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**RE: Comments in Response to the DHS/USCIS Notice of Proposed Rulemaking (NPRM or “Proposed Rule”) entitled *Deferred Action for Childhood Arrivals*; CIS No. 2691-21; DHS Docket No. USCIS-2021-0006; RIN 1615-AC64**

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program (“HIRC”), which includes the Harvard Representation Initiative (“HRI”) and the Harvard Law School Immigration Project (“HIP”), submits this comment on the Proposed Rulemaking published September 28, 2021 by the Department of Homeland Security (“DHS”) and U.S. Citizenship and Immigration Services (“USCIS”), entitled “Deferred Action for Childhood Arrivals” (the “Proposed Rule”).

We are strongly supportive of the Proposed Rule on Deferred Action for Childhood Arrivals (“DACA”) and the crucial protections to DACA recipients it will provide. DACA has allowed hundreds of thousands of individuals to pursue education and careers, which in turn has allowed them to reinvest in the diverse communities where they live. However, we believe that the Proposed Rule should be improved upon with certain important modifications. Specifically, the Proposed Rule should update the cut-off dates to remove arbitrary barriers to DACA, establish automatic renewals for DACA and employment authorization, and expand advance parole. The Proposed Rule should also ensure that USCIS maintains sole authority to adjudicate DACA applications for detained individuals, rather than making DACA adjudications dependent on ICE’s decision-making regarding release from detention. Finally, the Proposed Rule should remove the unlawful status on June 15, 2012 requirement, as well.

## **I. Statement of Interest**

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants' rights while teaching students critical lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugee law and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRC faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, trauma and refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRC has an interest in the proper application and development of U.S. immigration and asylum law to ensure that individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

HRI, based at Harvard Law School's HIRC, provides legal counsel and representation on immigration matters to members of the Harvard University community whose immigration status is at risk. HRI offers legal consultation and representation to undocumented and DACA-mented students and staff, among others. HRI additionally offers social work support to all clients as part of its holistic approach to legal representation, providing support on a range of issues, from health insurance problems to financial concerns to food and housing challenges.

HIP, a student-practice organization under the supervision of HIRC, provides law students with the opportunity to gain practical, hands-on legal experience. HIP represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylum seekers who are seeking family reunification and legal residency. HIRC and HIP regularly partner to offer Know Your Rights presentations and advice and counsel legal clinics throughout the greater Boston community.

## **II. The Proposed Rule Represents a Positive Step for DACA Recipients**

We strongly support efforts to fortify DACA, which has provided vital protections to many incredible members of our community, and the Proposed Rule is a positive first step. HRI has filed approximately 150 applications for DACA students, faculty, and staff at Harvard since the HRI program began in January 2017. We have prepared an average of twenty to thirty DACA applications per year, and we currently have six students with initial DACA applications that have been put on hold since the *Texas II* decision.<sup>1</sup> The Proposed Rule will allow these members of the Harvard community to continue to pursue their education and careers.

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<sup>1</sup> See Order of Permanent Injunction, *State of Texas, et al. v. United States of America, et al.*, No. 18-00068, (S.D. Texas July 16, 2021) ("Texas II") (issuing a permanent injunction against the operation of DACA).

In particular, we strongly support the provision of the Proposed Rule that recognizes DACA recipients as “lawfully present.”<sup>2</sup> As DHS notes, this provision will allow individuals to be eligible for certain public benefits and will prevent individuals from accruing unlawful presence which could present an obstacle to future admissibility under 8 U.S.C. § 1182(a)(9)(B). We also strongly support the provision of the Proposed Rule that clarifies that DACA recipients returning with advance parole satisfy the “inspected and admitted or paroled” requirement for adjustment of status purposes under INA § 245(a). Finally, we support the Proposed Rule’s provision of an official definition of deferred action, clarifying the relationship between deferred action and employment authorization.<sup>3</sup>

However, while we support these positive steps, we stress that the Proposed Rule is just a stopgap, and ultimately Congress should provide a path to citizenship for DACA recipients. We affirm DHS’s statement that “the DACA policy as proposed in this rule is not a permanent solution for the affected population,”<sup>4</sup> and we urge the administration to work with Congress to seek a permanent legislative solution to protect individuals who came to the U.S. as children.

### **III. The Proposed Rule Should Be Revised and Expanded**

In addition, we believe that the Proposed Rule must go further in the areas outlined below. Expansion of the Proposed Rule in these ways would fortify DACA, creating greater certainty and security for its recipients.

#### **A. The Proposed Rule Should Be Revised to Remove Arbitrary Barriers to DACA**

The language of the Proposed Rule seeks to embody the core principles set forth in the 2012 DACA program and aims to “preserve and fortify” the program for the foreseeable future. However, as the Proposed Rule stands today, it does not fortify who qualifies, given its adherence to the original eligibility requirements regarding continuous residency, physical presence, and age caps from the 2012 program—making it impossible to aid the youth and children that DACA has always sought to protect.

Under the original and current eligibility requirements, an individual applying for DACA must have had continuous residence in the United States from June 15, 2007, to the time of filing; they must have been physically present in the United States since June 15, 2012, as well as at the time of filing; they must have been born on or after June 16, 1981; and they must be at least 15 years old at the time of filing. The arbitrary continuation of these original standards excludes individuals who have entered since 2007 but essentially share the same attributes of long-term residency and strong attachments to the United States. To remain true to the purpose of DACA, the Proposed Rule should create an updated timetable to include eligible individuals who have been in the United States for a minimum of five years prior to their initial DACA filing (i.e., since 2016 if the filing occurs this year), which would allow USCIS to meaningfully protect immigrant youth. The Proposed Rule should also provide that moving forward, the President should review this requirement every two years to determine if it should be further extended.

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<sup>2</sup> 86 Fed. Reg. 53814 (to be codified at 8 C.F.R. § 236.21 (c)(3)–(4)).

<sup>3</sup> See 86 Fed. Reg. 53756–57 and 86 Fed. Reg. 53816 (to be codified at 8 C.F.R. § 274a.12(c)(14), (33)).

<sup>4</sup> 86 Fed. Reg. 53739.

The benefits of updating this requirement in the Proposed Rule are countless. Expanding the eligibility requirements for DACA would substantially improve quality of life, economic stability, and social and educational opportunities for young, undocumented immigrants. For example, the National Undocumented Research Project and the Immigration Initiative at Harvard in 2019 found that approximately 70% of DACA recipients reported being able to pursue and complete educational opportunities that were closed to them before DACA.<sup>5</sup> They reported increasing their yearly salaries, as well as significantly decreasing the amount of daily stress and trauma that they faced.<sup>6</sup> Expanding eligibility requirements would offer the same opportunities and peace of mind to other undocumented youth with similar attributes. Expansion of the eligibility date would also provide an opportunity for individuals to apply for DACA who were previously unable to prove that they were continuously physically residing and present in the United States, including youth who had a break in their physical presence or residence.

### **B. The Proposed Rule Should Establish an Auto-Extension of DACA Status and Employment Authorization while Renewal Applications Are Pending**

The Proposed Rule should establish an automatic extension of DACA status and employment authorization while renewal applications are pending. Currently, if the renewal application is not approved before the expiration of DACA, the individual is no longer in lawful status, begins to accrue unlawful presence, and loses the ability to maintain employment in the United States, which could, in turn, negatively impact their future opportunities, including their ability to obtain immigration visas.

Since the Trump administration, there have been serious backlogs reported when it comes to processing renewal applications, and without an automatic extension feature for DACA, these backlogs are putting individuals' futures at risk. According to CBS, as of March 2021, USCIS had a backlog of over 55,000 renewal requests.<sup>7</sup> Also, according to US News and CNN, 13,000 DACA renewal requests had been pending for more than 120 days by the end of June 2021.<sup>8</sup> Moreover, delays in renewal appear to be longer than ever, according to DACA recipients.<sup>9</sup>

Therefore, in order to prevent DACA recipients from falling out of status, accruing unlawful presence, and losing the ability to lawfully work, an auto-extension for renewal applications of DACA and employment authorization should be added into the Proposed Rule.

