

November 29, 2021

Ms. Samantha Deshommnes, Chief
Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 20529

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

Submitted VIA www.regulations.gov

Dear Chief Deshommnes,

I am writing on behalf of Northwest Immigrant Rights Project (NWIRP) to submit this comment regarding the Notice of Proposed Rulemaking published by the Department of Homeland Security (DHS) on September 28, 2021, titled "Deferred Action for Childhood Arrivals," CIS NO. 2691-21; DHS Docket No. USCIS-2021-0006; RIN 1615-AC64. We appreciate the opportunity to provide the following comments, which we urge DHS to incorporate into the final rule.

Interest of Northwest Immigrant Rights Project

Northwest Immigrant Rights Project (NWIRP) is a nationally-recognized legal services organization founded in 1984. Each year, NWIRP provides free direct legal assistance in immigration matters to over 10,000 low-income people from over 130 countries, speaking over 60 different languages. NWIRP also strives to achieve systemic change to policies and practices affecting immigrants through impact litigation, public policy work, and community education. NWIRP serves the community from four offices in Washington State located in Seattle, Granger, Tacoma, and Wenatchee.

NWIRP has particular expertise on the topic of the Deferred Action for Childhood Arrivals (DACA) program. NWIRP has been providing immigration legal services for over 35 years and is currently the largest nonprofit organization focused exclusively on providing immigration legal services in Washington State. Since the creation of the original DACA program in June 2012, NWIRP has assisted thousands of individuals in Washington State with preparing and filing initial and renewal applications for DACA.

Comments

We applaud the Administration's efforts to preserve and defend the DACA program through the proposed rule as we continue to urge Congress to adopt legislation that will provide a path to citizenship for DACA recipients and other undocumented community members. We appreciate the recognition in the Notice of Proposed Rulemaking (NPRM) of the many contributions made by DACA recipients and the benefits that DACA recipients, their families, employers, schools, communities, and the U.S. economy have obtained in reliance on the DACA program. However, we believe the NPRM fails to make important changes that will add stability to the lives of immigrants who were brought to this country as children and will advance the goals that motivated the original DACA program. Below, we outline the changes we would urge DHS to make when it publishes its final rule.

1. The Final DACA Rule Should Reset Eligibility Dates

The NPRM was published more than nine years after the original DACA program was announced by President Obama in 2012. However, the NPRM fails to update the dates of eligibility for the program. We urge USCIS to make the following changes:

- a. DACA should be available to individuals who have resided in the U.S. five years prior to their application

The NPRM retains as a threshold criteria the requirement in the original DACA program that an individual must have been living in the United States since June 15, 2007 in order to qualify for the program. This limitation will mean that people who entered at a young age and who have lived in the U.S. for most of their lives but who entered after June 15, 2007 will continue to be unable to access the protection of the DACA program. We urge DHS to reconsider this approach.

When President Obama announced DACA, he recognized that individuals who had entered the U.S. at a young age and who had lived in the U.S. for five years had developed significant ties that warranted protection. The same rationale for exercising prosecutorial discretion with respect to people then who entered at a young age, who have no current lawful immigration status, and who are generally low enforcement priorities for removal should be applied to people who meet those criteria today.

Changing the continuous residence requirement from June 15, 2007 to five years prior to their application is a more reasonable approach. Currently, the criteria would require proof of residence in the U.S. for over 14 years, which presents a burden for the DACA applicant and for DHS officers who have to review 14 years worth of evidence. And that timeline will continue to be extended if the continuous residence requirement is maintained as in the NPRM. We therefore urge DHS to set the continuous residence requirement to five years prior to the time of the person's application for DACA.

- b. DACA should be available to individuals who entered the U.S. prior to 21 years of age (or, at most, 18 years of age)

The NPRM retains as a threshold criteria the requirement in the original DACA program that an individual must have come to the U.S. under the age of 16. This criteria has left otherwise eligible youth out of DACA because they either arrived after their 16th birthday but before becoming an adult (age 18) or because they have no proof that they entered the U.S. before the age of 16 before enrolling in school. The Immigration and Nationality Act (INA) provides that in general, a child for immigration purposes is under 21 years of age and unmarried. INA § 101(b). The other definition of child applies to citizenship and naturalization--a child generally must be under the age of 18 and unmarried. INA § 101(c). Consistent with the rationale for the DACA program and existing authority, unmarried people who entered the U.S. as a child--either under age 21 or even under age 18--should have the opportunity to avail themselves of prosecutorial discretion under DACA. Changing the age guideline ensures that immigrant youth, as the rationale for DACA intended, will be covered.

