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November 18, 2021

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

Re: Comment in Response to the DHS/USCIS Notice of Proposed Rulemaking (NPRM) Deferred Action for Childhood Arrivals; CIS NO. 2691-21; DHS Docket No. USCIS-2021-0006; RIN 1615-AC64

Dear Chief Deshommes,

The Immigrant Legal Resource Center (ILRC) submits this comment in response to the Department of Homeland Security's (DHS) notice of proposed rulemaking (NPRM) for Deferred Action for Childhood Arrivals published on September 28, 2021.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

For the past nine years, the ILRC has been involved in advocating and working on Deferred Action for Childhood Arrivals (DACA). The ILRC has provided seminars on DACA issues, coordinated networks of legal service providers and DACA advocates across the country sharing advice and DACA experiences, and worked closely with organizations in a variety of models that assist DACA requestors. The ILRC is a leader in this space, producing trusted resources for immigrant practitioners, including webinars, trainings, and a practice manual, *DACA: The Essential Legal Guide*.

DACA is a lawful policy exercising DHS's deferred action authority to provide immigrant youth with protection from deportation and employment authorization. Given the legality of the program and Congress' failure to enact a permanent, inclusive solution, the ILRC strongly believes that DHS must include the following changes and recommendations in the regulation in order to fulfill the purpose of DACA.

The ILRC makes the following recommendations to the proposed rule.

- DHS should eliminate arbitrary dates that only serve as barriers to DACA. The date of eligibility should be updated to the date that the final rule is promulgated, request that applicants submit evidence of residency for the five-year period prior to the final rule's publication date, and remove the age cap. These measures will ensure that DHS is truly protecting immigrant youth who arrived in the U.S. as children.
- The Department must ensure that all DACA recipients are notified, without exception, before their DACA status is terminated and ensure that DACA is never terminated by the filing of a Notice to Appear (NTA) with the Executive Office for Immigration Review (EOIR). Automatic termination without notice violates an individual's due process and presents serious Administrative Procedures Act (APA) concerns. Further, the automatic termination of DACA by the filing of an NTA with EOIR is inconsistent with current DACA policy which permits individuals to request DACA while in removal proceedings, even if those proceedings have been administratively closed or the applicant has received an order of removal.
- DHS must eliminate crime categories that automatically bar an individual from accessing DACA. Excluding individuals based on a framework which is broadly defined and disproportionately implemented excludes and criminalizes the communities that DACA was implemented to serve.

I. Eliminate the Arbitrary Dates that Only Serve as Barriers to DACA and Prevent DHS from Fulfilling the Purpose of DACA.

The DACA policy, first announced in June 2012, was implemented as a stopgap measure to protect those individuals who entered the country as children. Then-President Obama's administration put the policy in place due to Congress' failure to once again pass the Dream Act or any other legislative solution that would offer permanent relief to this population.[1] Over the last nine years, this policy has given protection to over 825,000 people who have demonstrated they meet the policy's requirements. While protection from deportation and a pathway to citizenship is supported by a majority Americans,[2] DACA has been under attack by conservative, racist, and meritless agendas rooted in anti-immigrant sentiment. In response to these attacks, on January 20, 2021, President Biden directed DHS, to take all appropriate actions to "preserve and fortify" DACA.[3] Furthermore, the President stated that "DACA should reflect [that DACA recipients] should not be a priority for removal."[4]

In order to preserve and fortify DACA, it is imperative to ensure: 1) the purpose of the DACA policy is fulfilled, and 2) all those who meet the criteria of having arrived in the United States as children receive protection under DACA. These goals cannot be met if the regulation simply codifies the policy as it was written in 2012, incorporating the same age and residency requirements instead of updating and advancing those requirements to be current with

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[1] The White House Office of Press Secretary, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration.
[2] Joseph Guzman, Majority of Americans back path to citizenship for undocumented immigrants, new poll finds, The Hill (Feb. 4, 2021), https://thehill.com/changing-america/respect/537370-majority-of-americans-back-path-to-citizenship-for-undocumented
[3] Executive Office of the Presidency, "Preserving and Fortifying Deferred Action for Childhood Arrivals: Memorandum for the Attorney General and Secretary of Homeland Security," Memorandum of January 21, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/.
[4] *Id*.

today's needs and time. If the requirements for DACA are not expanded, DHS will not "preserve and fortify" DACA because it will fail to protect countless individuals who meet all the requirements of the DACA program but for the arbitrary dates established almost a decade ago. The regulation should update the DACA requirements to ensure that individuals who meet the same attributes as current DACA recipients are not excluded. To ensure that all who arrived as children are included, DHS must:

- Eliminate the requirement that an individual needs to have been born "on or after June 16, 1981."
- Advance the date for physical presence from June 15, 2012, to the date the final rule is implemented.
- Advance the date for physical presence from June 15, 2007, to five years prior to the date the final rule is published.

