed Rule would purport to assist USCIS in adjudicating DACA eligibility based on the *totality of the circumstances*. The Proposed Rule recognizes that USCIS is in the best position to make DACA determinations based on considered agency policy. 86 Fed. Reg. at 53,815–16. However, the Proposed Rule would authorize Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP") officers to compel USCIS's denial of a DACA application simply by issuing and filing a Notice to Appear ("NTA") or holding someone in immigration detention. ICE and CBP often base these decisions on reports of minor interactions with the criminal legal system and without the benefit of complete or accurate information. Indeed, statistics show that criminal charges are frequently dismissed or lowered. For example, a 2013 report shows that a quarter of felony charges in the 75 largest counties in the U.S were outright dismissed within a year.[9] Moreover, ICE and CBP sometimes detain and place people in proceedings based upon convictions that do not make them deportable. Nevertheless, a DACA recipient could lose their status even if they are never convicted of anything at all--let alone an offense that does not make them deportable--based upon ICE or CBP's action.

This reliance on contact with law enforcement is especially troubling because many DACA recipients are Black, Latinx, and/or other people of color and part of communities that experience high rates of policing. Automatically terminating DACA in response to these contacts—especially without a conviction—unfairly perpetuates the deeply flawed criminal legal system's significant

---

[9] Brian A. Reaves, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *Felony Defendants in Large Urban Counties, 2009—Statistical Tables* 22, 24 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

racial disparities in arrest and charging decisions. As just one common example, studies across the country have continued to find persistent racial bias in police traffic stop and search decisions,[10] which extends throughout the various stages of the criminal legal system.[11] The agency should not create rules that magnify these significant racial disparities.

Allowing ICE and CBP to overrule USCIS's determinations about a person's suitability for DACA, based on limited information and without accountability, would create arbitrary results and violate the core principles of DACA. Instead, affording USCIS the independence to make a separate judgment about whether to continue deferred action in a given case would ensure that the agency's discretion is exercised in a consistent manner and in keeping with adjudication guidance.

VI. The Proposed Rule Does Not Address Special Considerations Needed for Expunged or Juvenile Records

Under current DACA guidance, expungements and juvenile adjudications do not automatically disqualify people from DACA eligibility. However, the very process of expungement and juvenile adjudications recognize the capacity for rehabilitation of impacted individuals and the special vulnerabilities of youth. Moreover, as noted *supra*, many DACA recipients are Black, Latinx, and/or other people of color who come from communities harmed by a history of racial injustice and a deeply flawed law enforcement system. In immigration court proceedings, an adjudication of a criminal offense in juvenile court does not constitute a criminal conviction for immigration purposes and will not trigger adverse immigration consequences that flow from a conviction.[12] USCIS should likewise adopt a clear rule that exempts consideration of expunged convictions or juvenile delinquency adjudications for DACA decisions instead of leaving it to individual adjudicators' discretion. This approach would be more efficient and align better with current case law.

---

[10] Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUM. BEHAV. 736, 737, 739 (2020) (detailing results of analysis of "approximately 95 million traffic stops from 21 state patrol agencies and 35 municipal police departments" from 2011 through 2018); *see also* Alex Chohlas-Wood, et al., *An Analysis of the Metropolitan Nashville Police Department's Traffic Stop Practices*, STAN. COMPUTATIONAL POL'Y LAB 2 (Nov. 19, 2018), https://policylab.stanford.edu/media/nashville-traffic-stops.pdf (noting that "the stop rate for black drivers in Nashville in 2017 was 44% higher than the stop rate for white drivers," and the disparity increased to 68% for non-moving violations, e.g., broken taillights or expired registration tags.).

[11] Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUM. BEHAV. 736, 737, 739 (2020) (detailing results of analysis of "approximately 95 million traffic stops from 21 state patrol agencies and 35 municipal police departments" from 2011 through 2018); *see also* Alex Chohlas-Wood, et al., *An Analysis of the Metropolitan Nashville Police Department's Traffic Stop Practices*, STAN. COMPUTATIONAL POL'Y LAB 2 (Nov. 19, 2018), https://policylab.stanford.edu/media/nashville-traffic-stops.pdf (noting that "the stop rate for black drivers in Nashville in 2017 was 44% higher than the stop rate for white drivers," and the disparity increased to 68% for non-moving violations, e.g., broken taillights or expired registration tags.).

[12] *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135. 138 (BIA 1981); *Matter of CM,* 5 I. & N. Dec. 327, 335(BIA 1953).

VII. DACA is Legal and Supported by the Administrative Procedure Act

Congress has delegated broad authority to DHS over enforcement against individuals within its judgment and discretion. Existing areas of humanitarian relief, including *inter alia*, the VAWA Self-Petition, U non-immigrant status, and Temporary Protected Status, demonstrate the longstanding and well-established practice of granting deferred action. In implementing and codifying DACA, USCIS is appropriately exercising its discretion in favor of individuals who came to the United States as children and who should therefore not be a priority for deportation. Further, 8 C.F.R. § 1.3(a)(4)(vi) makes clear that deferred action does not grant status, but merely exempts individuals of accumulating "unlawful presence."

VIII. Conclusion

The Committee applauds DHS for drafting this Proposed Rule that seeks to preserve and strengthen DACA. However, as outlined above, many of the proposed changes conflict with this stated intent. In particular, the Proposed Rule would not do enough to preserve access to DACA for its intended beneficiaries, strengthen DACA's protections, ensure fair and consistent application of DACA, and protect DACA recipients and applicants from deportation.

The Committee stands ready to elaborate on any of the concerns and proposals outlined above and thanks DHS for their consideration of our concerns and feedback.

Submitted on behalf of the New York State Bar Association Committee on Immigration Representation on November 29, 2021, by

/s/ Shayna Kessler
Shayna Kessler, Esq.
Committee Co-chair
skessler@vera.org

/s/ Stephen Yale-Loehr
Stephen Yale-Loehr, Esq.
Committee Co-chair
swy1@cornell.edu