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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

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

Dear Ms. Deshommes:

We write on behalf of the American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) 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 support DHS's decision to incorporate Deferred Action for Childhood Arrivals (DACA) and associated procedures into regulation. We offer our support for the continuation of the DACA initiative and encourage DHS to consider and implement the below recommendations related to its administration and adjudication.

Established in 1946, AILA is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

DACA is an immensely valuable program that 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.”¹ 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.² 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.³ DACA recipients significantly contribute to Social Security and Medicare, as shown by studies that found that 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.”⁴

While AILA and the Council recognize that DHS is not requesting comments on eligibility for DACA, we would like to express our support for expanding these eligibility requirements given the significant positive impact the DACA program has had since its implementation. This should include removing the requirement that a DACA applicant be unlawfully present on June 15, 2012, removing the age cap, and moving forward the physical presence requirement.

I. SEPARATING THE DEFERRED ACTION AND EMPLOYMENT AUTHORIZATION APPLICATIONS

Under the proposed rule, DHS would make filing for an employment authorization document (EAD) optional. Applicants would be able to file for an EAD either at the time they filed the deferred action request or after DHS approves the deferred action request. The current fee structure would remain the same.

We support DHS’s proposal to make filing for employment authorization optional, while still allowing for a concurrent filing, because it provides applicants with the flexibility to choose which option is right for them. However, we have significant concerns about current processing times for the employment authorization applications and the impact this change may have on the ability of DACA recipients to obtain EADs in a timely manner. Even with the concurrent filing of the I-821D and I-765, USCIS does not begin to adjudicate the employment authorization application until the I-821D is approved.⁵ With average processing times for the I-821D at nearly six months and the I-765 processing time for DACA holders of nearly two months during the most recent fiscal year, it can be nearly eight months or longer before a DACA renewal applicant receives their work permit.⁶ We are worried that separating the I-821D and I-765 completely may lead to additional delays in the EAD adjudication process, causing disruptions for employers across the country and harming DACA recipients and their families. EAD delays are already a reality for the vast majority of applicants who are applying for work authorization based on applications and petitions other than DACA, with some EAD applications taking up to or over a year to

¹ “DACA’s Impact on Educational Outcomes,” Dartmouth Department of Economics, Aug. 20, 2021, <https://economics.dartmouth.edu/news/2021/08/dacas-impact-educational-outcomes>.

² “Deferred Action for Childhood Arrivals (DACA): An Overview.”

³ “Deferred Action for Childhood Arrivals (DACA): An Overview.”

⁴ “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>.

⁵ “Important Information About Form I-765, Application for Employment Authorization,” USCIS, accessed Oct. 22, 2021, <https://egov.uscis.gov/processing-times/i765>.

⁶ “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year: Fiscal Year 2017 to 2021 (up to September 30, 2021),” USCIS, accessed Oct. 22, 2021, <https://egov.uscis.gov/processing-times/historic-pt>.

adjudicate.⁷ We urge USCIS to ensure that DACA-based EAD processing times do not increase substantially.

USCIS should also issue automatic extensions of employment authorization for DACA-based employment authorization renewal receipts. The 180-day automatic extension of a timely-filed employment authorization renewal is an existing process that currently includes TPS grantees.⁸ Issuing automatic extensions for DACA-based EAD renewals 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."⁹ Allowing the receipt notice for a DACA-based employment authorization renewal application to serve as temporary work authorization would be a proactive step in avoiding an increase in DACA-based work authorization lapses, and would reduce the number of inquiries on cases pending past the posted processing times, thus freeing up precious USCIS resources. It would also prevent disruption in the workforce due to delays in adjudicating employment authorization.

Recommendations: USCIS should add DACA to the list of employment authorization categories that receive an automatic 180-day extension of their timely filed employment authorization renewal.

II. INDIVIDUALS GRANTED DACA SHOULD CONTINUE TO HAVE LAWFUL PRESENCE

We strongly oppose any version of the regulation that does not include lawful presence. Deferred action historically includes lawful presence, and any other formulation would be an unacceptable break from precedence and cause an adjudication nightmare.¹⁰

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.¹¹

Treating DACA recipients differently from those with other forms of deferred action, all of which include lawful presence, could have 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."¹² This clause "is essentially a constitutional requirement that all persons similarly situated should be treated

⁷ Processing times at the National Benefits Center for I-765 applications can take up to 12 months, while the California Service Center can take up to 14.5 months. See "Check Case Processing Times," USCIS, accessed Nov. 12, 2021, <https://egov.uscis.gov/processing-times>.

⁸ "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>.

⁹ 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>.

¹⁰ 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>.

¹¹ 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/>.

¹² U.S. CONST. AMEND. 14, § 1. Equal protection applies to the federal government through the Fifth Amendment Due Process Clause.

alike,” and if not, that the government must have a sufficient rationale for that disparate treatment.¹³ 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.”¹⁴ Here, the federal government would be treating DACA recipients differently from other deferred action categories when they are in all relevant aspects alike—potentially leading to legal challenges regarding the removal of lawful presence.

Recommendation: DHS should formalize the agency’s longstanding policy that DACA recipients granted deferred action do not accrue unlawful presence for the purpose of INA sec. 212(a)(9).

