

November 29, 2021

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

Re: DHS Docket No. USCIS-2021-0006

Dear Acting Chief Strano,

The American Council on Education (ACE) and the undersigned higher education associations submit these comments in response to Department of Homeland Security (DHS) Docket Number USCIS- 2021-0006 regarding the Notice of Proposed Rulemaking (NPRM) on Deferred Action for Childhood Arrivals (DACA). We applaud the efforts of the administration to protect and fortify this important program through an Administrative Procedure Act (APA) rulemaking exercise. Since the program was established in 2012 it has not undergone any formal rulemaking. This is an important step to further enshrine a program that many in the United States, including employers and institutions of higher education, have come to depend on, and allows qualifying undocumented people brought to this country at a young age to remain here.

Colleges and universities have engaged, educated, and worked with these remarkable DACA recipients and Dreamers up close as students, colleagues, friends, and leaders. They have become part of the fabric of our campuses and communities. Many DACA recipients are college graduates and/or members of the military. To qualify for DACA, they cannot have a criminal record. They work and pay taxes. They teach in our schools and have served on the front lines of the pandemic as researchers, doctors, nurses, and other healthcare workers. They consider the United States to be their only home, and despite the immigration, financial, and other challenges they face, DACA recipients have made incredible contributions to our country, its economy, and security.

Prior to the establishment of DACA, some colleges and universities were effectively unable to enroll and support qualified and meritorious students in the United States due to their undocumented status. Unable to receive federal student aid, work legally, or qualify for most state tuition benefits, these individuals were blocked from opportunities to finance their education. Without driver's licenses or work permits, Dreamers could not easily commute to school or complete many courses of study. Forced to live in the shadows, they often had to bear the serious emotional strains and anxiety of their undocumented status alone. DACA has not removed all these barriers, but it has made it possible for thousands of Dreamers to access postsecondary education and unlock the potential such an education affords. DACA recipients

can now qualify for many work-study programs, take on high-quality jobs, receive a range of state tuition benefits, and otherwise find the means to pay for their education. They can drive to work, school, and internships. When they graduate, they can qualify for occupational licenses and obtain work authorization in skilled jobs across the U.S. economy. In short, while policymakers and politicians have been unwilling or unable to enact permanent legal protections, the DACA program has offered its beneficiaries cautious hope that they can live the American Dream, and become part of this country's ever-evolving story of innovators, inventors, entrepreneurs, and leaders.

Our comments below are offered in the spirit of what we wish to see the DACA program grow into, beyond the program as established in June 2012. We understand that this rulemaking effort is meant to protect and fortify the existing program, but our comments are offered in the context of providing certainty for Dreamers.

Below are the major issues we raise regarding the proposed rule:

1. We are concerned that the threshold criteria for DACA included in the NPRM (*Section 236.22- Discretionary Determination*), regarding the date of arrival and the age threshold (i.e. required to come to the United States before their 16th birthday; continuously resided here since June 15, 2007; and were physically present in this country on June 15, 2012), are too narrow and omit many current Dreamers who entered this country at a very young age and are seeking a postsecondary education. These criteria are taken directly from the Napolitano Memorandum which established the DACA program almost ten years ago. The proposed rule itself estimates that the DACA recipients would grow by 3.61 percent (on average) in future years, up to an estimated 956,863 individuals in 2031. Under the criteria specified in the *Dream Act of 2021* (S.264), over 1.9 million people would be considered eligible for protections.

This rulemaking is an opportunity to strengthen the DACA program, and thus should not be bound by the terms of the Napolitano Memorandum. The rulemaking represents an opportunity to extend DACA protections to thousands of additional deserving young people. While the codification of the criteria included in the Napolitano Memorandum will help some Dreamers, we remain concerned that the criteria as included in the proposed rule will exclude many young Dreamers currently studying at colleges and universities, and those seeking to do so. We urge DHS to consider expanding the criteria, perhaps aligning to the criteria included in the *DREAM Act of 2021*, to allow for more Dreamers to enter the program. At the very least, the rule could maintain the basic requirements of the original DACA program—entry into the country before age 16 and at least 5 years prior to application—but update the effective date on which they are based to the current time period.

2. We are concerned about the proposal to modify existing practice by making the request for employment authorization optional. We urge DHS not to separate the forms and process for deferred action and work authorization under *Section 106.2- proposed fees*. While we understand the merits of separating deferred action from work authorization, it will be problematic for DACA recipients who graduate from our institutions and plan to enter the workforce if work authorization is not explicitly part of the DACA program.

This would also create situations where an individual's DACA and employment authorization do not match up in terms of validity dates. The current system also makes it easier for employers if they know that DACA recipients are automatically provided work authorization. *Section 236.24- Severability* notes that DHS intends the various aspects of lawful presence for DACA recipients to be severable. Therefore, if work authorization is eliminated by the courts then deferred action could still be allowable. As the proposed rule recognizes, this would be harmful to the overall U.S. economy, as well as very detrimental for DACA recipients. Indeed, the preamble of the proposed rule notes the importance of deferred action and work authorization. "As a result of these educational and employment opportunities, DACA recipients make substantial contributions in taxes and economic activity."

