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Submitted via Regulations.gov

November 24, 2021

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RE: DHS Docket No. USCIS–2021–0006; RIN 1615–AC64; CIS No. 2691–21; Public Comment on Deferred Action for Childhood Arrivals

The Catholic Legal Immigration Network, Inc. (CLINIC)[1] submits these comments regarding the current Notice of Proposed Rulemaking (NPRM) that would codify Deferred Action for Childhood Arrivals (DACA) and preserve the program for current and future beneficiaries. CLINIC strongly supports the goal of strengthening DACA. Nevertheless, we have concerns about several aspects of the proposed rule, which largely preserve the original DACA program without including much needed updates to the policy. We offer recommendations for ensuring stronger protections for DACA recipients.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to more than 400 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. Through its affiliates, CLINIC advocates for the just and humane treatment of noncitizens by providing legal services to low-income immigrants, including DACA applicants, and creating and disseminating educational materials for their local communities. CLINIC supports these efforts by providing in-depth technical assistance to member organizations that assist DACA recipients and applicants; training and mentoring attorneys, accredited representatives, and advocates on best practices related to DACA; developing DACA-related practice resources for attorneys and accredited representatives; and tracking and monitoring trends in DACA adjudications to address systemic problems and advocate for the fair administration of the program.

In addition, CLINIC's Religious Immigration Services department represents more than 200 religious organizations in the United States and over 800 foreign-born religious workers, some of whom are DACA recipients, who provide critical services to the community, including shelter and nutrition, caring for and ministering to the sick, elderly, and dying in hospitals, and spiritual support and counseling particularly in times of crisis such as the pandemic. Religious workers also provide spiritual presence and instruction at institutions of learning, special facilities, and assist refugees and immigrants in the United States to adjust to a new way of life.

[1] Ilissa Mira, Staff Attorney, Jen Riddle, Staff Attorney, and Rebecca Scholtz, Senior Attorney, authored these comments. The authors would like to thank Christy Williams, Staff Attorney, for her contributions to this comment.

I. Introduction

For almost a decade, DACA has provided over 800,000 undocumented youth with protection from deportation, employment authorization, and increased stability.[2] DACA recipients, who were brought to the United States unlawfully as children without any choice or willfulness on their part, have made significant contributions to the economy and their communities. After years of ongoing uncertainty about their status in the United States, DACA recipients deserve the security of knowing that their futures in this country will be safe. Congress has given the Department of Homeland Security (DHS) broad authority to defer immigration enforcement against individuals with significant ties to the United States,[3] and it is well within the discretion and judgment of the executive branch to determine that undocumented immigrants who came to the United States as children should not be a priority for enforcement.[4] While Congress must act to provide permanent relief to undocumented immigrants and their families, the proposed rule presents an opportunity to "preserve and fortify" DACA, as President Biden has directed.[5] We appreciate that the DHS proposed rule has taken a significant step toward preserving DACA.[6] However, CLINIC has concerns about several aspects of the proposed rule related to application costs, employment authorization, advance parole travel, termination without notice, and protections for DACA recipients. Moreover, CLINIC urges DHS to update the DACA eligibility requirements in order to modernize and expand DACA through the notice and comment rulemaking process.

II. Specific Comments Regarding Aspects of the Proposed Rule

A. CLINIC Recommends Taking Steps to Ensure that Employment Authorization is Accessible to all DACA Recipients

1. Deferred Action and Employment Authorization are Key Features of DACA that Should Not Be Separated

Employment authorization has always been an integral feature of the DACA program. DACA recipients make valuable contributions to our economy in many fields, including in frontline jobs. During the COVID-19 pandemic, 202,500 DACA recipients have been employed in crucial jobs as health care workers, educators, agricultural laborers, and essential food-related workers.[7]

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[2] *Number of Form I 821D, Consideration of Deferred Action for Childhood Arrivals Requests by Intake and Case Status, by Fiscal Year (Aug. 15 – Jun. 30, 2021)*,https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr3.pdf.

[3] Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a); Homeland Security Act § 405(5), 6 U.S.C. § 202(5).

[4] *See Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 487 (9th Cir. 2018) (deferred action "arises… from the Executive's inherent authority to allocate resources and prioritizes cases"), *aff'd*, 140 S. Ct. 1891 (2020).

[5] Memorandum from President Joseph R. Biden, Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/ [hereinafter "Biden DACA Directive"].

[6] DHS Docket No. USCIS – 2691-21, RIN 1615–AC64, Deferred Action for Childhood Arrivals, https://www.govinfo.gov/content/pkg/FR-2021-09-28/pdf/2021-20898.pdf. The Notice of Proposed Rulemaking is hereinafter referred in the text of these comments as "NPRM" and citations are based on the Federal Register page.

[7] 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/article/demographic-profile-daca-recipients-frontlines-coronavirus-response/

While CLINIC does not oppose giving DACA applicants the option to decide whether to apply for employment authorization, the cons of separating employment authorization from deferred action outweigh the pros. The NPRM suggests that making Form I-765 optional would reduce the financial barriers to seeking DACA for many applicants by lowering the application cost for those who do not have an immediate need for employment authorization.[8] A better option for reducing application costs would be to expand the fee exemption categories or to allow DACA recipients to seek fee waivers.

The NPRM states that "… a forbearance-only rule still would have significant advantages and be worthwhile in itself…"[9] However, a forbearance-only policy has limited value. First, most DACA recipients will want an Employment Authorization Document (EAD) regardless of whether or not they are employed or seeking employment at the time they apply. Having an EAD allows a DACA recipient to apply for a Social Security Number and, in all 50 states, a driver's license.[10] It also serves as an important form of identification, which is required for accessing a range of services and benefits. Second, deferred action without the ability to work lawfully undermines the stability of DACA recipients and their families. Lack of employment authorization would, at a minimum, limit the jobs available to DACA recipients and possibly prevent them from working at all. Third, while making employment authorization optional would reduce application costs for some DACA applicants who do not need to work, we are concerned that *pro se* applicants in particular may fail to understand the advantages of having an EAD and the benefits of concurrently filing their I-821D and I-765 applications. We urge DHS to use the rulemaking process to ensure that both forbearance and employment authorization are available to those who qualify for DACA.

