



November 15, 2021

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

RE: Comment of the National Immigration Forum in Support of the Proposed Rule on Deferred Action for Childhood Arrivals (DACA), Docket No. 2021-0006

Dear Ms. Strano:

The National Immigration Forum (the Forum) respectfully submits this comment in support of the Proposed Rule on Deferred Action for Childhood Arrivals (DACA), Docket No. 2021-0006.

The Forum is a nonprofit organization that works to advance sound federal immigration solutions through its policy expertise, communications outreach, and coalition-building work, which forge powerful alliances of diverse constituencies across the country. The Forum represents a network of faith, law enforcement, and business leaders who have come together to establish a new consensus on the critical role of immigrants in America. The perspectives of these leaders complement and inform the Forum's support of the legality, relevance, and pertinence of the Proposed Rule on Deferred Action for Childhood Arrivals (DACA).¹

The Forum sees the proposed rule as a positive — yet temporary — step to protect the millions of Dreamers who came to the United States as children and who are vital to our economy and communities. The proposed rule, offered under the formal rulemaking process, preserves and fortifies DACA within the bounds of executive discretion and within the framework of existing law. Moreover, it carefully addresses the concerns raised by U.S. District Court Judge Andrew S. Hanen, who, in July 2021, found DACA unlawful and barred the federal government from granting new applications. Therefore, the Forum urges DHS to adopt the proposed regulation.

Nevertheless, while the proposed rule is a positive step, the Forum does not see it as a permanent fix. The proposed rule confers no substantive rights, immigration status, or pathway to citizenship to Dreamers. Only Congress, acting through its legislative authority, can confer these rights. Thus, in the absence of legislation, the proposed rule — even if adopted — could be reversed by a future presidential administration and may continue to face challenges in the federal courts. Hence, the

¹ DACA is a deferred action policy aimed at protecting qualifying young undocumented immigrants who came to the U.S. as children (known as Dreamers), temporarily shielding them from deportation and providing them work authorization with possible renewal. DACA, however, does not provide lawful status nor does it provide the opportunity to stay permanently. See Laurence Benenson, [Fact Sheet: Deferred Action for Childhood Arrivals \(DACA\)](#), National Immigration Forum, October 16, 2020.



Forum respectfully requests DHS to adopt the proposed rule while continuing to urge Congress to pass a permanent legislative solution for DACA-eligible Dreamers.

The Forum endorses the proposed rule on DACA and urges Congress to act for the following three reasons:

1. DACA recipients are essential to the economic and social prosperity of the U.S.;
2. The proposed rule is within the legal bounds of executive discretion of DHS.; and
3. The proposed rule provides additional legal certainty to Dreamers.

DACA Recipients Are Essential to the Economic and Social Prosperity of the U.S.

Since 2012 — the year in which DACA was created — more than 825,000 Dreamers have applied successfully for deferred action under it.² Recent estimates show that as many as 3.6 million Dreamers reside in the United States,³ but only about 636,000 Dreamers are currently protected under DACA.⁴ These young people who have grown up and lived in the U.S. for most of their lives have become critical members of our congregations, schools, and communities.

On average, DACA recipients arrived in the United States at age seven and have lived here for more than 20 years.⁵ For many, this country is the only one they have known as home. In the nearly ten years since this policy was announced, DACA recipients have developed deep family and economic roots in the United States. Over 250,000 children have been born in the United States with at least one parent who is a DACA recipient, and about 1.5 million people in the United States share a home with a DACA recipient.⁶

DACA recipients are also critical to the American economy. Through DACA, they can work legally, pay their fair share of taxes, and build businesses that hire American workers. They are employed in a wide range of occupations, including thousands who are self-employed.⁷ Dreamers have also been indispensable to our recovery from the COVID-19 pandemic, with nearly 30,000 DACA recipients across the U.S. working in the health care sector⁸ Due to these educational and

² See USCIS, *DACA Quarterly Report (FY 2021, Q1)*, https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr1.pdf.