III. DHS SHOULD NARROWLY CONSTRUE DISQUALIFYING CRIMINAL CONVICTIONS

A. Minor traffic offenses

DHS seeks input on its definition of “minor traffic offenses.” The proposed rule states for “minor traffic offenses” to be “considered under a review of the totality of the circumstances.”¹⁵ Currently, USCIS’s DACA FAQ states: “a minor traffic offense will not be considered a misdemeanor for purposes of this process. However, your entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, you warrant an exercise of prosecutorial discretion.”¹⁶ The totality of circumstances approach can easily over-emphasize certain offenses, such as driving without a license, which could be a felony in states such as Florida, Georgia, Illinois, Indiana, Kentucky, and Missouri.¹⁷

Recommendation: Minor traffic offenses should be defined to exclude any traffic related infraction, misdemeanors, or felonies where there was no serious bodily injury to a third party. For offenses where there was serious bodily injury to a third party, adjudicators could continue using the “totality of the circumstances” analysis to determine if an individual warrants prosecutorial discretion. Certain offenses, such as driving without a license or with a suspended license, should always be considered minor traffic offenses due to the difficulties undocumented individuals can face in obtaining a license, regardless of any criminal implications on a state-by-state level.

B. Statute of limitations

When reviewing DACA requests from individuals who have misdemeanor and felony convictions, DHS should establish an administrative “statute of limitations” for consideration of convictions that occurred five or more years before the application date. The criminal justice system at its best is about second chances, the ability to rehabilitate oneself, and our commitment as a nation to reintegrate those who have paid their debt to society. DACA-eligible youth have developed deep ties to family and community in the United States, and they should not suffer further consequences if they have successfully completed the terms of any conviction. By moving beyond old 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.

¹³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

¹⁴ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

¹⁵ DACA Proposed Rule, 53769.

¹⁶ *Ibid.*

¹⁷ “Driving Without a License: Penalties by State,” *CarInsurance.com*, accessed Oct. 22, 2021, <https://www.carinsurance.com/Articles/driving-without-license-penalties-by-state.aspx>.

Recommendation: Within the context of the DACA application, DHS should establish an administrative statute of limitations for consideration of convictions that occurred five or more years before the application date.

C. Expunged convictions

DHS proposes to define conviction for DACA purposes as stated in INA § 101(a)(48), which has been interpreted to include expungements.¹⁸ Currently and throughout the length of DACA, DHS has reviewed expunged convictions on a case-by-case basis to determine whether they warrant a denial of discretion.¹⁹ This is a significant change of policy that is out of line with the history of the DACA program and potentially results in current DACA holders being unable to renew.

AILA believes DHS should not consider expunged and sealed convictions when adjudicating DACA. DHS is currently 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, and almost all states have expungement mechanisms that do not allow for the expungement of felonies.²⁰ There are many ways expungement is defined, which include adjudications or judgment of guilts that 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. Expunged convictions are also ignored in collateral contexts, like work, arms ownership, and federal financial assistance.

Recommendations: We oppose the new definition of conviction proposed in the rule, which adopts in the regulation a broader definition of conviction that includes expunged convictions. Instead, DHS should explicitly exclude expunged convictions from its adjudication of DACA applications.

IV. **DACA APPLICATIONS SHOULD BE INCLUDED ON THE LIST OF APPLICATIONS ELIGIBLE FOR AN I-912 FEE WAIVER**

Currently, DHS does not allow for DACA recipients to apply for an I-912 fee waiver. The current renewal fee is a barrier to DACA renewal, with the majority of DACA holders describing the \$495 filing fee as “a financial hardship on themselves or their families.”²¹ 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.²²

Recommendation: Allow DACA applicants and renewals to apply for the existing I-912 fee waiver.

¹⁸ DACA Proposed Rule, 53815.

¹⁹ DACA FAQ.

²⁰ “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>.

²¹ Ibid.

²² 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?>

V. DHS SHOULD MODIFY HOW IT DATES DACA RENEWALS

Currently, 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 the two grants overlap. While the time the application is pending is not considered unlawful presence if timely filed, over multiple renewals, these periods of "lost" DACA can add up to significant periods of time. This is an inefficient use of agency resources and can cost DACA applicants more in filing fees over the course of their DACA periods.

Recommendation: DHS should issue sequential, consecutive periods of DACA validity instead of overlapping time periods. If a requester currently has DACA, then the renewal would begin on the day their current DACA expires.

VI. DHS SHOULD HARMONIZE ADVANCE PAROLE APPLICATIONS FOR DACA HOLDERS WITH TEMPORARY PROTECTED STATUS HOLDERS

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 such as Temporary Protected Status (TPS) holders. Like TPS, DACA is a form of humanitarian relief, expressing the administration's compassion for children who grew up in the United States and lack legal status through no fault of their own. Requiring a different standard for two forms of humanitarian relief is not only arbitrary but increases USCIS's adjudication burden. Harmonizing advance parole for DACA with the advance parole requirements for TPS will also increase the receipts and revenues as it would remove barriers to applying for advance parole and increase the number of individuals eligible to apply.

Recommendation: DHS should expand the grounds for advance parole to include any reason for travel, similar to Temporary Protected Status (TPS).

VII. CONCLUSION

We appreciate the opportunity to comment on the proposed DACA regulation. For any questions, please contact Kate Voigt, AILA Senior Associate Director of Government Relations (KVoigt@aila.org).

Sincerely,

American Immigration Lawyers Association
American Immigration Council