2. Fee Exemptions Should Be Expanded or DACA Applicants Should Be Allowed to Request Fee Waivers

While choosing not to seek an EAD concurrently could reduce the cost of applying for DACA, the overall application costs would remain high for those who seek both deferred action and employment authorization. Cost remains a significant barrier for both initial and renewal applicants. A 2014 study found that more than 43 percent of DACA-eligible non-applicants indicated they could not afford the application fee.[11] Although DACA recipients enjoy an increased ability to pursue higher education, obtain valuable skills, and increase their earning potential, their average income is still significantly lower than the average worker in the United States.[12] The fee exemption categories that are currently set forth in the USCIS DACA FAQs are extremely narrow and no fee waiver is available for Form I-821D or an associated Form I-765.[13] Although fee exemptions and waivers are not addressed in the proposed rule, CLINIC urges DHS to take steps to reduce the financial burden for low income applicants by expanding the current guidance on fee exemption criteria or making fee waivers available for DACA and associated EAD applications.

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[8] 86 Fed. Reg. at 53772.
[9] *Id*.
[10] Silva Mathema, *What DACA Recipients Stand to Lose – and What States Can Do About It*, Center for American Progress (Sept. 13, 2018), https://www.americanprogress.org/article/daca-recipients-stand-lose-states-can/
[11] Roberto G. Gonzales and Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, American Immigration Counsel (June 16, 2014) https://www.americanimmigrationcouncil.org/sites/default/files/research/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf
[12] *What Ending DACA Could Cost the Economy*, PBS News Hour (Nov. 12, 2019), https://www.pbs.org/newshour/economy/making-sense/what-ending-daca-could-cost-the-u-s-economy
[13] 8 CFR § 106.3(a)(2); USCIS DACA Frequently Asked Questions, Question 8, (last visited Nov. 16, 2021) https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions

DHS should ensure that EADs are not just available to all DACA applicants, but that they are also accessible. As DHS notes in the NPRM, "[m]any DACA recipients are young adults who are vulnerable because of their lack of immigration status and may have little to no means to pay the fee for the request for deferred action."[14] The recurring nature of DACA application fees is an immense financial burden for significant numbers of DACA recipients. According to a 2014 study, 36 percent of respondents reported that the costs associated with their first DACA application caused a delay in applying for the program—the average length of this delay was three months. Fifty-one percent said that a $465 fee to renew DACA would impose a financial hardship on themselves or their families.[15] The cost of applying for DACA and an EAD has only risen since then.

USCIS could address this by updating its current policy guidance to expand the fee exemption criteria beyond those that currently require an applicant to demonstrate that he or she:

- Is under 18 years of age, homeless, in foster care or under 18 years of age and otherwise lacking any parental or other familial support and his or her income is less than 150% of the U.S. poverty level; or
- Is unable to care for themself because they suffer from a serious, chronic disability and their income is less than 150 percent of the U.S. poverty level; or
- Has, at the time of the request, accumulated $10,000 or more in debt in the past 12 months as a result of unreimbursed medical expenses for themself or an immediate family member, and the applicant's income is less than 150 percent of the U.S. poverty level.[16]

CLINIC recommends making fee exemptions available for anyone whose household income is less than 150 percent of the U.S. poverty level for their household size. USCIS might also consider fee exemptions for households in which multiple family members are applying for DACA at the same time. In the alternative, we recommend that DHS amend 8 CFR § 106.3(a)(1) to include a fee waiver provision for DACA deferred action and EADs. Expanded exemptions and/or fee waivers would improve access to DACA and employment authorization for the most vulnerable.

3. Deferred Action and Work Authorization Should Be Granted for a Period that is More than Two Years

The constant need to renew DACA creates substantial financial and emotional burdens for DACA recipients. Since the current policy requires renewal applicants to submit their applications between 120 days and 150 days before their deferred action expires, DACA recipients typically begin the process of preparing their renewal applications as early as a year into their most recent extension. The relief provided by a DACA approval is short lived, as the recipient must so frequently prepare to apply for renewal and consider the possibility that their application may be denied or may not be adjudicated before their current DACA grant expires. The threat of being placed into immigration detention, being deported, losing their job, or otherwise having their life disrupted is always looming.

CLINIC recommends that DHS provide DACA recipients with a period of deferred action and work authorization that is longer than two years. Under the 2014 Expanded DACA initiative, DHS would have extended DACA and accompanying employment authorization for three-year increments.[17] The new bona

[14] 86 Fed. Reg. at 53764
[15] Tom K. Wong, *In Their Own Words: A Nationwide Survey of Undocumented Millennials* (Working Paper 191, May 20, 2014), https://ccis.ucsd.edu/_files/wp191.pdf
[16] DACA FAQs, Question 8
[17] Memorandum from Jeh Johnson, Secretary, DHS to Leon Rodriguez, Director, USCIS, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect*

fide determination process allows U status applicants to receive deferred action and employment authorization in four-year increments.[18] Granting deferred action and employment authorization for a longer period would provide DACA recipients with greater stability and alleviate the financial burden of frequent renewals. DHS should strike language at proposed section 236.23(a)(4) that refers to providing a grant of DACA for an initial or renewal period of two years and instead replace that with a longer period of time.

4. Approved EAD Renewals Should Extend Employment Authorization from the Date of the Prior EAD's Expiration, Not from the Date the I-765 is Approved

The USCIS DACA FAQs instruct renewal applicants to file their requests between 120 and 150 days prior to the expiration of their deferred action and EAD.[19] Under the current policy, employment authorization is granted for two years from the date the renewal I-821D and I-765 are approved. As a result, some applicants who file early, including those who file within the recommended 120- to 150-day period, may receive less than a full extension. Processing times have varied since DACA was created, depending on USCIS backlogs, but the filing recommendation has remained constant for nearly ten years. Current I-821D and associated I-765 processing times are listed as about three to three-and-a-half months. According to USCIS statistics, the median processing time for Form I-821D and an accompanying Form I-765 is less than two months.[20]

Many applicants apply for renewal earlier than the recommended period in order to avoid a gap in deferred action and work authorization due to processing delays and to ensure that they remain in the workforce, can be relied on by employers, and are able to support themselves and their families. Constant litigation and uncertainty about whether the courts will halt the program have also led some DACA recipients to apply early. One CLINIC client filed his renewal application during the recommended period and was granted deferred action and employment authorization that overlapped with his current grant for four months. To avoid this result, CLINIC recommends that USCIS issue deferred action and EADs that are valid from the date the previous grants expire. Providing consecutive grants reduces the financial burden of regular renewals and ensures that DACA recipients who file timely renewals receive the full protections that DACA is intended to provide.

