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Ms. Samantha Deshombres
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

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

Dear Ms. Deshombres:

We write on behalf of the Presidents' Alliance on Higher Education and Immigration (Presidents' Alliance), Improve the Dream, and Community College Consortium for Immigrant Education (CCCIE), 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) on Deferred Action for Childhood Arrivals (DHS Docket No. 2021-0006) published on September 28, 2021. We write to express our emphatic support for DHS's decision to enshrine Deferred Action for Childhood Arrivals (DACA) and associated procedures into regulation, offer our unqualified support for the continued existence and administration of DACA, and encourage DHS to consider and implement the below recommendations related to DACA's administration, adjudication, and eligibility criteria.

The nonpartisan, nonprofit Presidents' Alliance on Higher Education and Immigration brings college and university presidents and chancellors together on the immigration issues that impact higher education, our students, campuses, communities and nation. We work to advance just, forward-looking immigration policies and practices at the federal, state, and campus levels that are consistent with our heritage as a nation of immigrants and the academic values of equity and openness. The Alliance is composed of over 500 presidents and chancellors of public and private colleges and universities, enrolling over five million students in 43 states, D.C., and Puerto Rico.

CCCIE is a national network of community colleges dedicated to giving immigrants and refugees full access to higher education in order to accelerate their success as new Americans and enable them to achieve their educational, career, and personal goals. CCCIE builds community colleges' capacity by promoting exchange of best practices, research, and community partnerships and raises awareness of the essential role these colleges play in advancing immigrant integration through education and career development.

Improve The Dream is a youth-led organization that advocates for and supports children of long-term visa holders who are raised and educated in the United States without a clear path to

citizenship. Since 2017, Improve The Dream has been advocating for change that permanently ends aging-out and provides a path to citizenship for every child who grows up in the United States, regardless of status. The network is composed of over 2000 Documented Dreamers and families in all 50 states, working collectively to raise awareness for the more than 200,000 Documented Dreamers in the United States and support one another in navigating the broken immigration system.

I. INTRODUCTION

Since its inception in 2012 by the Obama administration, Deferred Action for Childhood Arrivals (DACA) has enabled roughly 828,270 eligible young adults to attend school, work, plan their lives, and contribute to their communities without fear of deportation.¹ 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 they turned five years old.²

DACA has a quantifiable, significant, and long-lasting impact on students, 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.”³ 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 mixed-status families with one or more DACA recipients.⁴ DACA-eligible individuals 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.⁵

DACA has opened the door for hundreds of thousands of recipients to more easily access higher education at both the undergraduate and graduate levels. The United States is home to approximately 427,000 undocumented students enrolled in higher education, representing about two percent of all students in postsecondary education in the United States. Of these, students with DACA or who are eligible for DACA constitute approximately 181,000 students, or 0.8 percent of all students in higher education.⁶ In addition, an estimated 98,000

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 “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>.

³ “DACA’s Impact on Educational Outcomes,” Dartmouth Department of Economics, Aug. 20, 2021,

<https://economics.dartmouth.edu/news/2021/08/dacas-impact-educational-outcomes>.

⁴ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

⁵ “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/>.

⁶ *How Many Undocumented Students are in U.S. Colleges and Universities, and Who Are They?*, Presidents’ Alliance on Higher Education and Immigration and New American Economy (March 2021), available at

<https://www.higheredimmigrationportal.org/research/undocumented-students-in-higher-education-updated-march-2021/>.

undocumented students graduate from high school in the U.S. every year, with thousands of these new graduates applying for and receiving admission into institutions of higher education.⁷

DACA recipients also are interwoven into our economy, and ensuring the stability of DACA is vital to our economic stability and growth. DACA recipients are homeowners, making \$566.9 million in yearly mortgage payments.⁸ DACA recipients significantly contribute to funding 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.”⁹ The CATO Institute calculated that ending DACA would cost employers \$6.3 billion in employee turnover costs.¹⁰

Findings from the National UnDACAmented Research Project, a longitudinal study launched in 2013, demonstrate how DACA significantly increased economic and social mobility for its recipients by incentivizing on-ramps to educational pathways and boosting employment options, impacting immigrants, their families, employers, and communities. Over the course of seven years, the authors note, DACA recipients turned educational aspirations into concrete career outcomes. For those who had dropped out of high school, DACA facilitated enrollment in GED and adult education programs.

