



November 29, 2021

Ms. Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746
Submitted via www.regulations.gov

Re: DHS Docket No 2021-0006, Deferred Action for Childhood Arrivals

Dear Ms. Deshommes:

We write on behalf of Asian Americans Advancing Justice | AAJC and Asian Americans Advancing Justice - Los Angeles to submit this comment letter in response to the U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS), Notice of Proposed Rulemaking (NPRM or proposed rule) Deferred Action for Childhood Arrivals (DHS Docket No. 2021-0006) published on September 28, 2021. We write to express our support for DHS's decision to commit Deferred Action for Childhood Arrivals (DACA) and associated procedures into regulation; offer our support for the continued existence and administration of DACA given the continued absence of a long-overdue permanent pathway to citizenship; and encourage DHS to consider and implement the below recommendations related to DACA's administration, adjudication, and eligibility criteria.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national non-profit organization founded in 1991 dedicated to advancing civil and human rights for Asian Americans. We strive to empower Asian American and Pacific Islander communities across the country by bringing local and national constituencies together and advocating for federal policy that reflects the needs of Asian Americans and promotes a fair and equitable society for all. Advancing Justice | AAJC is the leading national advocate for immigration policy on behalf of the Asian American community, and in this capacity, we work to reunite and keep immigrant families together and ensure that all community members regardless of immigration status can live their fullest lives.

Asian Americans Advancing Justice - Los Angeles ("Advancing Justice-LA") is one of the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (AANHPIs). Founded in 1983 as the Asian Pacific American Legal Center, Advancing Justice-LA serves more than 15,000 individuals and organizations every year. Through direct services, impact litigation, policy advocacy, and organizational capacity building, Advancing Justice-LA focuses on the most vulnerable members of AANHPI communities while building a strong voice for civil rights and social justice.

I. INTRODUCTION

Since its inception in 2012 by the Obama administration, Deferred Action for Childhood Arrivals (DACA) enabled roughly 828,270 eligible young adults to attend school, work, plan their lives, and contribute to their communities without fear of deportation.¹ In the Asian American community, there are around 1.7 million undocumented community members with one out of every seven Asian immigrants being undocumented.² DACA provides much needed relief for eligible individuals within this group. As of June 2021, there were 14,610 Asian American and 170 Pacific Islander active DACA recipients originating from countries like South Korea (5,690), Philippines (2,940), India (2,000), and Pakistan (1,010).³ The Migration Policy Institute estimates that “approximately 110,300 youth and young adults from Asia were immediately eligible” for DACA in 2020.”⁴ Among Asian immigrants, those from South Korea had the highest DACA participation rate at 24 percent as of August 2018, ranking 14th behind immigrants from Central and South America and the Caribbean.⁵ Estimates find that the average DACA recipient arrived in the United States in 1999 at seven years old, with more than a third arriving before five years old.⁶

DACA has provided opportunities and immeasurable relief to this segment of the Asian immigrant community. DACA recipients are able to obtain a Social Security number, obtain a driver’s license, build credit, and seek jobs with benefits such as health care. In several states, DACA recipients can access in-state tuition, greater financial support, and scholarships. Through these lifted burdens, DACA recipients can feel a greater sense of security, helping to alleviate symptoms of stress and exclusion due to their status.⁷

DACA has a quantifiable, significant, and long-lasting impact on families, local communities, and our nation. Indeed, “the enactment of DACA . . . significantly increased high school attendance and graduation rates, reducing the gap in attendance and graduation by 40 percent between citizen and non-citizen immigrants.”⁸ Critically, DACA supports the financial and personal stability of the roughly 254,000 U.S.-born children with at least one parent with DACA and 1.5 million people belonging to

¹ “Number of Form I 821D, Consideration of Deferred Action for Childhood Arrivals Requests by Intake and Case Status, by Fiscal Year,” USCIS, accessed Oct. 25, 2021, https://www.uscis.gov/sites/default/files/document/reports/DACA_performancedata_fy2021_qtr2.pdf.

² Karthick Ramakrishnan and Sono Shah, “One out of every 7 Asian immigrants is undocumented,” AAPI Data, Sept. 8, 2017, accessed Nov. 24, 2021, <http://aapidata.com/blog/asian-undoc-1in7/>.

³ This estimate for Asian American DACA recipients are based on South Korea, Philippines, India, Pakistan, Indonesia, China, Bangladesh, Mongolia, Taiwan, Thailand, Hong Kong, Malaysia, Japan, Sri Lanka, Vietnam, Nepal, Cambodia, Singapore, and Laos. This estimate for Pacific Islander DACA recipients are based on Fiji, Tonga, Samoa, Western Samoa, and Guam. See “Count of Active DACA Recipients By Country of Birth As of June 30, 2021,” USCIS, accessed Nov. 29, 2021, <https://www.uscis.gov/sites/default/files/document/data/Active%20DACA%20Recipients%20%E2%80%93%20June%2030,%202021.pdf>.

⁴ “Immigrants from Asia in the United States,” Migration Policy Institute, Mar. 10, 2021, accessed Oct. 27, 2021, <https://www.migrationpolicy.org/article/immigrants-asia-united-states-2020>.

⁵ “Inside the Numbers,” Asian Americans Advancing Justice - AAJC and Asian Americans Advancing Justice - Los Angeles, June 2019, accessed Nov. 29, 2021, https://advancingjustice-aaic.org/sites/default/files/2019-07/1153_AAJC_Immigration_Final_0.pdf.

⁶ “Deferred Action for Childhood Arrivals (DACA): An Overview,” American Immigration Council, Sept. 30, 2021, accessed Oct. 21, 2021, <https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-daca-overview>.

⁷ Roberto G. Gonzales, “Here’s How DACA Changed the Lives of Young Immigrants, According to Research,” Vox, Feb. 16, 2018, accessed Nov. 29, 2021, <https://www.vox.com/2017/9/2/16244380/daca-benefits-trump-undocumented-immigrants-jobs/>; Sanam Malik, “DACA Helps Undocumented Students Access Higher Education,” Center for American Progress, April 7, 2015, accessed Nov. 29, 2021, <https://americanprogress.org/article/daca-helps-undocumented-students-access-higher-education/>.

⁸ “DACA’s Impact on Educational Outcomes,” Dartmouth Department of Economics, Aug. 20, 2021, <https://economics.dartmouth.edu/news/2021/08/dacas-impact-educational-outcomes>.

mixed-status families with one or more DACA recipients.⁹ DACA recipients include 181,624 students enrolled in higher education and approximately 202,500 DACA recipients as “essential critical infrastructure workers”—a particularly timely and important classification in light of the ongoing COVID-19 pandemic.¹⁰

DACA recipients are interwoven into our economy, and ensuring the stability of the DACA initiative is vital to our economic stability and growth. DACA recipients are homeowners, making \$566.9 million in yearly mortgage payments.¹¹ DACA recipients significantly contribute to Social Security and Medicare. Ending DACA would result in “\$39.3 billion in losses to Social Security and Medicare contributions over ten years, half of which represents lost employee contributions and half employer contributions.”¹² The CATO Institute calculated that ending DACA would cost employers \$6.3 billion in employee turnover costs.¹³

Despite the benefits of DACA, it is vital to address that Asian and Pacific Islander communities have a history of low application rates from DACA eligible individuals.¹⁴ Only 20 percent of DACA eligible people within these communities hold DACA because of cultural stigma, language barriers, and limited media coverage in their communities.¹⁵ Barriers to applying for DACA have included the high application fee, collecting the required documents (such as a birth certificate or other recognized identity documents), and lack of trust in the government, including fear of deportation of applicants’ family members.¹⁶ Lack of language assistance, the stigma of having an undocumented status, and isolation from their ethnic communities also appear to have a greater impact on Asian applicants than on Latino applicants.¹⁷ It is imperative that USCIS work to remove these existing barriers to accessing the DACA program and prevent further barriers from being imposed through the proposed rule.

II. ACCESSIBILITY

A. DHS should expand fee waiver access

DHS does not address a fee waiver in its proposed rule. We urge DHS to include DACA recipients under categories eligible for a fee exemption. A majority of Burmese, Nepalese, Hmong, and Bangladeshi American immigrants and 46% of Pacific Islander immigrants are low-income.¹⁸ From English

⁹ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

¹⁰ “Immigrant and International Students in Higher Education,” Higher Ed Immigration Portal, accessed Oct. 21, 2021, <https://www.higheredimmigrationportal.org/national/national-data/>; “A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response,” Center for American Progress, April 6, 2020, accessed Oct. 22, 2021, <https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response/>.