5. DACA Recipients Who File Renewal Applications Prior to the Expiration of Their Deferred Action Should Receive a 180-Day Automatic Extension

CLINIC encourages DHS to extend DACA and associated EADs automatically for 180 days for DACA recipients who submit their renewal applications prior to the expiration of their deferred action and work authorization. While the majority of renewal applications are filed between 120 and 150 days prior to expiration, processing times fluctuate. Some applicants may file renewal requests fewer than 120 days prior to the previous grant expiring for a variety of reasons, including an inability to pay the fees or find legal representation or uncertainty about the status of the program and litigation. A gap in work authorization harms employers, as well as DACA recipients and their families. The disruption in authorization may lead employers to view DACA recipients as being less stable and reliable employees. The added burden of

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to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents, (Nov. 20, 2014) (hereinafter 2014 Expanded DACA Memorandum).

[18] USCIS Policy Manual, Vol. 3, Part C, Ch. 5 (last visited Nov. 16, 2021), https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5

[19] DACA FAQ, Question 49.

[20] *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, FY 2017 – 2021*, https://egov.uscis.gov/processing-times/historic-pt

having to regularly verify employment authorization could contribute to discrimination based on national origin and/or lack of lawful immigration status.

The negative impact of disruptions in employment authorization could be avoided simply by extending renewal applicants' DACA and EAD for 180 days, as the agency does for other I-765 renewal applicants such as Temporary Protected Status (TPS) recipients, refugees and asylees, and adjustment of status applicants.[21] Those who submit renewal applications before their deferred action and EADs expire should not be penalized because of processing delays or backlogs.

We recommend that DHS consider including a DACA-specific exception to 8 CFR § 274a.13(d) that would allow USCIS to provide DACA recipients who timely file their DACA and EAD renewal applications with an automatic 180-day extension of deferred action and employment authorization. By issuing automatic extensions, USCIS could further protect DACA recipients from accruing unlawful status and having a gap in employment authorization solely because of processing backlogs. Providing automatic extensions should not require a significant amount of additional work for USCIS and would instead ease administrative burdens for the agency, legal service providers, and the applicants themselves. USCIS could include language in receipt notices that would extend DACA and work authorization for 180 days as well as publish guidance for employers explaining the extension on its website. USCIS already does this for applicants in other employment eligible categories.[22]

Since DACA's inception, USCIS has approved 88 percent of the DACA renewal applications it has accepted.[23] Therefore, we believe that it is both fair and reasonable to make automatic extensions available to DACA renewal applicants. To ensure that a 180-day automatic extension is effective, we urge USCIS to dedicate the resources necessary to provide prompt adjudications that are completed within the 180-day period.

An alternative to granting automatic extensions would be for USCIS to allow expedited processing of any DACA request (renewal or initial), as well as related applications for employment authorization and/or advance parole, by amending DACA FAQ 79.

B. USCIS Should Maximize its Positive Exercise of Discretion in Granting Advance Parole to DACA Recipients

CLINIC commends DHS for reiterating that it will continue to exercise its discretion to grant advance parole to DACA recipients in adherence to the statutory standard at INA § 212(d)(5)(A). Furthermore, CLINIC agrees with USCIS that its current DACA-based advance parole guidance does not conflict with Congress' expressed intent for eligibility for adjustment of status and urges USCIS to continue to view a return on advance parole as an "inspection and admission or parole" for purposes of adjustment under INA § 245(a) for DACA recipients who initially entered without inspection. However, CLINC also requests that

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[21] 8 CFR § 274a.13(d); 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.

[22] *Automatic Employment Authorization Document (EAD) Extension*, (last visited Nov. 16, 2021), https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension.

[23] *Number of Form I 821D, Consideration of Deferred Action for Childhood Arrivals Requests by Intake and Case Status, by Fiscal Year*, USCIS (Aug. 15, 2012 – Jun. 30, 2021), https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr3.pdf.

USCIS adopt the following changes to the language of the final rule, as well as take steps to adopt generous policy guidance for adjudicating advance parole applications.

1. A Departure from the United States without Advance Parole Should Not Result in the Automatic Termination of DACA

The proposed regulations at 8 CFR § 236.23(d)(2)(ii) provide that DACA is terminated automatically without notice upon "[d]eparture of the noncitizen from the United States without advance parole." Despite the fact that this has been the agency's longstanding policy,[24] CLINIC believes strongly that USCIS should provide all DACA recipients with notice and an opportunity to respond prior to any termination, including a termination based on travel without advance parole. The final regulations should only allow for discretionary termination following notice. This would require USCIS to issue a notice of intent to terminate (NOIT) and wait a period of at least 30 days for the DACA recipient to respond. Only then, if termination is warranted, may USCIS make an individualized decision to terminate DACA.[25]

In the NPRM, DHS indicates its openness to adopting an approach in which a departure without advance parole would not result in automatic termination if there were exigent circumstances, such as a DACA recipient who had to depart the United States in an emergency without sufficient time to first obtain advance parole. CLINIC urges USCIS to adopt this alternative approach in lieu of automatic termination. DACA recipients sometimes need to travel abroad on incredibly short notice, for example when a relative becomes seriously ill or is on the verge of death. Upon calling the USCIS Contact Center, the officer may be unable or unwilling to schedule an in-person emergency advance parole appointment in time for the trip. Or, even if the DACA recipient obtains an appointment within the next few days, the USCIS field office may decline to issue an emergency advance parole document. These individuals are then forced to make the impossible choice between seeing a loved one for the last time and maintaining their right to reside and work in the country they call home. CLINIC is also aware of numerous DACA recipients who have been subject to automatic termination following an inadvertent or unintentional departure from the United States at the Canadian or Mexican border without advance parole. For example, the DACA recipient who was taken to the Canadian side of Niagara Falls on a school field trip or who missed an exit and accidentally drove his vehicle into Mexico should not face automatic termination on the basis of an event that occurred through little or no fault of their own.

As discussed below in Section C, CLINIC urges DHS to delete 8 CFR § 236.23(d)(2) and to edit 8 CFR § 236.23(d)(1) to require that a discretionary termination of an individual DACA grant must be preceded by issuance of a NOIT providing a reasoned explanation of the intended basis for termination, as well as evidence of any allegations forming the basis for the termination and giving the DACA recipient 30 days to respond before a termination decision is made. This will allow USCIS the opportunity to consider the totality of the circumstances of the individual DACA holder's departure without advance parole and decide whether they were indeed exigent. Even outside the context of a departure without advance parole, CLINIC firmly believes DHS must change its longstanding policy permitting the termination of a DACA grant "at

[24] USCIS DACA FAQ, Question 58 (which provides: "CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.").

