November 19, 2021

Andria Strano
Acting Chief, Office of Policy and Strategy
Division of Humanitarian Affairs
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via https://www.regulations.gov/
DHS Docket No. 2021–0006; RIN 1615–AC64

Re: Notice of Proposed Rulemaking: Deferred Action for Childhood Arrivals

Dear Ms. Strano,

Apna Ghar, Inc.; Chicago Law and Education Foundation; Erie Neighborhood House; Elaine Han, Hanul Family Alliance; HANA Center; Immigration Judge James R. Fujimoto (retired); Illinois Coalition for Immigrant and Refugee Rights; Immigrants' Rights Clinic, Edwin F. Mandel Legal Aid Clinic, University of Chicago Law School; Bernadine Karge, Immigration Attorney, Advocate; Legal Action Chicago; Legal Aid Chicago; Life Span; Logan Square Neighborhood Association; Bree Yoo-Sun McLuen, Hanul Family Alliance; New American Welcome Center at the University YMCA; Northern Alliance for Immigrants; Northern Illinois Justice for Our Neighbors; Polish American Association; Rock Valley College Refugee and Immigrant Services; The Immigration Project; The Resurrection Project; United African Organization; Vietnamese Association of Illinois; West Suburban Action Project (PASO); and World Relief Chicagoland respectfully submit the following comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM) on the Deferred Action for Childhood Arrivals (DACA) policy, published in the Federal Register on September 28, 2021.[1]

The signatories to this letter include organizations that help clients submit initial and renewal applications for deferred action and employment authorization pursuant to the DACA policy. Given our collective experience helping clients navigate the DACA application and renewal process, we are well qualified to comment on the important issues addressed in these regulations and offer the following comments informed by this experience.

I. General Comments

We welcome the opportunity to submit comments on this NPRM and support DHS's decision to codify the DACA program through formal rulemaking. DACA has created a pathway to stability and greater inclusion for hundreds of thousands of people, including many clients of

[1] 86 FR 53736 (Sept. 28, 2021).

the undersigned organizations. In Illinois alone, there were more than 30,000 active DACA recipients as of June 2021.[2] The policy has helped DACA recipients pursue higher education, commit their talents and energy to critical industries, and further deepen their roots in American communities.[3] By providing DACA recipients with a measure of security, the policy has benefited not only these individuals, but their families, communities, and the nation. Yet the policy has also been clouded by persistent legal challenges that have undermined the program's purpose. Regular threats to the program's future have complicated its administration and created uncertainty and extreme stress for DACA recipients and the DACA-eligible population as a whole. After years of living in this legal limbo, some DACA recipients have become hesitant to make long-term commitments such as buying a home, starting a small business, or pursuing an advanced degree—the very kinds of investments that are critical to the policy's and our nation's success.[4] We hope that this NPRM, and the final rule that will result, will provide greater stability to the DACA program and those who rely on it.

We strongly endorse many elements of the NPRM. In particular, we support the proposed rule's recognition that the exercise of enforcement discretion is appropriate as to the identified class of DACA-eligible individuals because this population is a low priority for removal.[5] According to USCIS data from 2019, only about ten percent of DACA recipients have ever been apprehended or arrested, and recipients' most common offenses were infractions that posed no threat to health or safety (*e.g.*, non-DUI driving-related offenses and immigration offenses).[6] We also agree that DACA recipients should not accrue "unlawful presence" for purposes of admissibility determinations and should be considered "lawfully present" as stated in the proposed rule.[7] This provision will help to ensure that DACA recipients who become eligible for other forms of immigration remedies are not barred from pursuing those avenues.

We also agree with DHS's decision to retain access to employment authorization, on a case-by-case basis, for DACA recipients. Work authorization allows DACA recipients to enter into the formal labor force. This improves the lives of DACA recipients and their families and benefits the economy as a whole, particularly at this time of persistent labor shortages. One 2019 survey found that the employment rate of DACA recipients over age 25 was 91 percent.[8] Over the

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[2] Migration Policy Institute, *Deferred Action for Childhood Arrivals (DACA) Data Tools* (data as of June 2021), https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles (accessed Nov. 5, 2021).

[3] *See* FWD.us, *The Impact of DACA Nine Years After Implementation* (Oct. 19, 2021), https://www.fwd.us/news/impact-of-daca/; Roberto G. Gonzales et al., *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty*, Immigration Initiative at Harvard at 9-25 (2019), https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf (hereinafter "The Long-Term Impact of DACA").