¹¹ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

¹² “Draining the Trust Funds: Ending DACA and the Consequences to Social Security and Medicare,” Immigrant Legal Resource Center (ILRC), Sep. 28, 2017, accessed Oct. 21, 2021, <https://www.ilrc.org/report-daca-economic-cost>.

¹³ “Ending DACA Will Impose Billions in Employer Compliance Costs,” Cato Institute, Sep. 1, 2017, accessed Oct. 21, 2021, <https://www.cato.org/blog/ending-daca-will-impose-billions-employer-compliance-costs>.

¹⁴ “In Deportation Debate, Don’t Forget Asian Americans and Pacific Islanders,” Urban Institute, Feb. 19, 2017, accessed Nov. 12, 2021, <https://www.urban.org/urban-wire/deportation-debate-dont-forget-asian-americans-and-pacific-islanders>.

¹⁵ *Ibid.*

¹⁶ “Inside the Numbers.”

¹⁷ Sanam Malik, “More Work Is Needed to Increase DACA Applications from Asian American and Pacific Islander Immigrants,” Center for American Progress, June 22, 2016, accessed Nov. 29, 2021, <https://americanprogress.org/article/more-work-is-needed-to-increase-daca-applications-from-asian-american-and-pacific-islander-immigrants/>.

¹⁸ “Inside the Numbers.”

proficiency to educational attainment, South Asian, Southeast Asian, and Pacific Islander immigrants have historically faced challenges to economic mobility that limit their access to opportunities and critical services, and they cannot be further excluded from DACA.

Currently, DHS does not include DACA applications on the list of applications eligible for an I-912 fee waiver. Instead, DHS exempts fees for highly limited circumstances such as being in foster care, having a serious chronic disability, or being in \$10,000 or more in debt due to medical expenses.¹⁹ Despite this, the Migration Policy Institute (MPI) found that the current renewal fee “remains a barrier to DACA renewal.”²⁰ A majority of DACA holders described the \$465 filing fee as “a financial hardship on themselves or their families.”²¹ Nearly half of DACA holders can only afford these fees through financial assistance from family or others, with nearly half of applicants delaying applying for DACA while they saved the funds.²² Given that 35 percent of DACA eligible individuals live in families with incomes less than 100 percent of the federal poverty level and two-thirds live in households with incomes less than 200 percent of the federal poverty level, the data demonstrates that the filing fee is a significant financial burden on individuals already facing poverty.²³ We urge DHS to include DACA recipients under categories eligible for fee exemption and the ceiling for fee waivers be raised to 250 percent of the federal poverty line to account for more community members.

Moreover, DHS should consider using its transfer and reprogramming authority to transfer money from its enforcement arms (ICE and CBP) to fund fee waivers and reallocate funds from DHS to provide application financial assistance to fund the use of the existing fee waivers for DACA applicants.

B. DHS should waive biometrics collection for renewals

DHS proposes to maintain current biometrics requirements while removing the discrete biometrics fee. We urge DHS to utilize existing biometrics for DACA renewals rather than requiring new biometrics every two years upon renewal.

There is no clear rationale for requiring new biometrics, as fingerprints do not change without significant plastic surgery or scarring.²⁴ Given that biometrics are unlikely to change, requiring new biometrics is a costly waste of government time and resources. Recent ASC closures for COVID-19 and the successful re-use of prior biometrics during this time demonstrate that resubmission is not necessary for the adjudication of a DACA renewal application and that DHS does have this capacity.

¹⁹ “Guidance for an Exemption from the Fee for a Form I-765 filed with a Request for Consideration of Deferred Action for Childhood Arrivals,” USCIS, Feb. 4, 2020, accessed Nov. 29, 2021, <https://www.uscis.gov/forms/filing-fees/guidance-for-an-exemption-from-the-fee-for-a-form-i-765-filed-with-a-request-for-consideration-of>.