[25] See discussion below, in Section C, urging USCIS to strike proposed 8 CFR § 236.23(d)(2) and not to use departure as an automatic basis for termination.

any time, with or without a [NOIT], at DHS's discretion."[26] Instead, USCIS must require a NOIT and an opportunity to respond in all cases.

2. Extraordinary Circumstances Should Be Considered When Determining Whether Travel Outside the United States Without Advance Parole Disrupts Continuous Residence

The proposed regulations at 8 CFR § 236.22(b)(2) provide that "unauthorized travel outside of the United States on or after August 15, 2012, will interrupt continuous residence, regardless of whether it was otherwise brief, casual, and innocent." While CLINIC understands this has been longstanding USCIS policy,[27] we believe this disqualifying criterion should be modified in the final rule. Specifically, applicants who are otherwise eligible for DACA but departed the United States after August 15, 2012, without advance parole should not be disqualified from DACA if they can show extraordinary circumstances for their departure.

Nothing in DHS Secretary Napolitano's June 15, 2012, memo announcing DACA banned travel outside the United States after August 15, 2012. Presumably, when USCIS adopted this restriction, it assumed it was providing future DACA applicants with two months' notice that any subsequent departure without advance parole would disqualify them from DACA eligibility. This is unfair to the many Dreamers who did not learn of this restriction in time, including those who only became eligible for DACA at some point after its initial creation. CLINIC believes it is inherently unjust to deny DACA to someone who would otherwise qualify but for a brief, casual, or innocent departure after August 15, 2012 that was the result of an emergency or based on other exigent circumstances outside of the applicant's control.

3. Exercise Discretion to Issue Advance Parole Expansively to DACA Recipients with a Range of Travel Purposes

CLINIC urges USCIS to take all possible steps to expand the ability of DACA recipients to apply for and receive advance parole in a timely manner for a wide range of travel purposes. Section 212(d)(5)(A) of the INA provides the agency broad discretion to grant advance parole to DACA recipients when justified by urgent humanitarian reasons or significant public benefit. The DACA FAQs allow adjudicators to determine whether travel is "justifiable based on the circumstances" described by the individual applicant. While the FAQs favor travel that will further a humanitarian, educational or employment purpose, they permit advance parole to be granted more expansively, even when the travel reason falls outside of these enumerated purposes.[28]

It is clearly within the discretion of USCIS to grant advance parole for a wide array of travel purposes. However, in practice, many are deterred from applying for advance parole due to confusion about the qualifying criteria. Most DACA recipients have never departed the United States since their entry and, prior to receiving DACA, had no ability to travel overseas. There are a range of compelling reasons DACA recipients have for wanting to travel abroad that do not fit squarely into one of the three enumerated purposes. DACA holders and practitioners are not clear whether advance parole can be granted, for example, for the purpose of attending a wedding or baptism (as opposed to a funeral), visiting a close relative who is neither ill nor elderly, or reuniting with an extended family member (for example, an aunt,

[26] USCIS DACA FAQ, Question 27.
[27] USCIS DACA FAQ, Question 58 (which provides: "unauthorized travel outside of the United States on or after August 15, 2012, will interrupt continuous residence, regardless of whether it was otherwise brief, casual, and innocent.").
[28] USCIS DACA FAQ, Question 57 (stating that "USCIS will determine whether your purpose for international travel is justifiable based on the circumstances you describe in your request" and using the word "generally" to modify the limitation of approving advance parole only for humanitarian, educational or employment purposes).

uncle or cousin rather than an immediate family member) or friend. Moreover, USCIS adjudicators apply the advance parole criteria inconsistently, both within particular Field Offices, as well as from one Field Office to the next. DACA recipients often decline to apply for advance parole because of the cost and uncertainty regarding the outcome of "borderline" cases. One CLINIC client wants to visit her grandmother and father in Mexico but, due to lack of clarity regarding what will suffice as a "humanitarian" purpose and difficulties in documenting the purpose for her trip, is reluctant to apply for advance parole and remains separated from her family.

In addition to being the just thing to do, instructing adjudicators to interpret the advance parole guidelines more broadly and exercise discretion more generously to grant advance parole will enhance efficiency within USCIS and save the agency valuable resources. Processing times for I-131 applications for DACA recipients are extremely long and can take up to six months. Moreover, attempts to expedite adjudication of long-pending I-131s are often unsuccessful. Such processing delays in themselves are effectively denials when someone cannot actually travel by their target date. CLINIC is aware of DACA recipients who have filed applications several months in advance of an upcoming study abroad program or other qualifying trip who do not receive an approval until after the departure date has passed. Encouraging a broader use of discretion in granting advance parole when justified by the individual circumstances, even when the travel purpose is not one specifically enumerated in the DACA FAQ guidance, would save USCIS adjudicators valuable time and resources in reviewing and approving these applications. In addition, permitting concurrent filing of the I-131 application with the DACA request would make the application process more efficient for USCIS.[29]

C. USCIS Should Provide DACA Recipients with Notice and an Opportunity to Respond Before Any DACA Termination

CLINIC was disappointed to see that the proposed regulation at 8 CFR § 236.23(d)(1) would permit USCIS to terminate an individual's DACA grant "at any time in its discretion with or without issuance of a notice of intent to terminate." CLINIC urges USCIS to provide all DACA recipients with fair process before terminating a DACA grant through, at a minimum, providing notice of the intended termination ground, a copy of the evidence USCIS is relying on, and an opportunity to respond. Procedural fairness is essential to minimize the risk of erroneous deprivation due to USCIS's inaccurate understanding of the facts and to decrease racially disparate outcomes, as discussed below. Notice and an opportunity to respond also respects DACA recipients' deep-seated reliance interests.

CLINIC recommends that DHS make the following changes to proposed 8 CFR § 236.23(d)(1) regarding USCIS's discretionary authority to terminate DACA:

> *(d)Termination.*
> (1) *Discretionary termination **following notice**.* USCIS may terminate a grant of Deferred Action for Childhood Arrivals at any time in its discretion **but only if it first**:
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> **(a)** ~~with or without issuance of~~ **issues to the DACA recipient** a notice of intent to terminate **that provides a reasoned explanation of the intended basis for termination, as well as evidence of any allegations forming the basis for the termination, and**
> **(b) provides the DACA recipient an opportunity to respond within 30 days following receipt to the notice of intent to terminate.**

[29] USCIS DACA FAQ, Question 59 (providing: "Concurrent filing of advance parole is not an option at this time.").