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<sup>5</sup> ROBERTO G. GONZALES ET AL., THE LONG-TERM IMPACT OF DACA: FORGING FUTURES DESPITE DACA'S UNCERTAINTY (Immigration Initiative at Harvard ed., 2019) 48, [https://immigrationinitiative.harvard.edu/files/hii/files/final\\_daca\\_report.pdf](https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> Camilo Montoya-Galvez, *At Least 50,000 Immigrants Have Applied for DACA since the Program Was Reopened. Most Are Still Waiting*, CBS NEWS (June 30, 2021), <https://www.cbsnews.com/news/daca-immigration-50k-applicants-waiting/>.

<sup>8</sup> Claire Hansen, *Backlogs, Long Waits Throw DACA Recipients' Status, Jobs and Futures into Jeopardy*, US NEWS (July 19, 2021), <https://www.usnews.com/news/national-news/articles/2021-07-19/backlogs-long-waits-throw-daca-recipients-status-jobs-and-futures-into-jeopardy>; 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>.

<sup>9</sup> Acacia Hernandez, *DACA Holders See Delays in the Renewal of their Status*, WTTW NEWS (October 9, 2021), <https://news.wttw.com/2021/10/09/daca-holders-see-delays-renewal-their-status>.

### **C. The Proposed Rule Should Expand Advance Parole**

The Proposed Rule should expand advance parole to allow for departures from the U.S. for six months or a year. Currently, USCIS grants advance parole for very short, discrete windows. Moreover, USCIS adjudicates applications for advance parole on an inconsistent schedule. These short windows of allowable travel combined with inconsistent timing of adjudications make it difficult for many DACA recipients, particularly those in college or graduate school and those who are working, to plan and prepare for travel.

HRI, for example, recently received a Request for Evidence for a DACA student who had hoped to travel to volunteer during summer break. After taking many months to adjudicate the application, USCIS acknowledged in the Request for Evidence that the proposed project dates had elapsed and asked for additional evidence showing that the offer to volunteer still existed. Another recent college graduate wanted to travel to visit family, following the death of one of his family members. Again, his application took a prolonged time period to adjudicate. When USCIS finally adjudicated his application, he could not travel, because USCIS granted him a very small window in which to travel, and he could not coordinate the logistics of his travels on such short notice. As the procedures currently stand, it is incredibly difficult for DACA recipients to align the adjudication of their advance parole requests with breaks from school and work, often making it impossible for them to travel. Because of the inefficient USCIS process for adjudicating advance parole applications, DACA students who seek to contribute to service learning trips are often denied access to these valuable opportunities, and individuals who have experienced a death in the family are often prevented from grieving with family members.

In the Proposed Rule, USCIS should thus develop more consistent and clear procedures and criteria for adjudicating advance parole applications to allow for more efficient and effective processing of these applications. USCIS should also expand its grants of advance parole from short windows of time (ie. of one to two weeks) to longer windows of time (ie., of six months to a year), to mitigate any continued inconsistencies in USCIS's adjudication process.

### **D. USCIS Should Be Given Full Authority to Adjudicate DACA Applications for Detained Individuals**

While we support the Proposed Rule's provision that permits detained individuals to apply for DACA with USCIS,<sup>10</sup> we oppose the last part of this provision that precludes USCIS from approving a DACA application if ICE has not granted release from detention.<sup>11</sup> This bifurcation of authority between USCIS and ICE undermines some of DACA's principal benefits for both DACA recipients and the agencies. DACA is premised on the fact that certain individuals are a low priority for removal and are thus eligible for deferred action. These individuals need not be detained, saving agency resources and protecting individuals from the often dangerous and brutal experience of detention.<sup>12</sup> Making the USCIS DACA adjudication process contingent on ICE could lead to prolonged detention of DACA-eligible individuals who

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<sup>10</sup> 86 Fed. Reg. 53816 (to be codified at 8 C.F.R. § 236.23(a)(2)).

<sup>11</sup> *Id.*

<sup>12</sup> See SETAREH GHANDEHARI, ET AL., FIRST TEN TO COMMUNITIES NOT CAGES 2 (Detention Watch Network ed., 2021), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20First%20Ten%20to%20Communities%20Not%20Cages.pdf> (describing the often cruel and inhumane conditions of various detention centers).

would suffer the harms of continued detention. ICE’s decision-making process regarding bond for release from detention is notoriously arbitrary and disorganized<sup>13</sup>—meaning that securing release could take months or never happen at all—depriving an eligible individual of DACA.

This requirement also makes the DACA Proposed Rule inefficient, leaving the grant of DACA relief in the hands of two DHS component sub-agencies rather than one. USCIS is the agency already tasked with and experienced in adjudicating DACA applications. We urge the agency to extend its jurisdiction to permit full and immediate adjudication of applications for DACA by both detained and non-detained individuals, without reliance on decisions by ICE.

#### **E. The Proposed Rule Should Remove the Criminal Bars to DACA or, at a minimum, Allow Applicants the Opportunity to Apply for a Waiver to Overcome Criminal Bars to DACA**

The Proposed Rule should remove the criminal bars to DACA or, at a minimum, allow otherwise eligible DACA applicants the opportunity to apply for a waiver of the criminal bars to DACA. Under the current proposal, individuals who have been convicted of one felony, a significant misdemeanor or three non-significant misdemeanors are ineligible for DACA. As the Proposed Rule currently stands USCIS has no discretion to look at the particular facts surrounding the convictions such as, but not limited to, the severity of the crime, the age of the individual at the time the crime was committed, rehabilitation, minor drug-related offenses, community ties, and family ties. The Proposed Rule should provide applicants the opportunity to apply for a waiver that would allow USCIS to assess various mitigating factors, on a case by case basis.

#### **F. The Proposed Rule Should Remove the Unlawful Status on June 15, 2012 Requirement**

The Proposed Rule should expand DACA to provide protection for “documented Dreamers,” including children of long-term nonimmigrant visa holders, who were in status on June 15, 2012 but have since fallen out of status. Like current DACA recipients, documented Dreamers were brought to the United States as children and grew up in this country. And like current DACA recipients, documented Dreamers now face a choice between leaving the United States to return to a country they barely know or living in the United States without status. Unlike current DACA recipients, however, documented Dreamers who have fallen out of non-immigrant status since June 15, 2012 are barred from receiving DACA due to the unlawful status on June 15, 2012 requirement.

The best path forward for documented Dreamers, like DACA recipients, is legislation providing a clear path to citizenship. In the meantime, however, expanding DACA in this way would allow documented Dreamers to remain in the United States with their families, and access the work and educational opportunities that DACA provides.

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<sup>13</sup> See ACLU ANALYTICS AND IMMIGRANTS’ RIGHTS PROJECT, DISCRETIONARY DETENTION BY THE NUMBERS (American Civil Liberties Union ed.), <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention> (last visited Nov. 29, 2021) (describing how ICE’s practices for setting bond for release from detention are “inconsistent and arbitrary”).

#### **IV. Conclusion**

While we strongly support the Proposed Rule, we ask that the Proposed Rule include certain crucial updates to further its mission of preserving and fortifying the DACA program. In particular, the Proposed Rule should remove the barriers imposed by arbitrary cut-off dates that are holdovers from DACA's inception nearly ten years ago. The Proposed Rule should be updated to offer DACA protections to otherwise eligible recipients who have arrived since 2007 and who may have had a breach in physical presence since 2012. Additionally, the Proposed Rule should establish an auto-extension for DACA and employment authorization while renewal applications are pending, should expand advance parole, and should give USCIS full authority to adjudicate DACA applications for individuals in ICE detention. Finally, the Proposed Rule should remove the unlawful status on June 15, 2012 requirement so that "documented Dreamers" who have fallen out of status since 2012 are DACA-eligible.

We appreciate the opportunity to provide comments on these Proposed Rules. If you have questions, please contact us by phone at 617-384-8165 or by email at [hirc@law.harvard.edu](mailto:hirc@law.harvard.edu).

Sincerely,

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