²⁰ Angelo Mathay and Margie McHugh, “DACA at the Three-Year Mark: High Pace of Renewals, But Processing Difficulties Evident,” Migration Policy Institute, Aug. 8 2015, <https://www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident>; see also Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities, Asian Americans Advancing Justice, June 12, 2019, accessed Oct. 27, 2021 <https://www.advancingjustice-aajc.org/inside-the-numbers-report-2019>.

²¹ Ibid.

²² Ibid. (“Paying for DACA is a family and community expense with just over half (51%) of respondents reporting that they paid for their fees on their own”).

²³ Jeanne Batalova, Sarah Hooker, and Randy Capps, “Deferred Action for Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants,” Migration Policy Institute, Aug. 2013, <https://www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and?>

²⁴ “Fingerprints,” Interpol, accessed Oct. 22, 2021, <https://www.interpol.int/en/How-we-work/Forensics/Fingerprints>. (stating “[n]either do fingerprints change, even as we get older, unless the deep or ‘basal’ layer is destroyed or intentionally changed by plastic surgery.”)

Furthermore, ASCs often involve hours of driving for a DACA recipient, necessitating time off of work and transportation arrangements. Once at the ASC, they must sit in a crowded waiting room during the ongoing global pandemic. Given that DHS has shown that it can re-use prior biometrics and that fingerprints do not generally change on a two-year interval, the burden and health risk to a DACA recipient does not outweigh any adjudication benefit DHS has in requiring new biometrics every two years.

C. DHS should continue to accept affidavits

DHS requests comments on whether affidavits should be considered acceptable evidence of the start of the continuous residence period for new initial requestors for DACA who may have been very young at the time of entry to the United States and may have difficulty obtaining primary or secondary evidence to establish this threshold requirement. We affirm and support the use of affidavits in initial DACA applications.

Given that the average age of a DACA recipient when they entered the country is only seven years old, and the length of time since then, primary evidence documenting physical presence may be impossible even in situations where applicants were continuously present.²⁵ Additionally, to date, DHS has not publicly expressed any fraud-related concerns with affidavits.

III. RENEWALS

A. DHS should consider all requests from previous DACA recipients as renewal requests

We encourage DHS to expand which applicants qualify for renewal to mean any individual who has held DACA, regardless of the length of time since DACA expired. Currently, DHS policy is that DACA applications only qualify for renewal if the applicant files within one year after their last period of deferred action expired.²⁶ There are numerous reasons for delays in refileing for DACA, including financial barriers, and there is currently no stated reason for this policy.

Given that initial DACA requests are no longer authorized, someone attempting to file after one year has passed can no longer request DACA, despite meeting the qualifying criteria of an initial DACA application. This policy arises from the instructions and the FAQ and *not* the original memorandum.²⁷ Through this policy update, DHS would be able to accept additional numbers of DACA applicants under the current injunction in place by Judge Hanen, who limited DHS to only accept renewal and not initial requests.²⁸

B. DHS should issue automatic EAD extension for DACA renewals

DHS does not include an automatic extension for DACA renewals in its proposed rule. DHS should automatically renew employment authorization for DACA grants. As an alternative, DACA should be

²⁵ “What We Know About DACA Recipients in the United States,” Center for American Progress, Sept. 5, 2019, accessed Oct. 22, 2021, <https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states>.

²⁶ “Instructions for Consideration of Deferred Action for Childhood Arrivals,” USCIS, Aug. 31, 2021, accessed Oct. 22, 2021, <https://www.uscis.gov/sites/default/files/document/forms/i-821dinstr.pdf>.

²⁷ “Frequently Asked Questions,” USCIS, accessed, Nov. 29, 2021,

<https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions>.

²⁸ *Ibid.*



added to the list of employment authorization categories that receive an automatic 180-day extension of their timely filed employment authorization renewal.

An approved I-821D, even with an expired employment authorization document, could be sufficient for I-9 authorization for DACA renewals, much as it is for TPS holders. Other EAD categories that require resubmission upon expiration, such as pending asylum, F-1 OPT, and withholding of removal (WOR), require USCIS to re-verify the underlying status to confirm they're eligible for employment authorization (for example, that their asylum or WOR cases are still pending or that they're still a student). For DACA renewals, USCIS verifies the underlying status with the I-821D approval, making the I-765 adjudication an unnecessary step. Issuing an automatic employment authorization for DACA renewals would free up valuable USCIS time and resources in adjudicating an unnecessary application.