With these changes, the requirements for an individual to receive DACA should be as follows:

- Arrived in the United States before reaching their 16th birthday;
- Has continuously resided in the United States for the past 5 years from the date the final rule is implemented;
- Was physically present in the United States on the day the final rule is published;
- Has no lawful immigration status at the time of filing the request for DACA;
- Is currently enrolled in school, has graduated or obtained a certificate of completion from high school, has obtained a GED certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces.

In addition, the regulation should adopt the any credible evidence standard for the various forms of evidence that are allowed to show continuous residence, including primary sources like school and work records, to secondary sources like parent documentation, church records, and affidavits. In particular, the regulation should ensure that affidavits are sufficient to attest to presence, age, and entry date.

II. Allow DACA Recipients the Opportunity to Contest the Department's Allegations to Terminate DACA and Eliminate the Department's Ability to Terminate DACA Automatically Upon Filing of a Notice to Appear (NTA).

The proposed rule would allow United States Citizenship and Immigration Services (USCIS) to "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."[5] The rule would permit the agency to terminate DACA immediately—without providing a Notice of Intent to Terminate (NOIT) or the opportunity to contest the Department's allegations.

The proposed rule also provides that deferred action under DACA is "terminated automatically without notice upon: (i) Filing of a Notice to Appear for removal proceedings with EOIR, unless the Notice to Appear is issued by USCIS solely as part of an asylum case referral to EOIR."[6]
An automatic termination without notice and an opportunity to respond presents serious Administrative Procedures Act (APA) and due process concerns. Moreover, the automatic termination when an NTA is filed with EOIR is

[5] Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53769 (proposed Sept. 28, 2021).
[6] *Id*. at 53816.

inconsistent with other DHS and DACA policies. Current policy and the proposed rule language permit an individual to apply for DACA while in removal proceedings even if proceedings have been administratively closed or the individual has received a voluntary departure order or a final order of exclusion, deportation, or removal.[7]

A. Terminating Any DACA Without the Ability to Contest the Department's Allegations Violates the APA and the Fifth Amendment of the U.S. Constitution

As found in *Inland Empire - Immigrant Youth Collective v. Nielsen*[8] terminating DACA without notice or a fair process violates the APA because such terminations are arbitrary and capricious. Although the judge in *Inland Empire* did not reach the constitutional issues, such terminations also raise serious due process concerns under the Fifth Amendment of the U.S. Constitution.

Once a person is granted deferred action, a protected interest is conferred such that due process protections are required under the Fifth Amendment of the U.S. Constitution.[9] Thousands of DACA beneficiaries have come to rely on their deferred action and associated employment authorization to attend school and work. As the Supreme Court has recognized, the consequences of any DACA rescissions are significant and "radiate outward" beyond DACA recipients to their families, employers, schools, local and state governments, and more.[10]

The Department's reasoning for automatic termination includes instances when there are criminal, national security, or public safety concerns.[11] The proposed rule recognizes that USCIS should have full information to allow for a true "totality of the circumstances" determination.[12] This makes sense as the Department's allegations often involve a complex analysis that requires further evidence before making a determination. For example, certain persons who come in contact with law enforcement and are alleged to be a criminal, national security, or public safety concern might ultimately have their cases dismissed in criminal court, make plea arrangements for lower-level convictions, or obtain expungement or other post-conviction relief. Furthermore, it is well documented that Black immigrants and other communities of color are disproportionately targeted by law enforcement. Therefore, DACA beneficiaries deserve to contest a possible termination prior to DHS' final determination to raise concerns about discriminatory enforcement practices, correct inaccuracies, demonstrate extenuating circumstances, and provide information about positive equities.

Providing notice and a chance to respond before any termination decision is vital to that objective. It is therefore in the interest of the Department, DACA recipients, and their communities to provide this process before potentially upending DACA recipients' lives. There is no reason to limit this process to certain individuals, as the proposed rules currently does. Notice and an opportunity to respond would benefit and ensure due process for all DACA recipients as well as provide the Department an early opportunity to correct errors.

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[7] *Id*. at 53769.
[8] *Inland Empire - Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX at *18 (C.D. Cal. Apr. 19, 2018).
[9] *See Inland Empire - Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX at *18 (C.D. Cal. Apr. 19, 2018) ("the grant of DACA constitutes a conferred benefit that requires procedural safeguards before it can be terminated.").
[10] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914 (2020).
[11] Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53769 (proposed Sept. 28, 2021).
[12] *Id*. at 53765.