> Only if USCIS concludes that termination is warranted after reviewing the DACA recipient's response to the notice of intent to terminate may USCIS terminate DACA.

Providing notice and an opportunity to be heard before any DACA termination would: (1) decrease the risk of erroneous DACA terminations; (2) decrease the potential for racially discriminatory decision-making; and (3) honor the deeply-held reliance interests that DACA recipients possess. We further explain each of these points below.

First, procedural fairness before any DACA termination will reduce the risk of erroneous decision-making. When USCIS terminates DACA without providing the DACA recipient a chance to rebut the "derogatory" information, USCIS runs the risk of relying on inaccurate information. For example, USCIS might believe that a particular DACA recipient was the subject of a criminal arrest when it was actually someone else who was arrested. Or perhaps the DACA recipient *was* arrested but was subsequently cleared by law enforcement of any criminal involvement.[30] USCIS might believe that a particular DACA recipient departed the country without advance parole when in fact the DACA recipient never left. Or perhaps the DACA recipient was forced to leave briefly because of extraordinary circumstances unknown to the agency that should not result in termination of DACA.[31] More broadly, USCIS should have an interest in fair and factual decision-making concerning DACA recipients, which furthers the President's January 20, 2021, directive to "preserve and fortify" DACA.[32] In fact, regulations already require USCIS to advise applicants for immigration benefits of any "derogatory information" that serves as the basis for a possible adverse decision and provide applicants an "opportunity to rebut the information and present information in his/her own behalf before the decision is rendered."[33] The NPRM offers no persuasive reason why USCIS cannot or should not comply with this directive in the context of DACA recipients.[34] In fact, USCIS claims that it has a "longstanding practice of generally providing" notice prior to termination of DACA grants.[35] USCIS should codify this basic procedural protection through this rulemaking.

Second, providing DACA recipients with notice of derogatory evidence and an opportunity to respond prior to termination will reduce racially discriminatory decision-making. Often, young people of color, including

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[30] *See, e.g.*, ACLU, Wrongfully Arrested Because Face Recognition Can't Tell Black People Apart, June 4, 2020, https://www.aclu.org/news/privacy-technology/wrongfully-arrested-because-face-recognition-cant-tell-black-people-apart/; Tyler Cashman, *Multiple Police Departments Apologize for Mistaken Identity Stop in Bloomington*, KARE 11, July 11, 2020, https://www.kare11.com/article/news/local/multiple-police-departments-apologize-for-mistaken-identity-stop/89-f1ad03bd-0a4f-4d62-80fa-e0bbf164d7c3; Alyssa Lukpat, *Man Was Held for More Than 2 Years over Mistaken Identity, His Lawyer Says*, NY TIMES, Aug. 6, 2021, https://www.nytimes.com/2021/08/06/us/hawaii-mistaken-identity-release.html.

[31] As discussed above in Section B.1, CLINIC urges USCIS to strike proposed 8 CFR § 236.23(d)(2) and not to use departure as an automatic basis for termination; instead applying a totality of the circumstances analysis to the circumstances of the individual's departure.

[32] Biden DACA Directive, *supra* note 5.

[33] 8 CFR § 103.2(b)(16)(i).

[34] Indeed, available data show that the number of terminations is quite small in comparison to the total number of DACA recipients. See DHS Response to Representative Gutierrez's April 23, 2018 Letter, at 3 (July 9, 2018), https://www.uscis.gov/sites/default/files/document/foia/DACA_adjudication_data_-_Representative_Guitierrez.pdf (stating that from August 15, 2012 to April 30, 2018, there were approximately 3,010 DACA terminations); USCIS, DACA Terminations Related to Criminal and Gang Activity by Fiscal Year, https://www.uscis.gov/sites/default/files/document/data/DACA_Terminations_Related_to_Criminal_and_Gang_Activity_by_Fiscal_Year.pdf (providing certain termination data from FY 2013 to FY 2017).

[35] 86 Fed. Reg. at 53770; *see also id.* at 53769.

DACA recipients, are victims of racist policing, subjected to unjustified stops and baselessly accused of criminal activity or gang affiliation.[36] One example is the case of Daniel Ramirez Medina, a DACA youth whom ICE arrested based on unsupported claims that he was gang-affiliated, which led USCIS to terminate his DACA.[37] A federal court concluded that the agency's termination of Daniel's DACA based on unsupported gang allegations likely violated due process[38] and called the agency's gang allegations against Daniel "troubling" given that it had "offer[ed] no evidence . . . to support its assertions."[39] Providing DACA recipients notice of any derogatory evidence and an opportunity to respond would mitigate the risk that USCIS terminations will be the product of racist policing.[40] It would also better implement the President's executive order on advancing racial equity, which directs agencies to "recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity" and to "assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups."[41]

Third, codifying notice and an opportunity to be heard prior to termination respects the deeply-held reliance interests of DACA recipients. Termination takes crucial benefits away from youth who have previously proven to the agency that they qualify for, and should be granted, DACA. The NPRM repeatedly recognizes the "legitimate reliance interests" that DACA recipients have, noting that they have "order[ed] their lives in reliance on and as a result of this policy," which benefits not only the DACA recipient but also "their families, their communities, and [] the Department itself."[42] The loss DACA recipients suffer when the government terminates their DACA without notice or justification is acute. One such example is "Martin," whose story was featured in CLINIC's amicus brief to the Ninth Circuit in support of the district court's *Inland Empire* decision.[43] Martin, a community college student who has lived in the United States since he

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[36] *See, e.g.*, Alexi Jones, Prison Policy Initiative, *Police Stops Are Still Marred by Racial Discrimination, New Data Shows* (Oct. 12, 2018), https://www.prisonpolicy.org/blog/2018/10/12/policing/ (discussing Bureau of Justice Statistics report); Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUM. BEHAV. 736, 737, 739 (2020); *see also* Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use-of-Force in the U.S. by Age, Race/Ethnicity, and Sex*, 116 PNAS 16793 (Aug. 20, 2019), https://www.pnas.org/cgi/doi/10.1073/pnas.1821204116.