The alternative 180-day automatic extension of a timely field employment authorization renewal is the existing process that currently includes TPS grantees.²⁹ Doing so would be in line with DHS's rationale for the rule that implemented these 180-day extensions, which states that the automatic extension "provide[s] additional stability and certainty to U.S. employers and individuals eligible for employment authorization in the United States, this final rule changes several DHS regulations governing the processing of applications for employment authorization."³⁰

C. DHS should issue consecutive grants of DACA

DHS should issue sequential, consecutive periods of DACA validity instead of overlapping time periods. For example, if a requester currently has DACA, the renewal would begin on the day their current DACA expires. Furthermore, USCIS should offer optional backdating for delayed applications.

Current practice is when USCIS approves a request for DACA renewal, the renewal begins on the date of approval, instead of the date that a requestor's current grant expires. Under this practice, individuals with DACA lose months of DACA eligibility where it overlaps. Over multiple renewals, these periods of "lost" DACA eligibility can add up to significant periods of time. This is an inefficient use of agency time and can cost DACA applicants more in filing fees throughout their DACA periods. Additionally, the applicant can accrue unlawful presence under this practice if their current grant expires while the application is being adjudicated. The Obama administration piloted a program (which the Trump administration ended) making this change. This program should be resumed and expanded.

IV. BENEFITS

A. DHS should not separate work permits from deferred action

DHS proposes to decouple work authorization from deportation protection by making the request for work permits optional on Form I-765. We oppose this change as it may confuse applicants familiar with the existing bundled process. If applicants do not understand the new need to separately apply for work authorization, they will unknowingly lose their ability to work and trigger lapses in employment.

²⁹ "Automatic Employment Authorization Document (EAD) Extension," USCIS, Feb. 1, 2017, accessed Oct. 21, 2021, <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension>.

³⁰ Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82398 (Jan. 17, 2017), <https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled>.

Additionally, this rule opens the possibility of applicants being granted DACA but not work authorization, leaving them to pursue unauthorized employment and risk falling victim to exploitation. Like most DACA recipients, Asian American recipients have been able to utilize their work authorization to find meaningful employment, receive healthcare benefits, financially support their families, and reach economic mobility. This decoupling presents fundamental risks to the recipients' livelihoods which should not be taken lightly.

B. DHS should expand grounds for advance parole travel

DHS should expand the grounds for advance parole to include any reason for travel, similar to Temporary Protected Status (TPS). Currently, DACA recipients may request advance parole only on employment, educational, or humanitarian grounds, despite no such statutory or regulatory restriction of advance parole for others. This creates a significant documentary barrier to advance parole and can result in heartbreaking delays. For example, getting medical records from a foreign country to demonstrate a relative is ill can take months.

Alternatively, advance parole is a common avenue for DACA recipients to pursue lawful permanent residence through their spouse, yet a DACA recipient must still cite other grounds for travel. Pew Research Center estimates that less than half of undocumented immigrants generally enter with a visa (e.g. an admission), which means that an estimated more than half of the 76,000 DACA recipients that adjusted status likely required advance parole to do so.³¹ Advance parole is critical not only to travel but to enter in order to pursue paths to legalization. Existing legalization paths have been previously approved and codified by Congress. This is particularly important for Asian American DACA recipients, as the Migration Policy Institute found that “[c]ompared to all new LPRs, Asians were more likely to obtain green cards via employment-based preferences (21 percent versus 14 percent) or through family-sponsored preferences (24 percent versus 20 percent).”³² Requiring DACA recipients to have narrowly defined reasons for pursuing advance parole not only places an unnecessary barrier unique to DACA recipients but creates additional work and time for the adjudicator. There is no statutory, regulatory, or practical reason for the narrow grounds of advance parole available to DACA recipients.

V. ELIGIBILITY

A. DHS should rescind the unlawful status requirement for DACA eligibility

DHS proposes to continue the requirement that the applicant had unlawful status on June 16, 2012, to qualify for initial DACA. We urge DHS to remove this unfair and unjust requirement.