B. Terminating DACA Automatically Upon Filing of an NTA is Inconsistent with the Overall DACA Policies and DHS Prosecutorial Discretion Guidelines

DHS should implement their second alternative cited in the proposed rulemaking to strike the provision to automatically terminate DACA solely based on the filing of an NTA in immigration court.[13]

The current DACA policy and the proposed rule allow individuals to apply for deferred action irrespective of whether they are in removal proceedings or have already received a final order of exclusion, deportation, or removal or voluntary departure.[14] As courts have recognized, having DACA and being in removal proceedings are not incompatible. In fact, many DACA and other deferred action recipients are simultaneously in removal proceedings and even have final removal orders. The mere fact that someone is in removal proceedings does not provide a reasoned basis to automatically terminate DACA.

Finally, terminating DACA on the sole basis of an NTA filing also runs afoul of the recognized DACA policy to take a "totality of the circumstances" analysis before seeking termination.[15] The Department's current enforcement priority policies are also relevant in that they provide guidelines to DHS on when to provide certain benefits, such as deferred action.[16] To ensure consistency, DHS should not terminate DACA solely on the basis of an NTA filed with EOIR.

III. Eliminate the Crime Categories that Automatically Bar an Individual from Accessing DACA.

The ILRC strongly believes that in order to fulfill DACA's promise of protection from deportation for individuals who arrived here as children, the regulation must eliminate crime categories that automatically bar an individual from accessing DACA. Excluding individuals based on a framework which is broadly defined and disproportionately implemented across cases unfairly excludes communities who are already criminalized, surveilled, and facing discrimination. If the purpose of this rule is to "preserve and fortify DACA," DHS must implement a rule that does not arbitrarily punish individuals that have had contact with the criminal legal system. The criminal framework within DACA includes a unique system of criminal bars, separate from the grounds of inadmissibility and deportability, that are used to unfairly target certain members of the DACA population. The DACA framework singles out certain contact with the criminal legal system based on type of offense or conduct, without providing a clear framework. Currently, this unfairly excludes from DACA protection those targeted by unfair policing in their communities, compounding the impact of racial discrimination.

The framework does not account for differences in sentencing or severity of punishment across different localities. In addition, without a clear framework, the DACA criteria encourages officers to reach beyond the criminal legal system's disposition and form their own judgment of the contact with the criminal legal system, without the benefit of due process.

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[13] Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53770 (proposed Sept. 28, 2021).
[14] *Id.* at 53769.
[15] *Id.* at 53765.
[16] *See* Memorandum from Alejandro N. Mayorkas, Secretary, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021).

The regulation should eliminate all automatic criminal bars to DACA. Should DHS continue to unfairly use criminal legal system contact to disqualify individuals from DACA, the ILRC urges the Department to implement the following measures in the final regulation:

- Individuals should not be barred from DACA by any single offense or offenses where a sentence of less than 90 days was imposed.
- The regulation should make clear that expungements in the criminal legal system eliminate the conviction for purposes of establishing DACA eligibility, and thus should not reference INA §101(a)(48)(A).
- The regulation should exclude undefined exclusions, such as domestic violence and DUIs from the specific misdemeanor list of automatic bars to DACA.

A. If DHS Continues to Use Criminal Bars to Disqualify Individuals from DACA, a Single Offense or Offenses Where a Sentence of Less than 90 Days was Imposed Should Not be Automatic Bars.

A DACA recipient should not be barred from qualifying for DACA for any conviction where a sentence of less than 90 days was imposed. By adopting this measure, the regulation will increase consistency in DACA adjudications and ensure that individuals are not disqualified for offenses for which a lesser sentence was imposed.

As noted throughout this comment, adjudicators have applied the misdemeanor bars inconsistently in the DACA context. In addition, state criminal legal systems present a wide array of different treatment for different offenses, as well as regional differences in policing that compound the impact of disparate treatment for individuals who would otherwise be eligible for DACA and would benefit from protection from removal and work authorization.

While singling out members of immigrant communities based on contact with the criminal legal system for DACA protection does not align with the ILRC's views on how the DACA program should be implemented, limiting the impact of misdemeanor offenses may deter some, but not all, of the inconsistent and arbitrary adjudications characterizing the program.