³ See National Immigration Forum, *Dreamer Advocacy Resources*, July 17, 2021 <https://immigrationforum.org/article/dreamer-advocacy-resources/>

⁴ See USCIS, *Count of Active DACA Recipients By Month of Current DACA Expiration* (Dec. 31, 2020), https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients%20%80%93December31%2C2020.pdf

⁵ See National Immigration Forum, *Dreamer Advocacy Resources*, July 17, 2021 <https://immigrationforum.org/article/dreamer-advocacy-resources/>

⁶ See Nicole Prchal Svajlenka and Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition*, Center for American Progress (Apr. 6, 2020), <https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition>

⁷ See Jie Zong, et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, Migration Policy Institute (Nov. 2017), <https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf>

⁸ See Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response*, Center for American Progress (April 6, 2020),



employment opportunities, DACA recipients make substantial contributions in taxes and economic activity. Over the next ten years, DACA recipients will contribute an estimated \$433.4 billion to the G.D.P., \$60 billion in fiscal impact, including \$12.3 billion in taxes to Social Security and Medicare.⁹ Additionally, approximately two-thirds of recipients purchased their first car after receiving DACA,¹⁰ and an estimated 56,000 DACA recipients own homes and are directly responsible for \$566.7 million in annual mortgage payments.¹¹ DACA recipients also are calculated to pay \$2.3 billion in rental payments each year.¹²

The Proposed Rule Lies Within the Legal Bounds of Executive Discretion

A. DHS's Prosecutorial Discretion

Executive discretion is the exercise of governmental power vested in the president and other administrative agencies to carry out the laws adopted by Congress.¹³ The executive branch has broad discretion to issue agency interpretations when statutory language is ambiguous.¹⁴ In this case, the proposed rule on DACA aims to protect Dreamers – temporarily shielding them from deportation. DHS's authority to decide whether Dreamers are a priority for deportation – taking into account the agency's limited resources – is a matter of prosecutorial discretion.

U.S. courts have long recognized the legality of prosecutorial discretion to manage the day-to-day enforcement of the laws enacted by Congress.¹⁵ In *United States v. Nixon*, the Supreme Court noted: "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." Moreover, as multiple courts and authors argue, "prosecutorial discretion is a necessary and proper use of executive power in its law enforcement role. Where Congress has

<https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response>

⁹ See National Immigration Forum, *Talking Points about Dreamers*, <https://immigrationforum.org/wp-content/uploads/2019/04/Dreamer-Advocacy-Talking-Points.pdf>

¹⁰ Tom K. Wong, et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, Center for American Progress (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow>

¹¹ See Nicole Prchal Svajlenka and Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition*, Center for American Progress (Apr. 6, 2020), <https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition>

¹² See Nicole Prchal Svajlenka and Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition*, Center for American Progress (Apr. 6, 2020), <https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition>

¹³ See Coglianesi, Cary and Yoo, Christopher S., "The Bounds of Executive Discretion in the Regulatory State" (2016). Faculty Scholarship at Penn Law. 1715. https://scholarship.law.upenn.edu/faculty_scholarship/1715

¹⁴ See Shoba Sivaprasad Wadhia, *Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism*, February 10, 2016, *Yale Journal on Regulation*, <https://www.yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/>

¹⁵ See Kevin J. Fandl, *Presidential Power To Protect Dreamers: Abusive or Proper?*, *Yale L. & Pol'y Rev. Inter Alia* (01/29/2018), https://ylpr.yale.edu/inter_alia/presidential-power-protect-dreamers-abusive-or-proper.



failed to provide clear guidance or direct specific enforcement measures, the executive is left with the obligation to decide, within the parameters of statutory language, the intent of the law to enforce it."¹⁶ In 1985, the Supreme Court in *Heckler v. Chaney* rejected a challenge to a federal agency's authority to withhold enforcement of law and highlighted the role that an agency plays in selectively executing the law:

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.¹⁷

The proposed rule on DACA aligns with the well-established principle of prosecutorial discretion. It aims to enforce existing law under the INA, taking into account DHS's limited resources and the agency's knowledge on how to enforce the law better. In other words, the proposed rule reflects a policy of forbearance that is well within DHS's authority.

