Georgetown University
Health Policy Institute
CENTER FOR CHILDREN
AND FAMILIES

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VIA ELECTRONIC SUBMISSION

U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Attention: DHS Docket No. USCIS-2021-0006; Deferred Action for Childhood Arrivals

To Whom it May Concern:

Thank you for the opportunity to comment on DHS Docket No. USCIS-2021-0006, the notice of proposed rulemaking, "Deferred Action for Childhood Arrivals" (hereinafter referred to as "the NPRM").

The Georgetown University Center for Children and Families (CCF) is an independent, nonpartisan policy and research center founded in 2005 with a mission to expand and improve high-quality, affordable health coverage for children and families. As part of the McCourt School of Public Policy, CCF provides research, develops strategies, and offers solutions to improve the health of children and families, particularly those with low and moderate incomes. In particular, CCF examines policy development and implementation efforts related to Medicaid, the Children's Health Insurance Program (CHIP), and the Affordable Care Act (ACA).

Our comments focus on two main areas – the importance of preserving and fortifying the DACA policy as directed by President Biden's Executive Order and areas where the Department of Homeland Security (DHS) could improve the policies in the NPRM. We suggest four areas for policy improvements: (1) updating eligibility reference dates, (2) including notice and opportunity to respond prior to terminating DACA, (3) continuing to support a single-step application process for deferred action and employment authorization, and (4) aligning the definition of "lawfully present" to allow DACA grantees access to critical health coverage programs.

The DACA Policy is Successful and Should be Continued

Since the Deferred Action for Childhood Arrivals (DACA) policy was enacted in 2012, more than 825,000 people have applied successfully for deferred action and employment authorization. DACA grantees make substantial contributions to our communities and our economy. As noted in the NPRM, DACA grantees have relied on the policy as they have built

lives for themselves in the U.S., including by making significant investments in their education, careers, and families.

Over 250,000 children have been born in the U.S. with at least one parent who is a DACA grantee. About 30,000 DACA grantees are health care workers, and many more have been essential workers during the COVID-19 pandemic. The uncertainty created by the Trump Administration and ongoing litigation make it especially important that DHS take action to *preserve and fortify* the DACA policy quickly, as directed by President Biden's Executive Order.[1]

Codifying the DACA Policy in Regulation is an Important Step, but the NPRM Needs Improvement

(1) Update the eligibility reference dates

Given the success of the DACA policy over the last nine years, DHS should consider updating the eligibility reference dates to apply for deferred action and employment authorization under DACA. The Napolitano Memorandum describes the intent behind the exercise of prosecutorial discretion under DACA, emphasizing that "certain young people who were brought to this country as children and know only this country as home" lack "the intent to violate the law," and ought to be reviewed for prosecutorial discretion so that "resources are not expended on these low priority cases."[2] The Memorandum then lays out the criteria that must be satisfied before an individual can be considered for deferred action on a case-by-case basis.

The seven criteria proposed in the NPRM are based on the five criteria in the Napolitano Memorandum, with only minor changes to make them easier to follow (e.g., splitting a two-part criterion into two criteria). However, DHS should also update the reference dates such that the policy is consistent with the Napolitano Memorandum, that is, by allowing those who can demonstrate longstanding ties to the U.S., contributions to our local communities, and lack of intent to violate the law to apply for deferred action and employment authorization.

First, among the seven criteria proposed in the NPRM is a continuation of the requirement from the Napolitano Memorandum that applicants demonstrate continuous residence in the U.S. since 2007 at 8 CFR 236.22(b)(2). At the time the Napolitano Memorandum was issued, this date represented a pre-application residency requirement of five years. With the passage of time, continuing to rely on the June 15, 2007 date would require new applicants to show continued residence in the U.S. for a period of over 14 years. Today,

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[1] Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), January 20, 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/.

[2] Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, available at https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

such a standard means that a 14-year-old who immigrated at 3 months of age, has no connections to their country of birth, and is completely integrated into a U.S. community to which they make great contributions, would not be able to apply for DACA. And soon, even though they have no responsibility for the decision to immigrate, no new children will be eligible to apply.

Second, the requirement to demonstrate physical presence in the U.S. and unlawful status on June 15, 2012 coincided with the release date of the Napolitano Memorandum, but now requires applicants to demonstrate physical presence and unlawful status over nine years ago (8 CFR 236.22(b)(3) and (4)). This is inconsistent with the policy outlined in the Napolitano Memorandum and would require significant documentation to demonstrate.