[37] *Medina v. DHS*, 313 F. Supp. 3d 1237 (W.D. Wash. 2018); s*ee* Mark Joseph Stern, *ICE Claimed a Dreamer Was "Gang-Affiliated" and Tried to Deport Him. A Federal Judge Ruled That ICE Was Lying*, SLATE, May 16, 2018, https://slate.com/news-and-politics/2018/05/federal-judge-accused-ice-of-making-up-evidence-to-prove-that-dreamer-was-gang-affiliated.html.

[38] 313 F. Supp. 3d at 1251.

[39] *Id.* at 1250.

[40] Of course, this minimal procedural protection will not address the problem of racist policing itself, though it is a way to lessen one of the many harmful impacts racist policing has on the targeted individual. More broadly, the *Medina* case illustrates why USCIS should cease relying on mere allegations that an individual is gang-affiliated as a basis for adverse action such as termination of DACA, given that gang allegations are often the product of racial discrimination and/or error-laden databases. *See, e.g.,* April 1, 2021 letter sent by advocacy organizations including CLINIC to Secretary Mayorkas, https://www.hrw.org/news/2021/04/01/groups-urge-us-end-discriminatory-ice-gang-prioritization#.

[41] Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan, 20, 2021). Indeed, DHS lists "equity" as one of the goals of this rulemaking and states that it is "keenly alert to distributive impacts." 86 Fed. Reg. at 53796.

[42] 86 Fed. Reg. at 53739, *see also id.* at 53745 (noting "serious reliance interests" of DACA recipients as well as "their families, schools, employers, faith groups, and communities"); *id.* at 53783 (same).

[43] Brief of Catholic Legal Immigration Network, Inc. as Amicus Curiae in Support of Plaintiffs-Appellees, Doc. 27, *Inland Empire — Immigrant Youth Collective v. Nielsen*, No. 18-55564 (9th Cir. Dec. 21, 2018), https://cliniclegal.org/resources/litigation/inland-empire-immigrant-youth-collective-et-al-v-kirstjen-nielsen-et-al-amicus.

was five years old, lost his job at Amazon when USCIS terminated his DACA without notice. He then spent four painful weeks in immigration detention where he was mocked by jail guards for having a prosthetic leg—the result of a physical disability he was born with. While Martin's DACA was ultimately reinstated due to the *Inland Empire* injunction, the termination without notice made him feel that he had "lost everything"[44]—unable to return to his job at Amazon and left with the feeling that he could not live safely and securely in the United States. Requiring notice and opportunity to respond before USCIS may terminate DACA respects reliance interests and helps to ensure that no DACA recipient is unjustly or unnecessarily deprived of DACA.

In short, termination without notice runs counter to the Biden administration's commitment to this population, a group who have suffered enough arbitrariness and whiplash over the last five years. USCIS should not add to the arbitrariness and unfairness DACA recipients have already endured by codifying practices that violate due process. In his immigration platform, then-candidate Biden called out the Trump administration's "cruel and counterproductive decision to terminate DACA, throwing into turmoil the lives of millions of Dreamers."[45] The agency should not continue the previous administration's cruelty or pave the way for the cruelty of the next anti-immigrant administration by allowing terminations without prior notice and an opportunity to be heard through this rulemaking.

1. The Regulations Should Specify That Mere Issuance of a Notice to Appear Is Not a Valid Basis for Termination

The proposed regulation inexplicably codifies a practice enjoined as unlawful by a federal court—that of automatically terminating an individual's DACA grant based on mere issuance of a Notice to Appear (NTA). The final rule should strike this language and instead explicitly prohibit USCIS from terminating DACA based solely on the existence of an NTA. CLINIC proposes that USCIS implement the following changes to proposed 8 CFR § 236.23(d)(2):

> *(d)Termination.*
>
> . . . .
>
> **(2) *Notice to Appear not basis for termination*. The fact that the DACA recipient has been issued a Notice to Appear, or that such Notice to Appear has been filed with EOIR, shall not be the basis for any decision to terminate DACA.**
>
> ~~*Automatic termination.* Deferred Action for Childhood Arrivals is terminated automatically without notice upon:~~
>
> ~~(i) Filing of a Notice to Appear for removal proceedings with EOIR, unless the Notice to Appear is issued by USCIS solely as part of an asylum case referral to EOIR; or~~
> ~~(ii) Departure of the noncitizen from the United States without advance parole.~~

As the federal court held in *Inland Empire-Immigrant Youth Collective v. Nielsen*, terminating DACA based on nothing more than the fact that ICE has decided to issue an NTA is unlawful.[46] In enjoining USCIS from terminating DACA based solely on the existence of an NTA, the *Inland Empire* court noted that "a

[44] *Id.* at 6.
[45] The Biden Plan on Securing Our Values as a Nation of Immigrants, https://joebiden.com/immigration/.
[46] No. 17-2048, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018)

noncitizen's deportability due to unauthorized presence in the United States—the basis for NTAs—provides no relevant basis for terminating DACA."[47] In fact, unauthorized presence is an eligibility requirement for the DACA program, which "was *specifically designed* for persons without lawful immigration status."[48] And the DACA rules explicitly state that noncitizens in removal proceedings, whether pending or in cases of those with a final order, are nonetheless eligible for DACA.[49] It is thus nonsensical to make the existence of an NTA or removal proceedings a ground for terminating DACA. For the same reason, the NPRM's proposed alternative to tie automatic termination to issuance of a final removal order is similarly irrational.[50]

More broadly, the NTA termination provision essentially renders meaningless USCIS's authority to grant DACA, because the discretionary actions of any individual ICE officer to initiate removal proceedings automatically overrides USCIS's reasoned, deliberative decision to grant DACA. The NTA termination provision is especially inappropriate considering that under the proposed regulations "USCIS has exclusive jurisdiction to consider requests for [DACA],"[51] and neither ICE nor EOIR has any say over the matter. The proposed NTA termination provision essentially gives ICE a DACA veto based on mere issuance of an NTA, regardless of whether DHS can ultimately sustain the charges, including when the NTA is based only on a charge of being present without admission or parole.

Furthermore, the NTA termination provision suffers from the same potential for racially discriminatory decision-making described in the above section. Noncitizen youth often end up in removal proceedings as a result of minor interactions with the criminal justice system, which may stem from racist policing.[52] Terminating an individual's DACA based on nothing more than issuance of an NTA perpetuates the harms to youth of color caused by racist policing.

DHS should thus do away with the NTA termination provision and instead explicitly prohibit USCIS from terminating a DACA grant based on nothing more than the existence of an NTA or of pending or concluded removal proceedings against a DACA recipient.

2. DHS Should Strengthen Protections Against Removal for DACA Recipients

DHS should add further protections against removal for DACA recipients in order to fulfill the President's promise to "preserve and fortify" DACA.[53] Specifically, the regulations should include the following provisions:

1. DHS should generally not issue NTAs against DACA recipients or DACA-eligible individuals.[54]

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[47] *Id.* at *17.
[48] *Id.*
[49] *Id.*; proposed 8 CFR § 236.23(a)(2).
[50] 86 Fed. Reg. at 53770 (proposing alternative to "strike the provision regarding automatic termination of DACA solely based on the filing of an NTA or to modify it to make termination automatic at a later point in the process for some or all DACA recipients (*e.g.,* upon issuance of an administratively final order of removal)").
[51] Proposed 8 CFR § 236.23(a)(2).
[52] *See supra* note 38.
[53] Biden DACA Directive, *supra* note 5.
[54] In addition to adding the protections described here, the regulation should strike the language currently found at proposed 8 CFR § 236.21(c)(1) that "[a] grant of deferred action under this section does not preclude DHS from commencing removal proceedings at any time."

2. DHS should generally exercise favorable prosecutorial discretion by joining motions by DACA recipients or DACA-eligible individuals to, as relevant, reopen, terminate, dismiss, or administratively close removal proceedings.[55]
3. **DHS-issued removal orders should be deemed cancelled upon the grant of DACA.**

DHS should add provisions stating that removal orders should be deemed cancelled upon the grant of DACA. These provisions would ensure that, at the same time that USCIS considers and approves an eligible individual's DACA application, a separate component of DHS with no authority over DACA determinations does not work at cross-purposes to USCIS by seeking the removal of that individual. The above-listed protections would alleviate anxiety and trauma of DACA-eligible individuals, promote efficiency, and further the administration's stated goal of preserving and fortifying DACA.

First, DHS should include the above-mentioned protections because they will reduce mental health harms to DACA recipients and DACA-eligible individuals. Indeed, DHS recognizes in the NPRM that "forbearance of removal for such individuals furthers . . . human dignity" and will result in "a reduction of fear and anxiety for DACA recipients and their families."[56] But subjecting DACA recipients and DACA-eligible individuals to immigration enforcement and pursuing removal orders against them is likely to increase their fear and anxiety. DACA recipients suffered adverse mental health impacts in the face of the uncertainty about the future of the DACA program.[57] DACA recipients and DACA-eligible individuals against whom ICE pursues removal are likely to experience similar stress-induced mental health problems.[58] Adopting protective policies that decrease the likelihood that DACA recipients will suffer

[55] These protections would be in line with guidance issued by the ICE Office of the Principal Legal Advisor recognizing the appropriateness of dismissal in case of noncitizens likely to be granted temporary or permanent relief or who present compelling humanitarian factors, and by recent decisions recognizing immigration judges' authority to administratively close and terminate removal proceedings. *See* Memorandum from John D. Trasviña, Principal Legal Advisor, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities, at 9 n.18 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf; *Chavez Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. Oct 20, 2021) (abrogating *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), and concluding that agency erred in denying administrative closure without addressing Mr. Chavez Gonzalez's DACA status, noting that "colorable arguments can be made that administrative closure is appropriate and necessary" in the case of a DACA recipient); *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021) (reversing *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), and recognizing general administrative closure authority of immigration judges and the BIA).

[56] 86 Fed. Reg. at 53796.

[57] *See, e.g.*, Fahima Zaman, *DACA's Uncertain Future Negatively Impacts Mental Health of Recipients, Many More*, DAILY BRUIN, Mar. 6, 2021, https://dailybruin.com/2021/03/06/op-ed-dacas-uncertain-future-negatively-impacts-mental-health-of-recipients-many-more ("[F]or as long as the future of DACA remains uncertain, so too does the mental health of hundreds of thousands, and perhaps millions, of Americans like myself."); Caitlin Patler et al., *Uncertainty About DACA May Undermine Its Positive Impact on Health for Recipients and Their Children*, HEALTH AFFAIRS, May 2019, https://www.healthaffairs.org/doi/10.1377/hlthaff.2018.05495 ("We show that the health of DACA-eligible immigrants and their children in California improved in the three years following DACA's creation, when the rights that the program bestowed were relatively secure. However, when the program became increasingly threatened in 2015 as the US presidential campaign began, these health benefits did not persist."); Ruben Castaneda, *DACA Recipients Cope with Health Challenges in Face of Uncertainty*, U.S. NEWS & WORLD REPORT, Oct. 12, 2017, https://health.usnews.com/wellness/articles/2017-10-12/daca-recipients-cope-with-health-challenges-in-face-of-uncertainty.

[58] In an amicus brief CLINIC submitted in the *Inland Empire* case, we told the stories of 5 DACA recipients whose lives were upended when ICE initiated removal proceedings against them and unlawfully terminated their DACA. Brief of Catholic Legal Immigration Network, Inc. as Amicus Curiae in Support of Plaintiffs-Appellees, Doc. 27,

mental health problems will also allow DACA recipients to flourish as members of society and participants in the U.S. workforce.

Second, the above-listed protections would promote efficiency and cost savings. It is redundant and costly for ICE officers to initiate removal proceedings, or for ICE attorneys to insist on litigation of removal proceedings, against DACA recipients and DACA-eligible individuals. The NPRM states that "the DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients."[59] But these cost savings are non-existent if individual ICE officers are not constrained from issuing NTAs against DACA recipients and DACA-eligible individuals, and if individual ICE attorneys oppose motions to terminate, dismiss, or administratively close the removal proceedings of DACA recipients and DACA-eligible individuals.[60] DHS in the NPRM assumes that ICE acts in a manner consistent with the above-listed protections, stating that "ICE relies on the fact that a noncitizen has received DACA in determining whether to place the noncitizen into removal proceedings or, if the noncitizen is already in removal proceedings, in determining whether to agree to continue, administratively close, or dismiss the removal proceedings without prejudice."[61] However, without regulatory language directing ICE to act in this way, DACA recipients will continue to be subjected to individual ICE officers' de facto veto power over a DACA grant.[62] Moreover, future administrations could alter ICE enforcement priorities without going through notice and comment rulemaking, thus leaving DACA recipients vulnerable to termination of DACA with no due process protections. Codifying the above-listed protections would promote the efficiency goals of the NPRM to "reduce resource burdens on ICE attorneys and the immigration courts, provide more immediate respite to those who present low or no risk to the country, or avoid costs associated with detaining and ultimately removing a noncitizen."[63]