By removing this requirement, thousands of young people who grew up in the United States as dependents of nonimmigrant visa holders and had lawful status on June 15, 2012, would be afforded protection—individuals who fell out of status after aging out while waiting for an immigration petition. Due to decades-long green card backlogs and some visas having no pathways to citizenship, children age out of their status at 21, often with no clear path to citizenship. Approximately 5,000 young people, many Asian American and often referred to as “Documented Dreamers,” age out of their status every year

³¹ “Modes of Entry for the Unauthorized Migrant Population,” Pew Research Center, May 22, 2006, <https://www.pewresearch.org/hispanic/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/>.

³² “Immigrants from Asia in the United States.”

without protection.³³ Critically, this change is consistent with the original June 15, 2012 memorandum from Secretary Napolitano, as the original memorandum did not include criteria to have lawful status on the date of announcement of the memorandum.³⁴ The recent bipartisan bill H.R.6 that passed the House earlier this year included “Documented Dreamers.” This removal of the lawful status requirement is estimated to help 190,000 people.³⁵

The proposed rulemaking affirms that this explicit guideline was not in the original memorandum but also states that “it is implicit in the memorandum’s reference to children and young adults who are subject to removal because they lack lawful immigration status.”³⁶ This claim ignores the memorandum’s key goal, which was to give consideration “to the individual circumstances of each case” and not “remove productive young people to countries where they may not have lived or even speak the language.”³⁷ Documented Dreamers meet these principles.

Additionally, there is precedent from previous deferred action initiatives. In 2009, USCIS created a deferred action initiative for certain widows of U.S. citizens through a policy memo similar to DACA, but unlike DACA, the application form instructions did not require applicants to lack legal status.³⁸ Addressing this gap in the proposed regulation would significantly benefit Documented Dreamers while remaining in line with both the proposed rulemaking and the original DACA memorandum’s key goal.³⁹

B. Criminal Background Requirements

1. DHS should promulgate a fair and flexible expungement standard

We oppose the new definition of conviction proposed in the rule, which adopts, in the regulation, a definition of conviction that does not exclude expunged convictions (also known as convictions subject to post-conviction rehabilitation or relief). Additionally, DHS should explicitly exclude expunged convictions from its adjudication of DACA applications.

Currently and throughout the length of DACA, DHS reviews expunged convictions on a case-by-case basis to determine whether they warrant a denial of discretion.⁴⁰ Defining a conviction for DACA purposes by INA § 101(a)(48), which does not give effect to expungements, would represent a dramatic, unfair, and punitive departure from existing policy. This is a significant policy change that will have disastrous consequences on DACA applicants and potentially result in current DACA holders’ inability to renew, e.g. for those DACA recipients whose convictions would now be disqualified under the new framework.

³³ “100,000 Children in the Employment-Based Green Card Backlog at Risk of Family Separation,” Cato Institute, Nov. 20, 2021, accessed Oct. 22, 2021

<https://www.cato.org/blog/100000-children-employment-based-green-card-backlog-risk-family-separation>.

³⁴ Memorandum from Janet Napolitano to David V. Aguilar, Alejandro Mayorkas, and John Morton on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012),

<https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (hereafter “Napolitano memo”).

³⁵ “American Dream and Promise Act of 2021: Who Is Potentially Eligible?,” Migration Policy Institute, March 2021, accessed Oct. 27, 2021, <https://www.migrationpolicy.org/content/american-dream-and-promise-act-2021-eligibility>

³⁶ “Deferred Action for Childhood Arrivals: A Proposed Rule by the Homeland Security Department on 9/28/2021,” Federal Register, <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>, 53767 (hereafter “DACA Proposed Rule”).

³⁷ Ibid.

³⁸ “DHS Establishes Interim Relief for Widows of U.S. Citizens,” DHS, June 9, 2009, accessed Oct. 22, 2021 <https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

³⁹ AAJC worked with Improve the Dream on the language of this section. <https://www.improvethe dream.org/>

⁴⁰ “Frequently Asked Questions.”

DHS should align its interpretation of conviction fully with the criminal justice system and should explicitly not consider expunged and sealed convictions when adjudicating DACA. Instead of deferring to state courts who have essentially erased these convictions for all purposes, DHS is needlessly re-adjudicating expunged convictions and wasting valuable agency time to do so. State and local authorities already examined the facts of the case and concluded that the conviction merited expungement. Furthermore, almost all states have expungement mechanisms that do not allow for the expungement of felonies, which means that most expunged convictions are generally serious offenses.⁴¹ We strongly recommend that DHS exclude all expunged convictions from consideration of DACA, including variations where an adjudication or judgment of guilt has been dismissed, expunged, deferred, annulled, invalidated, withheld, sealed, vacated, or pardoned, an order of probation without entry of judgment, or any similar rehabilitative disposition. All of these are possible descriptors of an expunged conviction, and none of them should fall under the DHS definition of conviction for adjudicating DACA applications. In the criminal justice system, an expunged conviction is removed from the system entirely, including for housing, loan, employment, voting, and all other purposes. DHS must similarly abide by this standard.

2. DHS should implement a statute of limitations for convictions

The proposed rule does not address the length of time a conviction can be considered under DACA. We propose DHS establish an administrative “statute of limitations” for consideration of convictions in the DACA application process that occurred five or more years before the application date.

At its best, the criminal justice system is about second chances and our commitment as a nation to reintegrate people back to their communities. DACA-eligible youth have developed deep ties to family and community in the United States, and they deserve the chance to reenter society and contribute like anyone else. By disregarding old and stale convictions, DHS would expand DACA to individuals who have rehabilitated since their conviction and developed significant family ties and deep, long-lasting connections with their communities. This approach is also in line with the administration’s current enforcement priorities, which lists how long the conviction occurred as one of the factors in deciding whether to exercise prosecutorial discretion.⁴²

Such a change is necessary when Southeast Asian immigrant and refugee communities have a long history of being overpoliced and racially profiled. Southeast Asian Americans are three to five times more likely to be deported for old criminal convictions compared to any other immigrant group.⁴³ Southeast Asian refugee communities have faced deportations based on decades-old convictions that upend lives, families, and communities for people whose only home has ever been America. Prospective Asian Americans DACA applicants have been less likely to apply due to a lack of trust in the government and fear of deportation of applicants’ family members.⁴⁴ We urge changes to the proposed rule to prevent further repercussions of racial inequities and injustices in the criminal justice system that disproportionately impact Black and Indigenous communities and other people of color, including Asian American, Native Hawaiian, and Pacific Islander communities.

⁴¹ “50-State Comparison: Expungement, Sealing & Other Record Relief,” Restoration of Rights Project, accessed Oct. 22, 2021, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside>.

⁴² Memorandum from Alejandro N. Mayorkas to Tae D. Johnson on Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), accessed Oct. 27, 2021, <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

⁴³ “Southeast Asian Americans and the School-to-Prison-to-Deportation Pipeline,” Southeast Asia Resource Action Center, accessed Nov 29, 2021, https://www.searac.org/wp-content/uploads/2018/04/SEAA-School-to-Deportation-Pipeline_0.pdf

⁴⁴ “Inside the Numbers.”



VI. DHS should continue to consider DACA recipients lawfully present

DHS solicits comments on potentially promulgating a version of DACA where individuals with deferred action would not be considered lawfully present.⁴⁵ We strongly oppose this proposed formulation. Individuals with deferred action have always been considered lawfully present in our nation's entire immigration history, law, and framework. Any other formulation would be an unacceptable break from legal precedent and lead to a complex, unworkable, and time-consuming adjudicatory framework.⁴⁶

We support DHS formalizing the agency's long-standing policy that DACA recipients are lawfully present. Changing the long-standing DHS policy regarding lawful presence would likely not be retroactive, causing significant adjudication problems for USCIS as the agency would need to discern which DACA recipients accrued unlawful presence relative to this regulatory change. If this change were retroactive, it would run counter to extensive precedent against retroactive laws, especially in the immigration context, and represent an adjudicatory nightmare.⁴⁷

Additionally, carving out DACA as a form of deferred action that does not have lawful presence, while other forms of deferred action still maintain lawful presence, would very likely present equal protection clause implications. The Fourteenth Amendment states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁸ This clause “is essentially a constitutional requirement that all persons similarly situated should be treated alike;” and if not, that the government must have a sufficient rationale for that disparate treatment.⁴⁹ While the constitution does not prevent the government from creating classifications, it does serve to keep government actors “from treating differently persons who are in all relevant aspects alike.”⁵⁰ Here, the federal government would be treating DACA recipients differently from other deferred action categories when they are in all relevant aspects alike.⁵¹