We urge DHS to update these dates. DHS could establish a rolling date, for example, requiring applicants to have been in the U.S. for at least five years prior to application and linking the requirements for residency and unlawful status only to the date of application. This would allow the DACA policy to maintain its focus on deferred action for those with significant ties to the U.S. and would not require routine regulatory updates. It would also preserve the disincentive to immigrate to attain DACA status. Alternatively, DHS could change the continuous residency requirement at 8 CFR 236.22(b)(2) to a later date, such as 2017, and the physical presence and unlawful status requirements at 8 CFR 236.22(b)(3) and (4) to the date the DACA regulation is finalized. Assuming this regulation is finalized in 2022, this would be consistent with the Napolitano Memorandum requiring a continued residency period of five years and U.S. residency and unlawful status on a date certain to be eligible to apply for DACA. Both of these options would preserve the intent of the Napolitano Memorandum to authorize prosecutorial discretion on a case-by-case basis for people who can demonstrate significant ties to the U.S., contributions to the economy, and no intention to violate the law. DACA was not intended to respond to a historical anomaly specific to 2007 or 2012; it is meant to prioritize on-going immigration enforcement activities.

(2) Include notice and an opportunity to respond prior to terminating DACA

As noted in the NPRM, DACA grantees have relied on the policy as they have established their careers and families in the U.S. While DHS must retain its discretion in granting and terminating deferred action consistent with federal immigration laws, terminating deferred action without notice is a violation of basic fairness that underestimates the impact such a termination would have on the individual, their family, and their employer.

For over three years, DHS has been providing notice of the grounds for intended termination and an opportunity to respond to all class members of the *Inland Empire – Immigrant Youth Collective v. Nielsen* case.[3] These safeguards have provided this subgroup of DACA grantees with an opportunity to correct inaccuracies, demonstrate extenuating circumstances, and provide information about positive contributions to allow for a fully informed and accurate adjudication. All DACA grantees would benefit from this minimal

[3] 86 Fed. Reg. at 53,751.

process change because they would be warned of a potential change in their status and have an opportunity to provide new or more accurate information before a decision to terminate is final. This is especially important given that DACA grantees do not have a right to an appeal after a final determination is made. Moreover, providing notice and an opportunity to respond would not undermine DHS' discretionary authority, but rather enhance DHS' ability to make an accurate determination under the totality of the circumstances as outlined in the DACA policy.

(3) Continue to support a single-step application process for deferred action and employment authorization

The NPRM proposes separating the application for deferred action from the application for employment authorization, arguing that some DACA applicants may not be seeking employment authorization and/or may only seek employment authorization after a decision has been made about deferred action. Arguably, this would help lower the cost of the deferred action application for those applicants who never seek employment authorization and for those for whom deferred action is denied. This is a laudable goal, however, de-linking deferred action and employment authorization may also have some serious negative consequences.

For example, DACA grantees may find the new process confusing and seek employment under the false assumption that they have the appropriate authorization when they do not. DACA grantees may also find that the two-step application process is more burdensome than a single-step process, with determinations made at potentially different times, causing disruptions in their ability to contribute to their families and communities in the interim. Finally, a future administration may find it easier to revoke employment authorization if it is a separate regulatory section, leaving DACA grantees suddenly unable to work. Current DACA grantees are ages 15 to 40, and it is likely that the vast majority want and rely upon employment authorization in addition to deferred action.

In light of these concerns, we urge DHS to reconsider the decision to separate deferred action and employment authorization applications. DHS could achieve its goal of making the process less expensive for some applicants without undermining the benefits of a single-step process by expanding access to fee waivers. Employment authorization is a critical component of the DACA policy, and it should not be jeopardized.

(4) Align the definition of "lawfully present" to allow DACA grantees access to critical health coverage programs

The definition of "lawfully present" is critical because eligibility for certain federal benefits depends on whether a noncitizen is considered lawfully present. Under current DHS and Department of Health and Human Services (HHS) practice, some immigrants with the same status (e.g., deferred action) are treated differently than others, and the same term (e.g., lawfully present) sometimes confers eligibility for federal benefit programs and sometimes does not. This creates unnecessary confusion and results in disparate treatment for similarly situated individuals.