- c. DACA should be available regardless of the age of the applicant

The NPRM retains as a threshold criteria the requirement in the original DACA program that an individual must have been born on or after June 16, 1981 in order to qualify for the program. Individuals should not be excluded from DACA for a reason outside of their own control. When DACA was announced in June 2012, many youth who happened to be born before June 16, 1981 were faced with the blow of being excluded from the program due to an arbitrary cutoff date. Of those excluded from the DACA program, many had advocated for the DREAM Act since its first introduction in 2001, many were now college graduates hoping to gain lawful work authorization to be able to use their degrees, and many were parents or caretakers of their parents who came short of an opportunity to provide a better life for their loved ones due to the age framework around the DACA program. People who meet the DACA threshold criteria but are otherwise barred from applying due to being 31 or older on June 15, 2012 remain in great need of DACA as they have been living in the U.S. for decades without any immigration relief. Opening DACA eligibility to allow for these applicants, who present low or no risk of enforcement, will increase the economic benefits already seen, and save time and resources for DHS.

2. DACA Status Should be Granted For Renewable Five-Year Periods and Automatic Extensions Should Be Allowed

For the program to be more fair and inclusive, and less time intensive for USCIS adjudicators, DHS should increase the length of deferred action and work authorization. DACA recipients seek to renew their DACA status to continue to work, and statistics show that they are overwhelmingly granted their renewals. In fact, USCIS data shows that only about 7% of DACA renewals were denied or rejected during the period from 2015 to 2019.¹ Allowing for a longer

¹ See https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2020_qtr2.pdf.

grant period will allow for better use of DHS resources, and more economic stability, positively impacting DACA recipients, their employers, and the economy as a whole.

In addition to extending the period for which DACA would be granted, we urge DHS to add DACA recipients to the categories that are eligible for an automatic extension of work authorization of up to 180 days. DHS recognizes that delays in processing adversely affect the economy. USCIS has had long backlogs in the processing of applications, including DACA renewals, that result in the inability to work.² Several other categories benefit from an automatic extension, so long as applicants have timely submitted their renewals before their current EAD expired. At no fault of their own, many DACA recipients have lost their employment authorization, while their DACA renewals have been pending, due to the USCIS backlogs. USCIS created the automatic extension "to help prevent gaps in employment authorization and documentation."³ We urge DHS to add DACA recipients to this category.

3. The Final Rule Should Eliminate Categorical Exclusions to DACA Eligibility Based on Criminal Convictions

The NPRM maintains the original DACA program's criteria that automatically disqualifies individuals from eligibility for the program if they had been convicted of a range of criminal offenses, regardless of when the underlying conduct occurred or other equities present in the case. We urge DHS to reconsider this approach and to eliminate categorical exclusions based on prior criminal convictions.

We believe that the approach in the NPRM fails to take into account the inequities of the criminal justice system. We agree with the assessment of our colleagues at the National Immigrant Justice Center (NIJC), who wrote the following in their own comments regarding the NPRM:

In Executive Order 13985, President Biden directs executive departments and agencies to "redress inequities in their policies and programs that serve as barriers to equal Opportunity." Within this Order, the President also required an equity assessment in federal agencies to assess barriers underserved communities face for access to services. To comply with this directive, USCIS should revise the NPRM to eliminate categorical exclusions from the program based on misdemeanor or felony convictions and instead institute a case-by-case review for those with such convictions.

² See "Backlogs, Long Waits Throw DACA Recipients' Status, Jobs and Futures into Jeopardy," U.S. News and World Report, July 19, 2021, available at: <https://www.usnews.com/news/national-news/articles/2021-07-19/backlogs-long-waits-throw-daca-recipients-status-jobs-and-futures-into-jeopardy>.

³ U.S. Citizenship and Immigration Services, Automatic Extension Document (EAD) Extension, available at: <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension>

The NPRM currently precludes individuals entirely from eligibility on the basis of any felony, multiple misdemeanors, or any single misdemeanor if it falls within a broadly defined list of offenses regardless of the recency of a conviction. In other words, a sole misdemeanor off this list--even if from a decade or more ago--automatically disqualifies an individual from the program, regardless of any rehabilitative steps taken since and without opportunity to present mitigating circumstances and facts related to an underlying conviction.

Categorically disqualifying individuals from DACA based on criminal convictions unjustly transfers the racial inequities of the criminal legal system into the administration of DACA. Decades of over-policing in minority communities and racially discriminatory administration of the criminal legal system from the time of arrest through sentencing means that Black, Brown, and Indigenous immigrants are disproportionately involved in the criminal legal system as compared to white immigrants. Specifically, these individuals face arrest, suffer convictions, and are subject to harsher sentences due to explicit and implicit racial biases and institutionalized discrimination. Despite increasing national awareness and protest of the racism endemic to the criminal legal system, USCIS proposes to categorically deny individuals access to DACA on the basis of convictions from this flawed system---thereby disadvantaging those who are the target of discrimination in the criminal legal system. These categorical exclusions therefore impose a double-punishment on largely Black, Brown, and Indigenous immigrants who have already served their full sentences and complied with the requirements and consequences of the criminal legal system and are subsequently denied access to DACA.⁴

Because of the inequities inherent in the criminal justice system, we urge DHS to reject the NPRM's current approach of categorical exclusions based on prior criminal convictions. Instead, we urge DHS to adopt an approach that allows for a case-by-case exercise of discretion. Such an approach should include an opportunity to present equities to an adjudicator who can weigh the totality of the circumstances. DACA applicants should be given the opportunity to present evidence balancing various factors, including the seriousness of the prior violations, evidence of rehabilitation, length of residence, and presence of U.S. citizen or lawful permanent resident relatives.

We also urge DHS to strike the language in the proposed section 236.22(b)(6) referencing section 101(a)(48) of the INA in determining what constitutes a "conviction" for purposes of the DACA program. That provision would prevent USCIS from considering in many cases the fact that a prior conviction has been expunged or overturned. This will only exacerbate the disparate impact of interactions with the criminal justice system and we urge DHS to reject that reference.

⁴ National Immigrant Justice Center, Comments in Response to the DHS/USCIS Notice of Proposed Rulemaking, November 3, 2021, available at: https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2021-11/NIJC_DACA_Comment_Final_Nov2021.pdf (internal citations omitted).

4. Any Prior DACA Recipient Should Be Able to Renew Their Status Without Submitting a New Initial Application

We urge DHS to also make clear in the final rule that individuals who have been previously granted DACA status may renew their status through a more streamlined renewal process. Under current practice, individuals whose DACA status has expired for more than one year may only renew their status by submitting a full new, initial application. However, this requirement is burdensome and unnecessary. Many past DACA recipients who did not have the funds to renew were unable to submit their renewal within this arbitrary time frame. And the uncertainty caused by litigation over the program has also deterred some applicants from pursuing renewal applications within the limited timeline.

The requirement for a full new application also does not further any important interest since, in order to obtain DACA in the first place, the applicants had to be able to establish they met the criteria in the first place. Any questions about continuing eligibility could be addressed through the simplified renewal process. We therefore urge DHS to include in its final rule a provision that allows all individuals who have previously had DACA status to use the normal renewal process and not have to submit a full, new initial application.

5. USCIS Should Provide Reasons for Denial of DACA Applications

We urge DHS to modify its proposed rule to ensure that all DACA recipients whose applications USCIS intends to deny are provided reasons for such an intended denial. In the preamble to the NPRM, DHS states that, in processing DACA applications, USCIS would not “be required to indicate the reasons for the denial, provide for the right to file an administrative appeal, or allow for the filing of a motion to reopen or motion to reconsider.” NPRM at 53769. The outcome is Kafkaesque. Individuals are given no opportunity to clarify any potential errors or issues that have reasonable explanations. Given the importance of the DACA program for applicants and the economy, we urge DHS to provide reasons for any intended denial and allow applicants an opportunity to respond.

6. The DACA Fee Exemption Should Be Expanded to Cover Applicants Under 18 Years of Age

We urge DHS to consider expanding the proposed fee exemptions--which are unchanged from those under the original DACA program--to cover individuals under 18 years of age. In our experience, the cost of the application can be a significant barrier to first-time applicants who are not authorized to work. However, this issue is particularly a barrier for younger applicants. We therefore urge DHS to consider expanding the fee exemption in the final rule to include those applicants under age 18.

7. DHS Should Allow Individuals in Immigration Detention to Have Their DACA Applications Considered Independent of ICE Action

We also urge DHS to reconsider the provision in the NPRM (proposed section 236.23) that would prevent USCIS from granting DACA to an individual who is in immigration detention unless Immigration and Customs Enforcement (ICE) first decides to release that individual. While we appreciate and support the aspect of the NPRM that allows individuals in immigration detention to apply for DACA directly to USCIS, we are concerned that the NPRM would allow ICE to have effective veto power over the DACA decision. Even if USCIS determines that the applicant meets the criteria for DACA and also merits the favorable exercise of discretion, the local ICE office that detained the individual could effectively block this decision by failing to release the individual from ICE custody. Particularly in light of our experience with arbitrary and inconsistent decisions on custody reviews by ICE officers, we believe that the decision of whether to grant DACA should lie with USCIS and not be dependent on a separate action by a local ICE office.

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NWIRP agrees that DACA is a lawful exercise of prosecutorial discretion and of deferred action. DHS has authority to fortify, update, and expand the DACA program so that it provides stability to immigrants who were brought to this country as children who either benefited or are currently left out due to the outdated June 2012 DACA guidelines.

Thank you for the opportunity to submit comments. Please do not hesitate to contact me at jorge@nwirp.org or 206-957-8609 if I may help answer any questions or provide further information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. L. Barón". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Jorge L. Barón
Executive Director
Northwest Immigrant Rights Project