Another agency attempted to make a similar change and faced significant public opposition. HHS stripped lawful presence from DACA recipients for Affordable Care Act purposes, which led to worse health care outcomes and health care access discrimination for DACA recipients.⁵² This approach is opposed by 320 organizations and 94 members of Congress, who have called on HHS to restore lawful presence in the health care context.⁵³ HHS's removal of lawful presence had significant and long-lasting negative impacts on DACA recipients in regards to health care access—removing lawful presence in the immigration sphere will undoubtedly have devastating consequences for DACA recipients in terms of future immigration relief.

Importantly, lawful presence has implications on the accrual of unlawful presence and, consequently, we support DHS's reiteration of the longstanding policy that a noncitizen who has been granted deferred

⁴⁵ Proposed DACA Rule, 53763.

⁴⁶ See Memorandum from Johnny N. Williams to Regional Directors on Unlawful Presence (June 12, 2002), AILA Doc. No. 02062040, <https://www.aila.org/infonet/ins-says-deferred-action-is-lawful-presence>.

⁴⁷ See *Vartelas v. Holder*, 566 U.S. 257 (2012) (ruling against applying a law retroactively “[g]uided by the deeply rooted presumption against retroactive legislation”); see also “212(c) Relief and Retroactivity,” Immigrant Defense Project, accessed Oct. 25, 2021, <https://www.immigrantdefenseproject.org/212c-relief-and-retroactivity/>.

⁴⁸ U.S. CONST. AMEND. 14, § 1. Equal protection applies to the federal government through the Fifth Amendment Due Process Clause.

⁴⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

⁵⁰ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

⁵¹ See *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017), finding that there was no basis in federal law for treating DACA differently from other forms of lawful presence.

⁵² “#ACA4DACA Campaign,” Masa Group, LLC, accessed Oct. 22, 2021, <https://www.masadc.com/aca4daca>.

⁵³ *Ibid.*

action does not accrue “unlawful presence” for purposes of INA sec. 212(a)(9). This policy significantly reduces the long-term ramifications of decisions made when DACA recipients were children. Removing lawful presence from DACA would prospectively foreclose these paths to legalization and cement DACA recipients as a permanent underclass and prevent DACA recipients with immediate relatives from pursuing the stability of a green card.

VII. CONCLUSION

We appreciate the opportunity to comment on the proposed DACA regulation. While we commend DHS’s efforts to commit DACA to regulations, there are critical changes that need to be made to meet the needs of the Asian American immigrant community.

As detailed previously, Asian and Pacific Islander communities have a history of low application rates from DACA eligible individuals and DHS must take necessary measures to mitigate the barriers preventing people from receiving relief.⁵⁴ DHS should ensure the program is accessible by expanding fee waivers, continuing to accept affidavits, and issuing consecutive periods of DACA validity, among other improvements, to ensure access for low-income applicants such as those from South Asian, Southeast Asian, and Pacific Islander communities who have historically faced challenges to economic mobility that limit their access to opportunities and critical services. DHS should expand the eligibility criteria to ensure the “Documented Dreamers,” many of whom are Asian American, are no longer excluded from relief. DHS ought to implement a statute of limitations for convictions to ensure the program does not carve out applicants and perpetuate the injustices of over-policing and deportations of community members, especially those from the Southeast Asian American community. DHS should not decouple employment authorization from deferred action to prevent potentially disastrous effects on the livelihoods of the applicant and their family. This is not an exhaustive list and we support all efforts to strengthen and expand access to DACA, as well as the preservation and expansion of the rights and benefits conferred through the program.

For any questions, please contact Daishi Miguel-Tanaka, Manager of Immigration Advocacy, at dtanaka@advancingjustice-aaajc.org.

Sincerely,

Asian Americans Advancing Justice | AAJC
Asian Americans Advancing Justice - Los Angeles

⁵⁴ “In Deportation Debate, Don’t Forget Asian Americans and Pacific Islanders.”