B. DHS's Discretion to Provide Work Authorization

Besides shielding Dreamers from deportation, the proposed rule on DACA seeks to provide them work authorization with possible renewal. In that regard, Congress has delegated to DHS the legal authority for issuing work authorization to noncitizens. "The Immigration and Nationality Act (INA), as provided in Title 8 U.S.C. § 1103(a)(1) vests in the Secretary of Homeland Security the power to administer and enforce the INA and related laws, and provides DHS with the authority to establish regulations and policies to carry out the provisions of the INA."¹⁸

Moreover, "8 U.S.C. § 1324a(h)(3) defines an 'unauthorized alien' for employment purposes as a person who is neither an LPR nor 'authorized to be ... employed ... by the Attorney General [now Secretary of Homeland Security.]' This language ... has served as at least one statutory basis for DHS to name people who could work, and Congress has placed no cap on the number of work permits that may be issued."¹⁹ Hence, the proposed rule is consistent with DHS's legal authority to provide work authorization to those who benefit from prosecutorial discretion, including the Dreamers mentioned above.

¹⁶ See Shoba Sivaprasad Wadhia, *Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism*, February 10, 2016, Yale Journal on Regulation, <https://www.yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/>

¹⁷ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

¹⁸ See Shoba Sivaprasad Wadhia, *Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism*, February 10, 2016, Yale Journal on Regulation, <https://www.yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/>

¹⁹ See Shoba Sivaprasad Wadhia, *Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism*, February 10, 2016, Yale Journal on Regulation, <https://www.yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/>



The Proposed Rule Provides Additional Legal Certainty to Dreamers

A fair degree of certainty is a critical element of every legal system.²⁰ While providing crucial protections for Dreamers, DACA was only intended to be temporary and, since its inception, has failed to provide the certainty that would exist in a permanent legislative solution. After never-ending battles in the courts, Congress, and through changing administrations, DACA recipients continue to be in limbo.²¹ Yet, despite the deep uncertainty, Dreamers continue strengthening their ties in the United States. Providing additional legal certainty through the formal rulemaking process would help them reach their full economic and social potential in the country.

Through DACA, Dreamers have enrolled in degree programs, started businesses, obtained professional licenses, and purchased homes.²² The DACA policy has also encouraged its recipients to obtain driver's licenses, buy cars, and open bank accounts.²³ As USCIS points out, conferring deferred action has increased DACA recipients' sense of acceptance and belonging to a community, improved their sense of hope for the future, and provided them with the confidence to increase their civic engagement.²⁴ Moreover, DACA has encouraged its recipients to make significant investments in their careers and education. Providing additional legal certainty for Dreamers via the rulemaking process would help them reach their full potential, benefiting the nation as a whole.

While the proposed rule is a positive step to achieve some legal certainty for Dreamers, the Forum recognizes that it is not a permanent fix. The proposed rule confers no substantive rights, immigration status, or pathway to citizenship. Only Congress, acting through the legislative process, can confer these rights. Thus, in the absence of legislation, the proposed rule — even if adopted — could face additional legal challenges or reversal by a future presidential administration. Accordingly, while requesting DHS to adopt the proposed rule, the Forum continues to urge Congress to pass a permanent legislative solution for DACA-eligible and other Dreamers.

²⁰ Frederic R. Coudert, *Certainty & Justice & Judicial Constitutional Amendment* (New York: Reprinted from Yale Law Review., 1906), http://www.columbia.edu/cu/lweb/digital/collections/cul/texts/ldpd_7931324_000/ldpd_7931324_000.pdf

²¹ See Roberto G. Gonzales, et al., *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty*, Immigration Initiative at Harvard (2019), https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf

²² See Roberto G. Gonzales, et al., *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty*, Immigration Initiative at Harvard (2019), https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf

²³ See Roberto G. Gonzales and Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, American Immigration Council (June 2014); Zenén Jaimes Pérez, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three Years Later*, United We Dream (Oct. 2015), <https://unitedwedream.org/wp-content/uploads/2017/10/DACA-report-final-1.pdf>

²⁴ See Roberto G. Gonzales, et al., *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty*, Immigration Initiative at Harvard (2019), https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf