**[DATE – please note this comment must be submitted by November 29, 2021]**

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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

To whom it may concern:

[*Insert organization name*] issues the following comment in response to the Department of Homeland Security’s (DHS) notice of proposed rulemaking (NPRM) published on September 28, 2021, for *Deferred Action for Childhood Arrivals* (DACA)*.*

[*Insert organization’s work with DACA or DACAmented individuals*]

*[Add any general thoughts on DHS DACA rulemaking, areas of concern and areas of support that your organization wanted to raise up, even if not discussed in detail below. This is also a good place to add any positions or areas you want to include in the comment.*

*Examples of positions or thoughts on the rule could include:*

* DACA is lawful, and the Department has the power to implement the deferred action policy.
* Expanding DACA— DACA must be expanded to include those that have entered and maintained presence in recent years. At minimum, the agency should eliminate the age cap, and move the required date for eligibility criteria from 2012 to 2021. Applicants should only be required to prove continuous residence for 5 years back from when rule is implemented, and DHS should make clear that various forms of evidence, including affidavits attesting to presence is sufficient.
* DACA should not be terminated without notice. In order for the DACA to offer stability and protection, notice provisions are essential. Automatic termination upon issuance of a Notice to Appear undermines the tenets of DACA, which protects against removal and can be requested while in proceedings.
* Holding DACA status should always prevent the accruing of unlawful presence.
* DACA is not a solution, it is a stop gap measure. There needs to a permanent solution that offers inclusive immigration relief for all with no criminal bars.]

Given these important principles and the need to offer protection to all those that entered as children, we offer the following comments to address the arbitrary and discriminatory criminal bars to DACA.

**Crimes and DACA:**

[*Organization’s Name*] strongly believes that in order to fulfill the promise of DACA, the protection from deportation of 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, disproportionately 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.

DACA was implemented by the Obama Administration in 2012 through executive action as a stopgap measure to protect youth from deportation and provide benefits while Congress passes a permanent solution. For the past nine years, individuals who have DACA have lived in limbo, wondering if they would meet obscure and sometimes arbitrary requirements that would permit them to receive DACA on a two-year basis. These requirements include 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, these exclusions fail to acknowledge how Black communities and other communities of color are targeted by discriminatory policing, compounding the impact of racism upon these communities.

The framework also does not account for differences in sentencing or severity of punishment across different localities. In addition, without a clear framework, the DACA criteria encourages immigration 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.

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, we urge the Department to implement the following measures in the final regulation:

* Individuals should not be barred from DACA by any single offense, especially where a sentence of 90 days or less 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.

1. **If DHS continues to use criminal bars to disqualify individuals from DACA, a single offense or offenses where a sentence of 90 days or less 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 90 days or less 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, the 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 our views on how DACA should be implemented, limiting the impact of misdemeanor offenses may deter some, but not all, of the inconsistent and arbitrary adjudications characterizing the policy.

*[If your organization has anecdotal evidence of DHS’ over-criminalization of DACA recipients with single offenses that carried a sentence of fewer than 90 days, you could include those stories here.]*

1. **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 permit a criminal court to erase a prior conviction because the person showed rehabilitation by successfully completing probation, counseling, or other requirements.[[1]](#footnote-2)

Since the beginning of the DACA an expunged conviction has not been an absolute bar to DACA, although it may be considered as a matter of discretion. [[2]](#footnote-3) The DACA Frequently Asked Questions (FAQs) state that:

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).[[3]](#footnote-4) That definition of conviction does *not* give effect to expungements.[[4]](#footnote-5)

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.

*[If your organization has anecdotal evidence of DACA recipients benefiting from the case-by-case analysis of expunged convictions, you could include those stories here.]*

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

While the criminal bars should be eliminated in their entirety, any bars remaining in the rule should provide clear guidance to avoid arbitrary application. 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 currently is designated as 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 that presented some underlying facts related to domestic conflict has been deemed a bar to DACA. This is problematic, because such a practice does not give weight to the resolution reached in the criminal court system. Applicants are then barred from DACA, without regard to whether they were actually convicted for a domestic violence offense. 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.

*[If your organization has anecdotal evidence of DACA being denied due to inconsistencies in the interpretation of domestic violence offenses, you could include those stories here.]*

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.

1. **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.

*[If your organization has anecdotal evidence of inconsistencies around DUIs or where DACA applicants have been automatically barred for an offense that was less than a DUI, you could include those stories here.]*

Because of this inconsistency, the regulation should eliminate DUIs from the list of specific misdemeanors that would automatically bar someone from qualifying for DACA.

**Conclusion**

[*Organization Name*] strongly urges DHS to consider the recommendations proposed in this comment. The DACA program is vital to countless individuals, families and communities. DHS should strive for consistency and equity in its adjudications.

Sincerely,

[*Organization Contact]*

*[Organization Name]*

1. 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>. [↑](#footnote-ref-2)
2. USCIS, *DACA Frequently Asked Questions,* Q68, at <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions>. [↑](#footnote-ref-3)
3. Proposed 8 CFR § 236.22(b)(6), at p. 53815. [↑](#footnote-ref-4)
4. *Matter of Pickering,* 23 I&N Dec. 623 (BIA 2003). [↑](#footnote-ref-5)