[4] *See* The Long-Term Impact of DACA, *supra* n. 3, at 37.

[5] Proposed 8 C.F.R. § 236.21(c)(1); 86 FR 53751-53753.

[6] USCIS, *DACA Requestors with an IDENT Response* at 3-4, 5 (Nov. 2019), https://www.uscis.gov/sites/default/files/document/data/DACA_Requestors_IDENT_Nov._2019.pdf (cited at 86 FR 53752 n. 135).

[7] Proposed 8 C.F.R. § 236.21(c)(3)-(4); 86 FR 53760-53762.

[8] Tom K. Wong et al., *DACA Recipients' Livelihoods, Families, and Sense of Security Are at Stake This November*, Center for American Progress (Sept. 19, 2019), https://www.americanprogress.org/issues/immigration/news/2019/09/19/474636/daca-recipients-livelihoods-families-sense-security-stake-november/.

years that the DACA program has been in place, those with DACA status have made many valuable contributions, including as frontline health care workers during the pandemic.[9] A DACA policy without the possibility of employment authorization would substantially diminish DACA's economic benefits, undermine the reliance interests of DACA recipients and their communities in DACA recipients' continued participation in the labor force, and deprive DACA recipients of their livelihoods and ability to support themselves and their families.[10] For these reasons and others detailed more comprehensively in the NPRM, we strongly urge DHS to retain the opportunity for employment authorization in the final DACA rule.

While we support these aspects of the NPRM, we also believe that the NPRM reflects a missed opportunity to extend DACA eligibility to many more individuals. DACA provides tremendous benefits for recipients and the nation as a whole, but its eligibility requirements are currently too narrow, excluding thousands of people who should be granted deferred action for many of the same reasons that apply to the population that is currently DACA-eligible. We urge DHS to broaden the threshold criteria for DACA eligibility in § 236.22(b) of the final rule by (1) shortening the time period for which a DACA requestor must provide evidence of continuous residence, for instance by requiring proof of residence for a period of five years preceding issuance of the final rule; (2) eliminating the maximum age for eligibility; and (3) stating that expunged convictions are not disqualifying convictions for DACA eligibility purposes. Each of these changes would more fully effectuate the humanitarian, public safety, and economic goals that animate DACA.

Although we urge DHS to expand DACA eligibility, we also understand that this NPRM is focused on codifying the preexisting DACA eligibility criteria and preserving DACA for those who have strong reliance interests in the policy. Accordingly, the remainder of our comments suggest avenues to clarify and strengthen DACA for the population that is currently DACA-eligible.

II. Suggestions

A. DHS should employ an "any credible evidence" standard for the continuous residence threshold criteria (§ 236.22(b)(2)), expand applicants' ability to rely on affidavits to satisfy this requirement, and clarify that the agency will draw reasonable inferences from evidence of residence.

One of the DACA threshold criteria requires requestors to have continuously resided in the United States from June 15, 2007, to the time of filing of the request.[11] Based on the signatories'

[9] *See* Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response*, Center for American Progress (Apr. 6, 2020), https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response/.

[10] *See* 86 FR 53810-53811.

[11] Proposed 8 C.F.R. § 236.22(b)(2). The NPRM states that DACA requestors will need to demonstrate that this criteria is met by a preponderance of the evidence, relying on primary or secondary evidence. 86 FR 53766. The NPRM adds that affidavits will "generally not be sufficient on their own" to satisfy the threshold criteria, but "may be used to support evidence that the requestor meets the continuous residence requirement if there is a gap in

experience helping clients apply for DACA, discussed further below, the proposed documentation standards for continuous residence will result in eligible individuals being denied DACA status or choosing not to apply to the program. In addition to harming DACA requestors, the exclusion of eligible individuals from the program due to overly stringent documentation standards undermines several other goals of the DACA policy, including allowing immigration enforcement agencies to focus their resources on high priority individuals, improving community safety by reducing barriers to crime reporting, and increasing tax revenues.[12]

Recommendations: To avoid these unintended harms, DHS should adopt a standard of accepting "any credible evidence" of an applicant's continuous residence. This standard of proof applies in other immigration contexts where, as in the DACA program, applicants may experience significant difficulty obtaining primary or secondary evidence.[13] Examples of documents that should qualify as "credible evidence" include tax returns or tax transcripts (which should establish a full year of presence), a date-stamped photo of the applicant at a recognizable location in the United States, credit or debit card statements showing purchases made in the United States, insurance policies, vehicle registrations, and cell phone records showing calls placed from the United States.

