



November 29, 2021

Samantha Deshommès  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security

**Re: DHS/USCIS Notice of Proposed Rulemaking (NPRM), *Deferred Action for Childhood Arrivals*, DHS Docket No. USCIS-2021-0006; CIS NO. 2691-21; RIN 1615-AC64**

Dear Ms. Deshommès:

Kids in Need of Defense (KIND) submits this comment in response to the above Notice of Proposed Rulemaking (NPRM), “Deferred Action for Childhood Arrivals (DACA),” published by the Department of Homeland Security (DHS) on September 28, 2021 (86 Fed. Reg. 53736). KIND appreciates the opportunity to express its strong support for preserving and strengthening DACA, which provides critical protection to hundreds of thousands of people who came to the U.S. as children. We believe significant changes to the Proposed Rule are necessary to realize the important goals of DACA as lawfully implemented in 2012 and to align DACA with the realities of the present moment, in which DACA recipients and other undocumented immigrants continue to live with uncertainty and fear of deportation as a result of attacks on the policy and congressional delays in enacting permanent protection. Specifically, we urge the Biden Administration to broaden and update DACA’s eligibility requirements to expand its protection to people who came to the U.S. as children but who are currently denied protection due to unduly narrow and outdated age and other restrictions. We similarly urge the Administration to ensure that DACA continues to provide protection from deportation together with lawful presence and employment authorization, which is fundamental not only to the wellbeing, stability and ability to thrive of DACA recipients and their families, but to our country and communities, which benefit enormously from the contributions of DACA recipients.

We are mindful, however, that administrative action only will not provide the enduring protection that is needed. We ask that the Administration strongly support swift action by Congress to provide *permanent* protection for immigrants for whom the U.S. is home, including DACA recipients and individuals who may be DACA-eligible, through the enactment of a pathway to citizenship as part of the budget reconciliation process.

**KIDS IN NEED OF DEFENSE (KIND)**

Headquarters – 1201 L Street NW, Floor 2, Washington, DC 20005, Phone: 202-824-8680; Fax: 202-824-0702;

Email: [info@supportkind.org](mailto:info@supportkind.org)

[www.supportkind.org](http://www.supportkind.org)

## *Background*

KIND is the preeminent U.S.-based nongovernmental organization devoted to protection of unaccompanied and separated children. KIND provides pro bono legal representation and coordinated social services to unaccompanied children in removal proceedings, advocates for laws and policies to improve the well-being of unaccompanied children, and promotes protection of children in countries of origin and transit countries to address the root causes of child migration. KIND provides unaccompanied children with holistic care that includes legal assistance and social services through its offices across the United States and in Mexico. Since its inception, KIND has received referrals for more than 27,000 cases and now serves over 5,900 children annually in partnership with nearly 700 law firm, corporate, law school and bar association partners.

KIND's work takes root in a deep commitment to the rights, wellbeing, protection, and best interests of immigrant children, youth, and families. It is through this lens that KIND offers the following comments on ways to preserve and strengthen the Proposed Rule, and in turn, DACA's protections.

### **I. Eligibility Criteria for DACA Should be Updated and Broadened to Meet DACA's Aims**

Through its work with unaccompanied children, KIND has witnessed the resilience and contributions that are possible when immigrant youth are provided with the protection and support they need and deserve to thrive. By affording recipients protection from deportation and the ability to safely live and work in the U.S., DACA has enabled more than 800,000 individuals to build their futures--pursuing educational and employment opportunities and nourishing communities and families. Their contributions to the U.S. as family members, professionals, neighbors, students, essential workers, and beyond are invaluable and have remained steadfast even while DACA's protections have remained in flux in the years since the policy's creation.

The Proposed Rule presents an opportunity to codify the policy lawfully created through prosecutorial discretion in 2012 and to expand upon it to reach many people who are currently excluded on the basis of the original eligibility requirements, despite their having come to the U.S. as children, facing ongoing risk of deportation, and falling outside of the Administration's enforcement priorities. Among other elements, the Proposed Rule retains the requirements that applicants have been under 16 at the time of their arrival and that they have continuously resided in the U.S. since at least June 15, 2007. Additionally, it provides that applicants must be at least 15 years old at the time of requesting DACA, unless they are in removal proceedings, have a final removal order, or have a voluntary departure order, and that they be born on or after June 16, 1981. Regrettably, these criteria give rise to arbitrary distinctions among individuals who came to the U.S. as children without regard to their shared need for protection.

By requiring continuous presence since 2007, the Proposed Rule formalizes DACA's initial eligibility criteria but neglects to account for the passage of time since the creation of those parameters. As a result, it unnecessarily limits DACA's ability to protect individuals with needs and equities similar to those of current

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recipients. The Proposed Rule also relies upon an inaccurate representation of childhood as being under the age of 16<sup>1</sup>—an understanding that is both unduly narrow and at odds with established child wellbeing principles as well as federal immigration law. For example, the Immigration and Nationality Act defines a child as an unmarried person who is under the age of 21.<sup>2</sup> The definition of an unaccompanied child under federal law is similarly more inclusive and references children without a parent or legal guardian and without lawful immigration status who have not yet reached the age of 18.<sup>3</sup> DACA’s protection should not be more limited. Restrictions related to age at the time of requesting DACA present similar barriers: They disregard the benefits of protection for applicants who have reason to apply before reaching 15 years of age and the continued necessity of protection for individuals who may have been older when DACA protection was first created.

Additional changes should address the limitations posed by the requirement that applicants had no lawful immigration status on June 15, 2012. Problematically, this requirement excludes from DACA’s protection thousands of individuals who came to the U.S as children and who have lawful status through derivative visas obtained through their parents but who may “age out” of such status after turning 21. These young people should not have to wait until they lose status and experience continued instability, uncertainty, and fear of deportation before they are able to apply for protection.

By updating and broadening age, continuous presence, and other eligibility requirements, the Administration can protect additional individuals from the threat of deportation and the risk of separation it poses, enable them to continue to thrive in and contribute to the country that is their home, and better achieve the aims of DACA.

## **II. Employment Authorization Should Not Be Severed from DACA**

The Proposed Rule provides that employment authorization and lawful presence can be severed from DACA’s protection from deportation. While KIND appreciates the Proposed Rule’s articulation of the importance of work authorization for DACA recipients,<sup>4</sup> we believe that separating work authorization from DACA would significantly frustrate access to this critical element of DACA. Already, individuals who may be eligible for DACA must navigate ever-shifting application procedures, deadlines, and policies owing to litigation, court rulings, and changes in administration. Creating a system in which work authorization is separate or optional could create additional misunderstandings for applicants, who may be unaware that filings are separate, given the change from earlier practice. Separate processes for DACA and work

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<sup>1</sup> 86 Fed. Reg. 53736, 53766 (“Retaining this threshold requirement is also reflective of DHS’s desire to limit DACA to those individuals who came to the United States as children and, as a result, present special considerations that may merit assigning lower priority for removal action due to humanitarian and other reasons, as described elsewhere in this proposed rule.”).

<sup>2</sup> 8 U.S.C. § 1101(b)(1).

<sup>3</sup> 6 U.S.C. § 279(g)(2).

<sup>4</sup> See, e.g., 86 Fed. Reg. at 53760.

authorization could magnify the potential for delays for one or both applications—providing incomplete protection and prolonging uncertainty for applicants.

Importantly, employment authorization documents (EADs) often serve not only as a means of accessing employment opportunities but also as proof of lawful presence or identification. In its work with unaccompanied children, KIND has seen first-hand the impact that delays or denials of EADs can have on children's ability to access basic needs and services—independent of their use in obtaining employment. For example, EADs are often required for children to receive Social Security Numbers (SSNs), which are frequently required to access long-term educational opportunities, qualify for vocational and technical programs, obtain health insurance, and receive preventative care. Without an SSN, children may be ineligible for or face barriers in accessing state identification documents, physical and mental health treatment, obtaining a driver's license, opening bank accounts, or accessing state programs or benefits. By creating barriers to obtaining an EAD, the proposed changes work at cross-purposes with DACA's goals and pose significant ramifications for DACA applicants and recipients, their children, families, and communities.

### **III. The Proposed Rule Should Include Due Process Safeguards Related to Terminations**

Under the Proposed Rule, the receipt of DACA could be terminated at the discretion of USCIS, including without notice to the recipient of its intent to do so. Potential reasons for termination could include not meeting the eligibility criteria, security or public safety concerns, certain crimes, or other factors. DACA could also be terminated automatically by USCIS in some cases upon the filing of a Notice to Appear.

Terminations pose broad consequences for DACA recipients, their families, and communities. Concerningly, the proposed provisions would exacerbate the very uncertainty and instability that DACA was created to relieve. In order to provide a fair process and to avert inaccurate or arbitrary decision-making by the government it is critical that the Proposed Rule include procedural protections applicable any time termination is considered. Such safeguards should include informing DACA recipients about the agency's intent to terminate, providing them with the reasons and/or information upon which the agency is relying, and affording an opportunity to respond, including to correct misinformation or misunderstandings and provide supplementary information, support, or documentation. Similarly, termination should not automatically follow from the filing of an NTA and initiation of removal proceedings, which represent only the beginning of an adjudication process.

### **Conclusion**

KIND strongly supports efforts to preserve and strengthen DACA. We believe the above recommendations can help ensure that DACA best serves current recipients and reaches additional individuals who can benefit from DACA's vital protections. At the same time, we urge the Administration to act with the greatest of urgency to support Congress' enactment of a pathway to citizenship and permanent legal protection for

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DACA recipients, DACA-eligible individuals, and other immigrants to make possible the lasting relief that is desperately needed and deserved, and long overdue.

Sincerely,

/s/

Jennifer Podkul  
Vice President for Advocacy and Policy  
Kids in Need of Defense (KIND)

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