Finally, the above-listed protections would help "preserve and fortify" DACA consistent with the President's directive.[64] Keeping DACA recipients and DACA-eligible individuals out of removal proceedings and clearing up pre-existing removal orders will remove roadblocks that might otherwise stand in their way of eventually achieving permanent resident status and ultimately U.S. citizenship. We appreciate President Biden's calls for Congress to "ensure a permanent solution by granting a path to citizenship for Dreamers that will provide the certainty and stability that these young people need and

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Inland Empire — Immigrant Youth Collective v. Nielsen, No. 18-55564, at 24 (9th Cir. Dec. 21, 2018) ("For these DACA recipients, the trauma and pain associated with the unlawful termination of DACA is immeasurable."), https://cliniclegal.org/resources/litigation/inland-empire-immigrant-youth-collective-et-al-v-kirstjen-nielsen-et-al-amicus.

[59] 86 Fed. Reg. at 53794; *see also id.* at 53752 ("As appropriate, a law enforcement action, such as an arrest or immigration detainer being issued, may be avoided if someone is a DACA recipient or eligible individual and has no disqualifying convictions subsequent to the granting or renewal of DACA and continues to merit a favorable exercise of prosecutorial discretion.").

[60] *See Chavez Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. Oct 20, 2021) (granting petition for review of DACA recipient in whose case DHS had opposed administrative closure, resulting in over three years of litigation and this Fourth Circuit decision remanding for the agency to consider termination and administrative closure).

[61] 86 Fed. Reg. at 53752.

[62] See Memorandum from Alejandro N. Mayorkas, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf (lifting previous constraints on ICE officers which had required pre-approval to arrest nonpriority individuals, and leaving enforcement decisions to ICE officers' individual discretion).

[63] *Id.*

[64] Biden DACA Directive, *supra* note 5.

deserve."[65] The above-mentioned provisions would help ensure that DACA recipients have meaningful access to the benefits of any such future legislation and thus obtain that certainty and stability.

D. CLINIC Urges DHS to Advance the DACA Continuous Residence Date and Eliminate the Age Ceiling in the Proposed Regulations

While CLINIC acknowledges the intent of this proposed regulation is to "preserve and fortify" the 2012 DACA policy, given that nearly a decade has passed since its creation, fairness mandates updating the DACA eligibility criteria related to continuous residence and age limit. As CLINIC has advocated in the past, we believe that protections for DACA recipients can reasonably be expanded to include many others who were brought to the United States as children but would otherwise be excluded from DACA due to date and age restrictions that have never been updated.

One of the threshold criteria set forth in proposed 8 CFR § 236.22(b) is to show continuous residence in the United States from June 15, 2007, to the date of filing. Advancing this date would be a logical step that maintains the initial goal of DACA - preserving limited enforcement resources by not deporting individuals who came to the United States as children. When DACA was created in 2012, applicants were required to gather five years of continuous residence evidence to prove eligibility. In contrast, current initial applicants must collect more than 14 years of continuous residence evidence. DACA applicants who CLINIC and its affiliates assisted in filing initial applications between December 2020 and July 2021 have experienced great difficulty in identifying and obtaining such a large volume of documents from so long ago, and this burden will only intensify with the passage of time. Moreover, expecting USCIS adjudicators to review such voluminous evidence is inefficient and imposes an administrative burden that will likewise continue to amplify over time. We urge DHS to update the continuous residence requirement. One option for doing so would be to require initial DACA applicants to prove continuous physical presence for the five-year period prior to the date of filing the initial application rather than from June 15, 2007.

Another DACA threshold criterion involves the age ceiling in proposed 8 CFR § 236.22(b)(7). To qualify for DACA, the applicant must have been born on or after June 16, 1981 (in other words, must have been under the age of 31 when DACA was announced on June 15, 2012). Countless undocumented immigrants meet the remaining qualifications for DACA but were born too early to meet this age cutoff. We advocate for DHS to eliminate the requirement in order to expand DACA protection to young adults who were also brought here as children and meet the other eligibility requirements but have been disqualified solely due to their birth date. Eliminating the upper age cap would retain the original purpose of DACA – to provide relief to those brought to the United States as children who essentially grew up in this country – regardless of their age at the time their DACA application is filed. CLINIC notes that the expanded DACA initiative announced on November 20, 2014, under former President Obama would have eliminated the age ceiling (in addition to advancing the continuous residence date).[66]

In addition to the aforementioned equity rationales for advancing the continuous residence date and raising the age limit, expanding the eligible pool of DACA recipients would enhance the invaluable economic and societal contributions this population has made to the United States. DACA has allowed its recipients to access education, obtain higher-paying jobs, start businesses, purchase homes and vehicles, and pay an

[65] Statement by President Joe Biden on DACA and Legislation for Dreamers | The White House (July 17, 2021).
[66] 2014 Expanded DACA Memorandum, *supra* note 19.

estimated $8.7 million in taxes each year. This has contributed to job creation and enhanced economic prosperity for all United States residents.[67]

III. CONCLUSION

CLINIC appreciates the commitment of DHS to preserve and strengthen DACA through this NPRM. We believe that protection for current DACA recipients and DACA-eligible individuals can be further fortified by adopting the above proposals to ensure that employment authorization and advance parole are accessible to all and that notice and an opportunity to respond precede any DACA termination. We also encourage the agency to take this opportunity to update the continuous residence date and eliminate the age ceiling in order to modernize and expand DACA through the notice and comment rulemaking process.

Catholic social teaching affirms that the dignity of the human person is the foundation for a moral vision of society. As previously noted, DHS states in this NPRM that DACA protections and security in one's home and future are key to human dignity. We could not agree more with that sentiment. It is for this reason that we make the above recommendations, in order to provide the protection and security that these young people need to honor their human dignity.

Thank you for your consideration of these comments. Please do not hesitate to contact Lisa Parisio, Director of Advocacy, at lparisio@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

Anna Gallagher
Executive Director

[67] *What We Know About the Demographic and Economic Impacts of DACA Recipients: A National and State-by-State Look*, Center for American Progress (April 6, 2020), https://www.americanprogress.org/article/know-demographic-economic-impacts-daca-recipients-spring-2020-edition/