B. The Regulation Should Restore Expungements for DACA and Eliminate the Reference to INA § 101(a)(48)(A).

The definition of "conviction" for immigration purposes in the DACA adjudication context should not include an adjudication or judgment of guilt that has been expunged, dismissed, deferred, annulled, invalidated, withheld, sealed, vacated, or pardoned, or any similar rehabilitative disposition. This varied group of laws are referred to for DACA purposes as "expungements." Many states have a form of "rehabilitative relief" that permits a criminal court to erase a prior conviction because the person showed rehabilitation by successfully completing probation, counseling, or other requirements.[17]

Since the beginning of the DACA program, an expunged conviction has not been an absolute bar to DACA, although it may be considered as a matter of discretion.[18] The DACA Frequently Asked Questions (FAQs) state that:

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[17] M. Love, National Association of Criminal Defense Lawyers – Judicial Expungement, Sealing, and Setaside (Chart #4) March 2015, available at http://www.ajc.state.ak.us/acjc/docs/resources/nacdl/expungement.pdf.
[18] USCIS, *DACA Frequently Asked Questions,* Q68, at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.

Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted.

The proposed regulation eliminates the effectiveness of expungements because it provides, for the first time, that a conviction is defined for DACA purposes by INA § 101(a)(48)(A).[19] That definition of conviction does *not* give effect to expungements.[20]

This would be a disastrous change. DACA uses a unique system of strict criminal bars, which do not track the grounds of removal, and uses its own policy on expungements. Expungements were available for similar programs such as the Special Agricultural Worker (SAW) and other Legalization programs of the 1980s and are included in legislation for farmworkers, essential workers, immigrant youth, and others currently before Congress. Recognizing the validity of expungements is critical to meeting the intent of DACA and giving effect to important criminal legal system safeguards that serve to recognize the potential of youth, the possibility of reform, and counter the impact of policing in our communities.

C. The Regulation Should Define Domestic Violence to Ensure Consistent Adjudication Across the Country.

As stated previously, the ILRC does not believe an individual should be disqualified from any form of immigration relief based on contacts with the criminal legal system. Domestic violence is a pervasive problem requiring complex and nuanced solutions. The denial of immigration relief for domestic violence offenses does nothing to address the needs of immigrant survivors of domestic violence but rather further harms immigrant communities.

Conviction of a misdemeanor "domestic violence" offense is a significant misdemeanor (although that term will not be used in the future) and an absolute bar to DACA. However, there is no definition of a domestic violence offense for DACA purposes, and the result has been a widespread pattern of inconsistent adjudications and irrational bases for denials. Consistent adjudications necessitate a definition of a domestic violence offense and a requirement that the person have been convicted of that offense. It also is not possible for defense counsel to provide a qualifying *Padilla* advisal of the immigration effect of a plea without a clear definition. In practice, any misdemeanor related to a domestic conflict has been deemed a bar to DACA. In addition, DACA applicants who initially were charged with a domestic offense, but who either were never convicted of any offense at all or were convicted of a different offense not related to domestic conflict, are routinely denied DACA. The denials have been based on the grounds that the event is a disqualifying domestic violence offense or a "discretionary" (but actually automatic) basis for denial.

While the DACA application process is not the right place to address domestic violence in our communities, DHS must provide clear guidance supported by law if such a bar is included. DHS could consider using the definition of a "crime of domestic violence" from the deportation ground, INA § 237(a)(2)(E)(i). This requires (a) a conviction (b) of a crime of violence as defined in 18 USC § 16(a), in a qualifying domestic situation.

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[19] Proposed 8 CFR § 236.22(b)(6), at p. 53815.
[20] *Matter of Pickering,* 23 I&N Dec. 623 (BIA 2003).

D. The Regulation Should Eliminate DUI as Automatic Crime Bar.

Conviction of a misdemeanor "driving under the influence" (DUI) is a significant misdemeanor (although that term will not be used in future) and an absolute bar to DACA. Since the implementation of DACA, this issue has not been consistently or fairly adjudicated. This has led to erroneous denials and requests for evidence that are highly dependent upon the state in which the applicant resides. For example, some state laws criminalize sitting in a vehicle while inebriated, without attempting to operate (drive) it. Other states have statutes that criminalize offenses considered less than a "regular" DUI but still have some element of impairment, or simply include the use of the word "impairment" in the title, and these have been counted as DUI bars to DACA. Other state laws do not require any finding of impairment of the ability to drive safely due to consumption of a substance and some of these laws have been wrongly counted as a DUI and an automatic bar to DACA.

The regulation should eliminate DUIs from the list of specific misdemeanors that would automatically bar someone from qualifying for DACA.

Conclusion

The ILRC strongly urges DHS to consider the recommendations proposed in this comment. The DACA policy is vital to countless individuals, families and communities. DHS should strive to meet the purpose of DACA, of offering protection from deportation to those who arrived as children and expand the protection so that it does not leave out individuals because of arbitrary dates, absurd criminal frameworks, and terminations. DHS should publish a rule that ensures individuals are protected while Congress works on a permanent inclusive solution for all.

Sincerely,

DocuSigned by:
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