For those seeking higher education, DACA improved access and led to the completion of “vocational programs, associate degrees, bachelor’s degrees, and even graduate and professional degrees from master’s programs to law and medical school. Respondents then acquired jobs in related fields. Many used these employment opportunities as stepping-stones to launch new careers.”¹¹ The authors of the research project note the stories of DACA recipients who earned short-term career and technical education (CTE) and industry-recognized credentials from community colleges and other local organizations. For example, Laura, a DACA beneficiary from Arizona, enrolled in an 8-month medical assistant training program, which offered her an affordable and immediate option to work in the medical field and save enough money to enroll in a degree program in nursing.¹²

At colleges and universities, we have witnessed on a daily basis both the immense contributions of DACA recipients - as students, staff, faculty, and alumni - to our campuses, and the vital benefits and protections that DACA has provided to these individuals. Presidents’ Alliance member institutions have educated thousands of DACA recipients, and have benefited greatly from their talents and the passion they bring to campus communities across the country - as students in the sciences, math, and engineering, health sciences, social sciences, humanities, and more.

⁷ Jie Zong and Jeanne Batalova, *How Many Unauthorized Immigrants Graduate from U.S. High Schools Annually?*, Migration Policy Institute and Presidents’ Alliance on Higher Education and Immigration (April 2019), available at <https://www.higheredimmigrationportal.org/research/migration-policy-institute-fact-sheet-on-number-of-dreamers-graduating-from-high-school/>.

⁸ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

⁹ “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>.

¹⁰ “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>.

¹¹ Roberto G. Gonzales et. al, *The Long-Term Impact of DACA: Forging Futures Despite DACA’s Uncertainty*, Immigration Initiative at Harvard, Special Report 1, 2019, accessed Nov. 4, 2021, https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf.

¹² Ibid.

DACA-eligible students represent a heterogeneous population in higher education, reflecting the broad range and diversity of first-generation immigrants in the U.S. While most DACA-eligible students in higher education are Hispanic (69.7 percent), significant numbers are Asian American and Pacific Islander (16.3 percent), White (7.2 percent), Black (5.3 percent), or identify as other race or ethnicity (1.6 percent).¹³ DACA, with its associated protection from deportation and work authorization provisions, represents an important driver for increased enrollment in colleges and universities institutions and higher high school graduation rates among immigrant youth.

DACA plays a major role in higher education affordability. Eighty-three percent of DACA recipients attend public institutions, making accessibility to in-state tuition and financial aid of vital importance.¹⁴ Eight states require undocumented students to have DACA in order to access in-state tuition: Alabama, Arkansas, Idaho, Indiana, Maine, Massachusetts, Mississippi, and Ohio.¹⁵ Separate from those eight states, 17 states and D.C. allow the state's eligible undocumented students, including DACA recipients, to access in-state tuition and state financial aid. Four additional states allow their state's undocumented students to access in-state tuition, but they provide no access to state financial aid.¹⁶ The work authority eligibility that DACA recipients have under existing federal law allows recipients to legally work, save, and pay for their higher education expenses. Furthermore, DACA can also be a crucial part of professional licensing eligibility, opening the door to licensure as a lawyer, teacher, or in other professions requiring state-level licensure.¹⁷ DACA recipients who pursue higher education help offset critical skills shortages in the U.S. and become better positioned to support their families, communities, and the U.S. economy.

II. LEGAL FRAMEWORK

A. DHS should make application for employment authorization optional

USCIS currently requires that DACA applicants concurrently file for employment authorization, Form I-765, along with their request for deferred action. The DHS proposes making filing for the I-765, Application for Employment Authorization optional and allowing filing after an individual receives approval for a deferred action request while maintaining the current fee structure. We support DHS's proposal to make filing for employment authorization optional while still allowing for a concurrent filing. The proposed change would enable initial requesters to apply for and confirm that they are eligible for DACA *before* spending an additional \$410 for an employment authorization application. This two-step process would prevent applicants from losing the work permit fee if their application for deferred action is denied. We understand the rationale that this separation protects DACA against some legal challenges in the federal courts and that it would save money for requesters who do not need or want work authorization. In particular, the 181,000 DACA-eligible students in higher education may benefit from the ability to financially prioritize the separate applications, especially as many of these individuals may

¹³ *How Many Undocumented Students are in U.S. Colleges and Universities, and Who Are They?* (March 2021).