In addition, DHS should take two other important steps to improve the continuous residence documentation process. First, DHS should expand its acceptance of affidavits to establish continuous residence whenever requestors cannot obtain other primary or secondary evidence. We especially urge DHS to treat affidavits as acceptable evidence of the start of the continuous residence period for new initial DACA requestors. As we discuss further below, many DACA applicants encounter particular difficulties when trying to show residency in their earliest years of life, and affidavits can provide a reliable and essential replacement for other types of evidence. This type of affidavit-based evidence was part of the regulatory scheme for applications under the 1986 Immigration Reform and Control Act where, similarly, applicants were required to demonstrate continuous residence in the U.S. over a lengthy period of time.[14]

Second, DHS should clarify that (1) there is no minimum number of documents that a DACA applicant must provide per year to demonstrate continuous residence; and (2) agency adjudicators must draw reasonable inferences from the totality of the evidence of residence an applicant provides, including presuming residence for a reasonable period of time on the basis of "point-in-time" evidence that the applicant resided in the U.S. on a particular date. For example, in some cases a single document (such as a tax filing or lease) should suffice as evidence of residence for an entire year. In other cases, the applicant may show continuous residence over the course of a year by producing three or four "point-in-time" documents such as date-stamped photos or records of calls or purchases.

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documentation for the requisite periods and primary and secondary evidence is not available." *Id.* at 53767. DHS requested 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." *Id.*

[12] *See* 86 FR 53756.

[13] *See* 8 C.F.R. § 103.2(b)(2)(iii).

[14] *See id.* § 245a.2(d)(3) (affidavit evidence acceptable where primary evidence of employment unavailable; permitting organizational attestations.)

***Justification*:** These recommendations—an "any credible evidence" standard for the DACA continuous residence requirement, increased flexibility in the use of affidavits, and drawing reasonable inferences from evidence of residence at a particular point in time—are appropriate because DACA recipients were young during the time of their qualifying residence and may not have access to dated records back to 2007, but can still provide credible and reliable evidence of their presence in the U.S. during the qualifying period.

In our experience, DACA requestors often encounter severe barriers to documenting their residence in the United States. To begin with, they are required to document residence for a lengthy period—currently fourteen and a half years—and that time period will only increase in the future. Even DACA requestors who once had paper documentation of their residence may have misplaced or lost access to those documents over the past decade and a half. Other DACA applicants never had such documents. For example, many DACA applicants come from indigent, undocumented households where their parents may have intentionally refrained from recording the family's presence in the United States because of concerns about immigration enforcement. Applicants may lack medical records because their families were unable to afford medical treatment, and some may even lack school records because they helped support their families by working and were denied the opportunity to enroll in school. Due to their lack of work authorization, applicants may have been prevented from building a written record of their employment history because they worked for cash. And applicants may not have bills or lease agreements in their own names because they arrived in the U.S. as children and because some landlords request Social Security numbers during the leasing process. Any of these situations can result in gaps in primary or secondary evidence of residence.

These documentation issues are especially pronounced for DACA applicants trying to prove their residence in the U.S. as young children. Before children are enrolled in school, they may lack consistent records of their location. Some children may have records from a child care facility, but others were cared for by informal caregivers who did not keep regular records or cannot be located. A parent or other relative may be able to supply the applicant with records, but this avenue is not available to every applicant. Parents or relatives may have passed away, lost touch, or failed to maintain records. Legal Aid Chicago has worked with clients who are estranged from their families because of the client's sexual orientation or a history of trauma in the family; in these situations, clients can be left with no access to their childhood records.

DACA applicants who are indigent are also very likely to encounter documentation difficulties. These applicants may not have filed taxes due to their low income and lack of work authorization and may not have standard lease documents. As noted above, they may also have fewer medical or school records. We also have worked with DACA applicants who were homeless for periods of time and who had little or no documentation of their residence for those periods.

As a result of these documentation challenges, Legal Aid Chicago and the Immigrants' Rights Clinic at the University of Chicago Law School have worked with clients who have resided in the United States since 2007 but chose not to apply for DACA because they could not gather sufficient documentary evidence of their residence. If an applicant does apply and USCIS denies their application, the applicant cannot appeal. Applicants must either give up their goal of attaining DACA status, or gather the funds to reapply and hope that they can secure stronger documentary

evidence of their residence. The absence of an appellate review process makes it all the more essential that DHS adopt the clear and flexible documentation requirements identified above.

B. DHS should take steps to avoid lapses in DACA status and employment authorization documents (EADs) for applicants who have filed timely renewal applications, and DHS should implement sequential renewals (§ 236.23(a)(1), (4); § 236.23(d)(3)).

Individuals with DACA status and accompanying EADs rely on DHS to process their renewal applications in a timely manner. If a renewal is not processed before DACA status expires, the DACA recipient will experience a lapse in status; they will accrue unlawful presence, lose work authorization (and consequently their job), and potentially suffer lasting harms.[15] The current system of two-year DACA grants and EADs, coupled with slow processing times for DACA and EAD renewals and a lack of a sequential renewal option, has caused far too many DACA recipients to experience these damaging lapses. The system also creates unnecessary burdens for DACA requestors, who must renew their DACA applications earlier and earlier to account for increasing processing times, and for the USCIS adjudicators who must process these renewal applications.

We offer the following recommendations to improve the renewal process. First, extend the DACA and EAD periods from two to four years to reduce the burdens of a two-year renewal process on USCIS and DACA requestors and minimize lapses in status. Second, allow automatic extensions of DACA status and category (c)(33) EADs while timely renewal requests are being processed. Third, implement consecutive renewals—issuing the renewal from the date of expiration of the prior deferred action status and EAD—so that when a new deferred action status and EAD is granted "early," it does not cut short the initial grants.

1. DHS should extend DACA and work authorization time periods to four years.

We recommend that DHS lengthen the initial and renewal periods for DACA, and associated EADs, from two to four years. This four-year deferred action and EAD timeframe is already employed for noncitizens with pending, bona fide U nonimmigrant status petitions,[16] and EADs are also issued for four years incident to U- and T-visa status.[17] Adopting a four-year DACA period would have two principal benefits.

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[15] *See* USCIS, *Consideration of Deferred Action for Childhood Arrivals: Frequently Asked Questions*, Question 52, https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions (accessed Nov. 5, 2021) (hereinafter "DACA FAQs") ("[I]f your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request. Similarly, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will not be authorized to work in the United States regardless of your age at time of filing until and unless you receive a new employment authorization document from USCIS.")

[16] USCIS, Policy Manual, *Bona Fide Determination Process*, https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5 (accessed Nov. 5, 2021).

[17] 8 C.F.R. § 214.14(c)(7), (g); 8 C.F.R. § 214.11(c)(1), (d)(11).

First, extending the periods would decrease administrative burden and costs for both USCIS and DACA applicants. Longer-lasting deferred action status and EADs would reduce the administrative burden on USCIS because the agency would be able to process renewals less frequently; lengthening the DACA and EAD periods from two to four years would approximately halve the total number of renewal applications. With a projected active DACA program population of roughly 670,000 in 2021 and 955,000 in 2031,[18] this change would save the agency substantial staff time that it otherwise would have to devote to processing and vetting renewals.

Extending the DACA and EAD periods would also reduce burdens on applicants. DHS proposes in the NPRM to charge DACA requestors $495 to apply for DACA status and employment authorization, and $85 to apply for DACA status only.[19] DACA requestors also bear additional costs in the form of time spent filling out the Form I-821D and Form I-765, gathering supporting documents, and traveling to and attending biometrics appointments.[20] Many pay legal fees for assistance with this process, including fees to some legal services organizations. If DACA and EAD periods were extended from two to four years, DACA requestors would need to renew only half as often and would effectively see their costs of participating in the program reduced by half. This change would also reduce burdens on legal services organizations, including some of the undersigned organizations, which assist DACA recipients with their renewal applications and would allow those organizations to allocate resources to other client needs.

Second, extending the periods would reduce the risk of harmful lapses in DACA status and work permits. The current, two-year renewal periods coupled with case processing delays create a high risk of lapses in DACA status and disruption in work permits. With only half as many renewals to process, USCIS would be able to lower renewal processing times and avoid these harms.

In our experience, even a timely-filed DACA renewal provides no guarantee that DACA status will be renewed in time or that a DACA recipient will receive their new EAD promptly so they can continue work without interruption. USCIS recommends that DACA recipients file their renewal applications between 150 and 120 days prior to the expiration of their current DACA/work authorization period in order to avoid a lapse in status.[21] The agency's current estimated processing time for a DACA renewal application and concurrently filed application for work authorization is 3 to 3.5 months.[22] USCIS instructs DACA renewal applicants to contact the agency if their

[18] 86 FR 53786.
[19] *Id.* at 53792.
[20] *See id.* at 53789 (estimating that Form I–821D requires three hours and Form I–765 requires 4.75 hours to complete).
[21] DACA FAQs, *supra* n. 15, Question 49 ("USCIS strongly encourages you to submit your [DACA] renewal request between 150 days and 120 days before the expiration date located on your current Form I-797 DACA approval notice and [EAD]. Filing during this window will minimize the possibility that your current period of DACA will expire before you receive a decision on your renewal request.").
[22] *See* USCIS, *Processing Time for Consideration of Deferred Action for Childhood Arrivals (I-821D) at Nebraska Service Center*, https://egov.uscis.gov/processing-times/ (3-3.5 months for renewal application) (accessed Nov. 15, 2021); USCIS, *Processing Time for Consideration of Deferred Action for Childhood Arrivals (I-821D) at Vermont Service Center*, https://egov.uscis.gov/processing-times/ (same) (accessed Nov. 15, 2021); USCIS, *Processing Time for Application for Employment Authorization (I-765) at California Service Center*, https://egov.uscis.gov/processing-times/ (3-3.5 months based on an approved, concurrently filed, I-821D [(c)(33)]) (accessed Nov. 15, 2021).

applications have been pending longer than 105 days (roughly three-and-a-half months).[23] But our clients regularly encounter much longer processing times. In one case, a Legal Aid Chicago client with a straightforward renewal application waited over 200 days (six-and-a-half months) for a decision, which she ultimately received only after a U.S. Senator's Office intervened on her behalf. In a 2020 survey of more than 1,000 DACA recipients, 8.5 percent reported that their last DACA renewal took six months or more to process.[24]

These long processing times heighten the risk that DACA recipients will experience lapses in status, and even temporary lapses in DACA status and accompanying work authorization can create lasting negative consequences for DACA recipients. When a DACA recipient over the age of 18 loses DACA status, they accrue unlawful presence for the time between the deferred action periods.[25] They also experience fear and anxiety from being "out of status." When a DACA recipient loses their work authorization, they may also lose their job, either temporarily or permanently. They may lose their health coverage, be unable to pay for basic living expenses, fall behind on mortgage or car payments, be forced to drop out of college or stop taking classes, and—assuming they are able to return to the same employer—see the clock restarted on their accrual of employee benefits.[26] Moreover, if a DACA recipient whose work authorization has lapsed does not immediately lose his or her job, the recipient will be working without authorization, which itself is an immigration violation that could bar the recipient from later adjusting their status.[27]

These lapses in EADs also harm employers. The short renewal cycle means that employers of DACA recipients must grapple once every two years with potential disruptions to their workforce, including the potential loss of productive and valuable employees.

The NPRM acknowledges that categorically depriving the DACA-eligible population of work authorization would "result in substantial economic losses" and "produce a great deal of human suffering … associated with lost income and ability to self-support."[28] This reasoning applies equally to short-term lapses in work authorization.

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[23] USCIS, *Outside Normal Processing Time*, https://egov.uscis.gov/e-request/displayONPTForm.do?entryPoint=init&sroPageType=onpt (accessed Nov. 15, 2021).

[24] Tom K. Wong et al., *New DHS Policy Threatens to Undo Gains Made by DACA Recipients*, Center for American Progress (Oct. 5, 2020), https://www.americanprogress.org/issues/immigration/news/2020/10/05/491017/new-dhs-policy-threatens-undo-gains-made-daca-recipients/ (accessed Nov. 5, 2021) (hereinafter "New DHS Policy Threatens to Undo Gains").

[25] *See* DACA FAQs, *supra* n. 15, Question 52.

[26] *See* Priscilla Alvarez, *DACA Recipients Lose Permission to Work Amid Application Backlog*, CNN (July 14, 2021), https://www.cnn.com/2021/07/14/politics/daca-work-permits/index.html; Esther Yu Hsi Lee, *Hundreds Of Immigrants Are Losing Their Jobs Because Of A Federal Government Screwup*, ThinkProgress (Sept. 8, 2016), https://thinkprogress.org/these-immigrants-followed-the-rules-but-they-still-may-lose-their-jobs-1df37d99b7ea/. Even before an EAD expires, the short renewal period for EADs can harm DACA recipients. For instance, Legal Aid Chicago has worked with clients who have difficulty finding work when their EAD is close to its expiration date because employers do not know whether the EAD will be renewed.

[27] *See* INA § 245(c)(2), (8); 8 U.S.C. § 1255(c)(2), (8).

[28] 86 FR 53811.

Extending the DACA and EAD periods to four years would allow USCIS to reduce processing times, avoid unnecessary cutoffs of work authorization, and further the goals of the DACA program by creating greater certainty and stability for applicants and their employers.

2. Alternatively, or in addition, the agency should implement auto-renewals or extensions of deferred action and EADs when timely renewal applications have been filed.

As explained above, the current renewal system causes some DACA recipients to experience disruptive lapses in status and work authorization while they await renewal. These lapses are avoidable. DHS should implement automatic extensions for up to 180 days for DACA recipients who timely file for DACA and work authorization renewals before their current DACA and EAD expire. Beginning in 2017, USCIS began offering automatic 180-day EAD extensions for many other noncitizens "to help prevent gaps in employment authorization and documentation."[29] Auto-extensions for DACA renewal applicants are likewise appropriate.

Although DACA renewal requests are considered on a case-by-case basis, in every year from FY2015-FY2020, the approval rate for DACA renewal requests was over ninety-eight percent.[30] Given that the overwhelming majority of DACA renewal applications are granted, it is in applicants' and the agency's interest to avoid disruptive lapses in status while renewals are being processed. The risk of lapses in status will only increase if renewal processing times slow further.

Implementing an auto-extension policy would not only avoid the harmful impacts of lapsed status and lapsed work permits on DACA recipients, their families, and employers, which we discuss further above, but also allow the agency to allocate resources to initial DACA applications.

3. The agency should shift to sequential, instead of overlapping, grant periods of DACA status and EADs.

Under current agency policy, DACA renewals and accompanying EADs do not run sequentially from the expiration date of the prior DACA/EAD period. This means that DACA recipients who apply early for renewal run the risk of having overlapping grant periods. This feature of the DACA renewal process—in combination with unpredictable processing times—leaves DACA recipients in a Catch-22 situation: submit their renewal applications too late, and they risk a lapse in status and work authorization; submit them too early, and the new two-year period of DACA and work authorization will likely begin before the last two-year period has expired, effectively limiting the prior grant periods to one year and eight to eleven months (rather than a full two years), depending on the timing of the renewal. These several months' of overlap can be frustrating for applicants who may have struggled to save up for the necessary filing fees. In practice, it means they are not getting the full two years of status and work authorization for

[29] USCIS, *Automatic Employment Authorization Document (EAD) Extension*, https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension; *see also Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398, 82406, 82454-82455 (Nov. 18, 2016).

[30] Cong. Research Serv., *Deferred Action for Childhood Arrivals (DACA): By the Numbers* at 8-9 (Apr. 14, 2021), https://sgp.fas.org/crs/homesec/R46764.pdf.

which they have paid. To avoid this overlap, some applicants may delay applying for renewal, which creates the risk of administrative bottlenecks and the disruptive lapses in status discussed above. In other words, applicants are currently forced to choose between filing early and risking losing the benefit of their DACA status for several months, or filing late and risking falling out of status altogether.

Moving to a consecutive renewal system would avoid these problems and allow applicants to file their renewal applications early without the risk of having their current period of work authorization and DACA status cut short. Such a system would also reduce the administrative burden on the agency because DACA statuses and accompanying EADs would last for their full period, leading to less frequent renewals.

C. DHS should codify additional aspects of the agency's existing DACA policies.

The NPRM requests input on whether additional elements of the DACA FAQs should be incorporated into the final rule.[31] We recommend that DHS codify the following aspects of its current policies.

1. DHS should codify its definition of "currently … enrolled in school" in § 236.22(b)(5).

The NPRM describes longstanding DHS policy establishing when an individual is considered to be "currently … enrolled in school" for purposes of the threshold criteria in § 236.22(b)(5).[32] To meet this standard, the DACA requestor must be enrolled in: (1) "[a] public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program that meets State requirements"; (2) "an education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in postsecondary education, job training, or employment and where the requestor is working toward such placement;" or (3) "an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under State law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other State authorized exam (*e.g.,* HiSet or TASC) in the United States."[33]

We encourage DHS to codify these three categories of approved educational programs in the final rule. Doing so would offer additional stability to DACA requestors as they consider their educational options and assess the consequences of those decisions for DACA status. If DHS does take this step, DHS would not need to concurrently codify DHS's guidance regarding the relationship between funding sources and whether educational programs qualify as "school" for DACA purposes. The NPRM explains that the agency's policies regarding funding may be subject to revision,[34] and DHS could codify the broad strokes of its policies in this area without restricting its flexibility to refine its funding-specific policies.

[31] 86 FR 53763.
[32] *Id.* at 53767-53768.
[33] *Id.*; *see also* DACA FAQs, *supra* n. 15, Question 33.
[34] 86 FR 53768.

2. DHS should codify the availability of fee exemptions in § 236.23(a), but should not codify the current, narrow fee exemption criteria.

We recommend that DHS codify the availability of fee exemptions for DACA and DACA-related EADs. The proposed rule does not refer to fee exemptions,[35] but the NPRM states that DHS "proposes no changes to the existing DACA fee exemptions … ."[36]

Under DHS's current fee exemption policies, exemptions are available only in very limited circumstances.[37] These exemptions provide a valuable failsafe for individuals who qualify, but can be difficult to obtain and do not address the widespread difficulties that DACA applicants face in paying the required application fees. We therefore urge DHS to expand the availability of fee exemptions to a far broader range of individuals, akin to the policies for U-Visa or VAWA applicants.[38] By allowing additional members of the DACA-eligible population to apply, expanded fee exemptions would further DACA's goals and produce economic benefits by, among other things, streamlining enforcement encounters and facilitating entry of DACA recipients into the workforce.[39]

Although we urge the agency to broaden its fee exemption policies, at minimum we recommend that DHS codify the general *availability* of fee exemptions in the final rule. Without such codification, DACA applicants lack certainty that any fee exemptions will be available. We recommend that DHS add a new part (a)(5) to § 236.23(a) that states:

> "Fee exemptions for requests for Deferred Action for Childhood Arrivals and requests for employment authorization filed pursuant to 8 C.F.R. § 274a.12(c)(33) and 274a.13 will be available in circumstances to be defined by the agency."

3. DHS should codify its policy that an expunged conviction or juvenile conviction will not automatically disqualify an applicant (§ 236.22(b)(6)).

Many states, including Illinois, permit the expungement of certain prior convictions. As noted above, we support amending the DACA threshold criteria to exclude all expunged convictions from the definition of "conviction" for DACA purposes. The academic research

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[35] Proposed 8 C.F.R. § 236.23(a)(1) ("A request for Deferred Action for Childhood Arrivals must be filed in the manner and on the form designated by USCIS, with the required fee … .").

[36] 86 FR 53764.

[37] The fee exemption currently is available to requestors who can demonstrate that they are "under 18 years of age, homeless, in foster care, or otherwise lacking any parental or other familial support and [their] income is less than 150% of the U.S. poverty level," they "cannot care for [themselves] because [they] suffer from a serious chronic disability and [their] income is less than 150% of the U.S. poverty level," or the requestor, "at the time of the request, accumulated $10,000 or more in debt in the past 12 months as the result of unreimbursed medical expenses for [themselves] or an immediate family member and [their] income is less than 150% of the U.S. poverty level." USCIS, *Guidance for an Exemption from the Fee for a Form I-765 filed with a Request for Consideration of Deferred Action for Childhood Arrivals*, 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.

[38] *See* USCIS, I-912, *Request for Fee Waiver*, https://www.uscis.gov/i-912.

[39] *See* 86 FR 53743-44.

reflects that individuals with expunged convictions present a low public safety risk[40] and thus should be a low priority for removal, like other members of the DACA-eligible population. Additionally, legislative and policy changes providing for expungement—including automatic expungement—reflect an increased desire to create "second chance" opportunities in, for example, employment, housing, and professional licensing for individuals with prior criminal convictions.[41]

At minimum, we urge DHS to maintain its current discretionary approach to reviewing expunged and juvenile convictions. Under current DACA policy, an individual with an expunged or juvenile conviction is not automatically disqualified from DACA status. Instead, requests involving such convictions "will be assessed on a case-by-case basis."[42] Unfortunately, the proposed rule does not mention this discretionary approach. Instead, the proposed rule defines a "conviction" for DACA purposes by reference to INA § 101(a)(48), which has been interpreted to include even expunged convictions.[43] This change could be read to limit DHS's discretion in this area and have severe and harmful consequences for applicants with expunged convictions or juvenile convictions. We urge DHS to revise the final rule to ensure that such convictions do not automatically disqualify applicants from receiving DACA status.