Under longstanding DHS policy, a noncitizen who has been granted deferred action is considered "lawfully present" for the purpose of authorizing receipt of certain Social Security benefits, Medicare, and railroad retirement and disability benefits.[4] The NPRM rightfully reiterates these policies and emphasizes that DACA grantees should be treated like other deferred action recipients.[5] However, HHS has excluded DACA grantees from participating in Medicaid, CHIP, and the health insurance Marketplaces while others with deferred action status are eligible to participate.[6]

Eligibility for Medicaid and CHIP is generally limited to citizens and certain "qualified" immigrants, some of whom are subject to a 5-year waiting period prior to becoming eligible.[7] Section 214 of the Children's Health Insurance Program Reauthorization Act (CHIPRA §214) allows states to cover lawfully residing immigrant children and pregnant women without a 5-year waiting period at their option.[8] HHS issued guidance implementing the CHIPRA §214 option in 2010, which clearly includes immigrants "currently in deferred action status" as eligible for Medicaid and CHIP in states that take up the option.[9] And yet, when the DACA policy was outlined in 2012, HHS issued subsequent guidance stating that DACA grantees are ineligible for Medicaid and CHIP under CHIPRA §214.[10]

Under the current program rules for Marketplace coverage, all immigrants with deferred action status are eligible to purchase subsidized private coverage *except for* DACA grantees. Not only are DACA grantees ineligible for advance premium tax credits (APTC) and cost-sharing reductions (CSR), they are unable to purchase Marketplace coverage even at full cost.[11] In making this policy choice, the federal government unjustifiably created different eligibility rules for people with the same deferred action immigration status.

In related regulations and subregulatory guidance, HHS simply states that, "Because the reasons that DHS offered for adopting the DACA process do not pertain to eligibility for Medicaid or CHIP, HHS has determined that these benefits should not be extended as a result of DHS deferring action under DACA."[12] The regulations add that, "it also would not be consistent with the reasons offered for adopting the DACA process to extend health insurance subsidies under the Affordable Care Act to these individuals."[13]

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[4] 8 CFR 1.3(a)(4)(vi) and 8 USC 1611(b)(3) and (4).
[5] 86 Fed. Reg. at 53,762.
[6] 77 Fed. Reg. at 52,615 and SHO #12-002 available at https://www.medicaid.gov/federal-policy-guidance/downloads/sho-12-002.pdf.
[7] Personal Responsibility and Work Opportunity Act (PRWORA, P.L. 104-193).
[8] Children's Health Insurance Program Reauthorization Act (CHIPRA, P.L. 111-3).
[9] SHO #10-006 available at https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/sho10006.pdf.
[10] Op cit. 6.
[11] Ibid.
[12] Ibid.
[13] Ibid.

This policy justification is weak. DHS makes decisions about deferred action based on immigration enforcement priorities, not based on eligibility for health coverage. And contrary to DHS policy, this policy decision means that DACA grantees are treated differently with respect to Medicaid, CHIP and Marketplace eligibility than others with deferred action status. Research shows Medicaid coverage of children and pregnant women is associated with improved health and lower rates of disability in adulthood. Medicaid coverage is also associated with higher educational attainment and greater financial security.[14]

Therefore, DHS must go further in clarifying the definition of "lawfully present" as it applies to DACA grantees to achieve the stated goal of uniform treatment for those with deferred action status. DHS should make clear that DACA grantees are lawfully present and that they should not be treated differently with respect to access to Medicaid, CHIP, and subsidized Marketplace coverage than others with deferred action status. It does far more harm than good to have an inconsistent policy that differentiates DACA deferred action status from other deferred action statuses for federal health coverage program eligibility.

Conclusion

We applaud DHS for taking this important step to codify the DACA policy in regulation. However, we believe that the NPRM needs improvement in order to meet the goal laid out by President Biden's Executive Order to *preserve and fortify* the policy. Specifically, we believe that DHS should update the reference dates for DACA applicants, provide all DACA grantees with notice and opportunity to respond prior to termination, maintain a single-step application process for both deferred action and employment authorization, and align the definition of "lawfully present" to ensure that DACA grantees are treated the same as other immigrants with deferred action status with respect to access to health coverage.

If you have questions regarding our comments, you may contact Kelly Whitener at kelly.whitener@georgetown.edu.

Sincerely,

Kelly Whitener
Associate Research Professor

[14] E. Park, J. Alker, and A. Corcoran, "Jeopardizing a Sound Investment: Why Short-Term Cuts to Medicaid Coverage During Pregnancy and Childhood Could Result in Long-Term Harm," December 2020, available at https://www.commonwealthfund.org/publications/issue-briefs/2020/dec/short-term-cuts-medicaid-long-term-harm.