¹⁴ *Ibid.*

¹⁵ Christian Penichet-Paul and Ivana Lopez-Espinosa, *Ending DACA Would Limit Access to Higher Education in Ten States*, Presidents' Alliance on Higher Education and Immigration (June 2020), available at <https://www.higheredimmigrationportal.org/policy/ending-daca-would-limit-access-to-higher-education-in-ten-states/>.

¹⁶ "Portal to the States," Higher Ed Immigration Portal, accessed November 2, 2021, <https://www.higheredimmigrationportal.org/states/>.

¹⁷ "Professional and Occupational Licenses for Immigrants," National Conference of State Legislatures, Jan. 17, 2021, accessed Oct. 22, 2021, <https://www.ncsl.org/research/immigration/professional-and-occupational-licenses-for-immigrants.aspx>.

not necessarily need nor want work authorization during their enrollment in higher education.¹⁸ Similarly, for mixed-status families, who have multiple DACA-eligible individuals, some who may be in school and not working, the ability to apply only for deferred action is a potential economic boon.

Finally, as DHS states in its notice, making employment authorization optional is also in part to further bolster DACA's legality and potentially maintain the availability of deferred action even if a court strikes down work authorization eligibility for DACA recipients. While we strongly believe that DACA, including the deferred action and employment authorization grant, is a lawful and constitutional use of the Executive's immigration authority, we do support separating work permits from deferred action to bolster further the continued existence of DACA in whole or in part.

B. 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.¹⁹ 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.²⁰

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.²¹

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."²² 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.²³ 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."²⁴ Here, the federal government would be treating DACA recipients differently from other deferred action categories and earlier DACA recipients who did

¹⁸ "Immigrant and International Students in Higher Education," Higher Ed Immigration Portal, accessed Oct. 21, 2021, <https://www.higheredimmigrationportal.org/national/national-data/>; Higher Ed Immigration Portal.

¹⁹ Proposed DACA Rule, 53763.

²⁰ 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>.

²¹ 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/>.

²² U.S. CONST. AMEND. 14, § 1. Equal protection applies to the federal government through the Fifth Amendment Due Process Clause.

²³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

²⁴ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

not accrue unlawful presence before they were able to adjust, when they are in all relevant aspects alike.²⁵

No other agency, except one, attempted to make a similar change and faced significant public opposition—including raising serious legal and constitutional questions regarding such a policy. 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.²⁶ 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.²⁷ 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 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 cement DACA recipients as a permanent underclass and prevent DACA recipients with immediate relatives from pursuing the stability of a green card.

III. ELIGIBILITY

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

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

Over 200,000 children and young adults who have been raised in the United States are ineligible for DACA because they have maintained a documented status. 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, often referred to as “Documented Dreamers,” age out of their status every year without protection.²⁸ 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. 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 no lawful status on the date of announcement of the memorandum.²⁹ The recent

²⁵ 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.

²⁶ “#ACA4DACA Campaign,” Masa Group, LLC, accessed Oct. 22, 2021, <https://www.masadc.com/aca4daca>.

²⁷ *Ibid.*

²⁸ “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>.

²⁹ 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”).

bipartisan bill H.R.6 that passed the House earlier this year included “documented dreamers,” and this removal of the unlawful status requirement is estimated to help 190,000 people.³⁰

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.”³¹ 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.”³² Documented Dreamers meet these principles. According to survey data from Improve the Dream, the average Documented Dreamer arrived in the United States at the age of five and has resided here for at least eleven years.³³ They are also STEM graduates, high-performing students, and essential workers, contributing significantly to our nation.

Additionally, there is precedent from previous deferred action initiatives. In 2009, USCIS created a deferred action initiative for certain widows of U.S. citizens. This was created through a policy memo similar to DACA, but unlike DACA, the application form instructions did not require applicants to lack legal status.³⁴ 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.