D. DHS should further clarify the definition of "economic necessity" (§274a.12(c)(33)).

We recommend that DHS codify the following definition of economic necessity in the DACA context:

> §274a.12(c)(33). An alien who has been granted deferred action pursuant to 8 CFR 236.21 through 236.23, Deferred Action for Childhood Arrivals, if the alien establishes an economic necessity for employment. Economic necessity is established where the requestor needs to work to support the requestor or the requestor's family.

Codifying this definition would improve administrative efficiency and reduce burdens on applicants by offering agency staff and requestors clear parameters regarding the "economic necessity" standard.

This definition acknowledges the reality that most DACA requestors do have a clear economic necessity for work authorization: for working-age DACA recipients, employment authorization is the key to entry into the formal labor market and to securing safer and better-paying jobs. For instance, a recent survey of 1,157 DACA recipients found that the respondents'

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[40] Prescott, J.J. and Starr, Sonja B., *Expungement of Criminal Convictions: An Empirical Study*, 133 Harvard L. Rev. 2460, 2510-2523 (June 2020), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3167&context=articles.

[41] *See* Kristian Hernández, *More States Consider Automatic Criminal Record Expungement* (May 25, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/25/more-states-consider-automatic-criminal-record-expungement; *see also* Press Release, *Casey, Ernst Push to Give Americans a "Clean Slate," Seal Records for Past Low-Level, Nonviolent Offenses* (Apr. 27, 2021), https://www.casey.senate.gov/news/releases/casey-ernst-push-to-give-americans-a-clean-slate-seal-records-for-past-low-level-nonviolent-offenses.

[42] DACA FAQs, *supra* n. 15, Question 68.

[43] *See Matter of Pickering*, 23 I&N Dec. 621, 623 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263, 271 (6th Cir. 2006).

average hourly wage increased by nearly 111 percent, from $11.80 per hour to $24.88 per hour, after receiving DACA.[44] President Biden's January 20, 2021 Memorandum concerning the DACA program recognized that work authorization "enable[s] [DACA recipients] to support themselves and their families, and to contribute to our economy, while they remain."[45] The NPRM also acknowledges that depriving DACA recipients of work authorization would "produce a great deal of human suffering, including harms to dignitary interests, associated with lost income and ability to self-support."[46] Codifying a clear definition of economic necessity in the DACA context will help ensure that DACA recipients who need to work to support themselves or their families are able to gain work authorization and participate fully in the labor market.

III. Conclusion

We strongly support DHS's effort to codify the DACA program in formal rules. The DACA program recognizes the indispensable contributions of DACA-eligible members of our communities and creates a path for DACA recipients—all of whom, by definition, came to this country as children—to further deepen their ties to this country, avail themselves of the economic and educational opportunities that exist here, and continue to contribute to our society. Despite its benefits, the DACA program also has flaws, including its limited availability and the administrative barriers to attaining and renewing DACA status and work authorization. We urge DHS to consider our suggestions and use this opportunity to strengthen the DACA program.

If you have any questions regarding these comments, please contact: Lisa Palumbo, Director of the Immigrants and Workers' Rights Practice Group at Legal Aid Chicago, at lpalumbo@legalaidchicago.org, or Rachel Wilf-Townsend, Staff Attorney at Legal Action Chicago, at rwilftownsend@legalactionchicago.org.

Respectfully submitted,

Apna Ghar, Inc.

Chicago Law and Education Foundation

Erie Neighborhood House

Immigration Judge James R. Fujimoto (retired)

Elaine Han, Hanul Family Alliance

HANA Center

Illinois Coalition for Immigrant and Refugee Rights

[44] New DHS Policy Threatens to Undo Gains, *supra* n. 24.
[45] Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 FR 7053, 7053 (Jan 25, 2021).
[46] 86 FR 53811.

Immigrants' Rights Clinic, Edwin F. Mandel Legal Aid Clinic, University of Chicago Law School

Bernadine Karge, Immigration Attorney, Advocate

Legal Action Chicago

Legal Aid Chicago

Life Span

Logan Square Neighborhood Association

Bree Yoo-Sun McLuen, Hanul Family Alliance

New American Welcome Center at the University YMCA

Northern Alliance for Immigrants

Northern Illinois Justice for Our Neighbors

Polish American Association

Rock Valley College Refugee and Immigrant Services

The Immigration Project

The Resurrection Project

United African Organization

Vietnamese Association of Illinois

West Suburban Action Project (PASO)

World Relief Chicagoland