B. DHS should remove the age cap for DACA

DHS proposes to maintain the age cap in the regulation. We urge DHS to revisit the original June 2012 memorandum and rescind the age cap for potential DACA requestors. The current age restriction excludes those who were older than 31 on the date of announcement (those born before June 15, 1981). DHS previously attempted to remove this age cap with the November 20, 2014 memorandum, which was rescinded following the 2016 *Texas v. United States* opinion, partially due to failure to follow the notice and comment procedures pursuant to the Administrative Procedure Act.³⁵ As DHS is currently going through notice and comment, nothing precludes the agency from removing this age cap through the ongoing proposed NPRM.

Removing this age cap will further the goal of DACA by addressing an arbitrary date that excludes many otherwise eligible DACA applicants. For first-time applicants, the age cap now is the same as imposing an age cap of 21 in 2012. This will allow people who are already not enforcement priorities to receive lawful status and work authorization. A key example of an impacted individual is Jose Antonio Vargas, the Pulitzer Prize winning journalist and author who missed the cut off by only four months.³⁶ Finally, this revision would particularly benefit older dreamers, who are more likely to have U.S. citizen children; providing access to DACA for

³⁰ “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>

³¹ “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”).

³² *Ibid.*

³³ <https://www.improvethe dream.org/>

³⁴ “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>.

³⁵ Memorandum from Elaine C. Duke to James W. McCament et. al. on Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

³⁶ Jose Antonio Vargas, “Why I Turned Myself in to DHS,” Politico, Sept. 8, 2014, accessed Oct. 22, 2021, <https://www.politico.com/magazine/story/2014/09/obamas-deferred-action-on-deportations-110737/>.

these individuals would enable them to economically provide for their U.S. citizen families. Lifting the age cap would particularly benefit immigrant adult learners attending community colleges, where the average age of students is 28.³⁷

D. DHS should update the arrival date to January 1, 2011

DHS should update the arrival date to January 1, 2011. The current arrival date is June 15, 2007, which has not changed since the June 15, 2012 memo. There is nothing preventing DHS from revising this date to be in line with the intention of the original memo to provide protections from deportations to children who arrived in the United States at a young age and grew up in the United States. The current arrival date assists a very narrow portion of this population, as a child who arrived in 2007 as a newborn would be 14 years old today. Under the 2012 memo, there are an additional estimated 1,159,000 people who could be eligible for DACA and 590,070 current active DACA holders.³⁸ Recent numbers from the Migration Policy Institute found that an arrival date of January 1, 2011 would help up to an estimated total of 2.6 million Dreamers, people who arrived before the age of 18 (this number also includes those who are currently eligible or hold DACA).³⁹ While not all of these individuals would be eligible for DACA without a concurrent updating of the initial age at entry requirement, updating the arrival date to January 1, 2011 will likely help hundreds of thousands of DREAMers who fall between the gap of these numbers. Finally, an arrival date of January 1, 2011 in legislation to provide relief to Dreamers has passed the House twice.⁴⁰ Changing this arrival date would modernize access to DACA and subsequently increase access to higher education and work authorization in line with the initial intent of the program.

C. DHS should update the physical presence requirement to January 1, 2021

DHS proposes to maintain the physical presence date of June 15, 2012. Instead, we recommend that DHS should move the physical presence requirement to January 1, 2021.

DHS has not updated the physical presence requirement in nine years, and there is nothing that prevents DHS from moving the date in recognition that there are many Dreamers who arrived since the original physical presence date who are otherwise eligible for DACA. Most individuals who would benefit from moving this date would not be enforcement priorities under the current administration. Enabling these Dreamers to access higher education and employment authorization through DACA will help them contribute to their communities and is in line with the intent of the original 2012 memo to not remove “productive young people to countries where they may not have lived or even speak the language.”⁴¹

IV. ACCESSIBILITY

A. DHS should expand fee waiver access

DHS does not address a fee waiver in its proposed rule. DHS should include DACA applications on the list of applications eligible for an I-912 fee waiver. The Migration Policy Institute (MPI)

³⁷ Fast Facts 2021, American Association of Community Colleges, accessed Nov. 4, 2021, <https://www.aacc.nche.edu/research-trends/fast-facts>.

³⁸ “Deferred Action for Childhood Arrivals (DACA) Data Tools,” Migration Policy Institute, accessed Nov. 29, 2021, <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles>.

³⁹ “MPI Issues Latest Data Profiles of Unauthorized Immigrants at U.S., State & Top County Levels and Offers Estimates of Legalization Provisions in Reconciliation Bill,” Migration Policy Institute, Nov. 24, 2021, <https://www.migrationpolicy.org/news/latest-data-profiles-unauthorized-immigrants-reconciliation-estimates>.

⁴⁰ American Dream and Promise Act of 2021, H.R.6, 117th Cong. § 102(b)(1)(A) (2021); *see also* Build Back Better Act, H.R. 5376, 117th Cong. § 60001 (b)(1) (2021).

⁴¹ Napolitano memo.

found that the current renewal fee “remains a barrier to DACA renewal.”⁴² A majority of DACA holders described the \$495 filing fee as “a financial hardship on themselves or their families.”⁴³ 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.⁴⁴ 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.⁴⁵ And yet, DHS continues to exclude DACA recipients from being eligible to request a fee waiver in the DACA context.

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.⁴⁶ 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 period of time demonstrate that resubmission is not necessary for the adjudication of a DACA renewal application and that DHS does have the capacity to renew based on prior biometrics.

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 outweighs any adjudication benefit DHS would derive by requiring new biometrics every two years.

⁴² 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>.

⁴³ Ibid.

⁴⁴ 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”).

⁴⁵ 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?>

⁴⁶ “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.”)

V. RENEWALS

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

We encourage DHS to expand the applicants that 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.⁴⁷ There are numerous reasons for delays in refileing for DACA, including financial, and there is currently no stated reason for this policy.

Given that the current practice does not allow initial DACA requests, someone attempting to file after one year has passed can no longer request DACA, despite having met the qualifying criteria of an initial DACA application. This policy arises from the instructions and the FAQ and *not* the original memorandum.⁴⁸ 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.⁴⁹

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 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, should 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 that would be wasted 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.⁵⁰ 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."⁵¹

⁴⁷ "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>.

⁴⁸ DACA FAQ.

⁴⁹ Ibid.

⁵⁰ "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>.

⁵¹ 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>.

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, then 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 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 over the course of their DACA periods. Additionally, under this practice, the applicant can accrue unlawful presence 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.

VI. BENEFITS

A. 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 there being no such statutory or regulatory restriction of advance parole for others. The availability of advance parole has enabled DACA recipients to pursue study abroad, fellowships, research, and other academic programs or related employment opportunities that significantly enhance the intellectual and professional development of individual students and increase their contributions to campuses. Likewise, it has been vital for DACA recipients to be able to go abroad for humanitarian reasons. However, limiting the availability of advance parole to employment, educational, or humanitarian grounds has no statutory or regulatory basis and 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 on top of adjudication time, which can foreclose any window of time the applicant might have left to visit the relative.

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.⁵² Advance parole is critical not only to travel but following paths to lawful admission previously approved and codified by Congress. 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.

⁵² "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/>.

B. DHS should codify the domicile language from the DACA FAQ

DHS should codify into this regulation the language present in the DACA FAQs related to domicile. This language currently states “[i]ndividuals granted deferred action are not precluded by federal law from establishing domicile in the United States.”⁵³ Codifying this language will ensure that states, consistent with well-established federal control over matters of immigration law status, know that an individual who holds DACA can establish domicile in the United States, which some states require when determining whether an individual is eligible for in-state tuition. This is particularly significant for the 181,624 DACA-eligible higher education students.⁵⁴ Eighty-three percent of these DACA recipients attend public institutions, making accessibility to in-state tuition and financial aid of vital importance.⁵⁵

We appreciate the opportunity to comment on the proposed DACA regulation. For any questions, please contact Miriam Feldblum, Executive Director of Presidents’ Alliance at miriam@presidentsalliance.org; Dip Patel, President, Improve the Dream, at dip@improvethe dream.org; or Jill Casner Lotto, Director, Community College Consortium for Immigrant Education at jill.casnerlotto@gmail.com.

Sincerely,



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⁵³ DACA FAQ.

⁵⁴ “Immigrant and International Students in Higher Education,” Higher Ed Immigration Portal, accessed Oct. 21, 2021, <https://www.higheredimmigrationportal.org/national/national-data/>.

⁵⁵ Ibid.