Additionally, if work authorization is eliminated it would remove the ability of DACA recipients to support themselves while pursuing postsecondary education, or limit their ability to enter the workforce after graduation. Our institutions could also lose valued and skilled employees and faculty if they suddenly lost their work authorization. While the proposed rule notes that, "some DACA requestors may not need employment authorization," we question how often a DACA applicant would choose to NOT apply for work authorization. We believe this would likely be a very limited population of DACA registrants. We therefore urge the final rule to keep work authorization and deferred action together under the DACA program.

3. The *Build Back Better Act* being considered by Congress, and passed by the U.S. House of Representatives, would expand Title IV eligibility to DACA eligible students, as well as those who are eligible for Temporary Protected Status (TPS) and Deferred Enforced Departure (DED). The proposed rule also notes that DACA recipients are "lawfully present" and eligible for certain Social Security benefits. Therefore, if the *Build Back Better Act* is enacted while this rule is being finalized, we ask that the final rule make explicit that those under the DACA program are eligible for Title IV federal student aid programs such as Pell Grants, federal work study, and Direct Loans.

In addition, we know DACA recipients have unique challenges as students in demonstrating financial need (which often requires parents' tax returns and a verification process, which can be difficult if parents are undocumented). We urge DHS and the Department of Education to work closely together to allow for flexibility for DACA students to demonstrate Title IV eligibility, if that eligibility is extended to DACA recipients and those who qualify.

4. The final rule needs to make clear that the program will start accepting new applications, given the Texas court decision this summer which stopped U.S. Citizenship and Immigration Services from approving new applications. While there are currently less than 700,000 people in the DACA program, we know there are thousands more who would qualify for this vital program if they are able to apply. We urge the final rule to make explicit that the program will accept new applications once the rule is finalized.
5. We agree with DHS that existing authority under the *Immigration and Nationality Act* (INA) allows for "advance parole" for DACA recipients, and this does not conflict with

Congress' expressed intent for eligibility for adjustment of status (*Section III-Background, Authority, and Purpose, Part G. Advanced Parole*). Advance parole provides a non-citizen the option to leave the United States and then re-enter the U.S. This is an important policy for DACA recipients, especially for students seeking to participate in study abroad programs, who cannot leave the United States unless they had advance parole to re-enter the U.S. In addition, we have seen the absolute heartbreak when our DACA students are unable to travel to attend the funeral of a grandparent or to visit with an ailing family member before they pass away. Without advance parole, the decisions these students weigh (travel to see a grandparent one last time or risk not being readmitted to the U.S.) are unimaginable. Given all of this, we strongly support making the policy allowing for advance parole for DACA recipients explicit in the final rule.

6. We agree with the proposed rule *Section 236.21- Applicability* that DACA recipients should not be a priority for removal, and applaud the proposed rule for stating that DACA recipients are considered “lawfully present” and should not accrue “unlawful presence.” We agree with DHS that “it is not generally the best use of limited resources to forcibly send productive young people to countries where they may not have lived since early childhood and whose languages they may not even speak.” Many DACA recipients have lived for nearly their entire lives in the United States, contributing to the economy and their communities, and have established families and lives. It makes no sense to suddenly deport these Dreamers, who have no criminal history and pose no threat to national security, to countries they may not remember or even speak the language, separating them from their families in the United States. And, again, to qualify for DACA, recipients cannot have a criminal record and must be contributing members of society. Therefore, they should not be a priority for removal, and they should not be punished for unlawful presence if they came here at a young age, as they were likely unable to understand or be able to control their entry into the United States.
7. We agree with the information policies laid out in *Section 236.23- Procedures for Request, Terminations, and Restrictions on Information Use* and support efforts to codify this policy in the final rule. We appreciate the long-standing DHS policy that DACA information is collected and considered for the primary purpose of adjudicating DACA requests, and is “safeguarded from use for certain immigration enforcement-related purposes,” including immigration enforcement proceedings, with limited exceptions. We agree that this policy should be codified in the final rule, and support efforts to limit information provided by DACA recipients, in their good-faith efforts to register for DACA, from being used at a later date for enforcement action.
8. Because changes in the DACA program may have life-altering consequences for the people involved, a reasonable runway is necessary to implement any future changes to the final rule, and to allow DACA recipients to plan and make decisions based on those changes. We suggest that the final rule provide that any future changes to it cannot take effect for 240 days. Under the *Higher Education Act*, this is the period of time required by the Department of Education’s “Master Calendar,” which specifies that changes be announced in time to allow for implementation during an academic year. We believe this is a good model for DHS to use since possible changes to the final rule will likely

have consequential impacts on those involved.

9. Finally, we ask that DHS include a requirement that negotiated rulemaking, which is delineated in the *Negotiated Rulemaking Act*, be used for any future changes to the final rule. This NPRM is the first formal rulemaking process for the DACA program. Much will be learned from the comments submitted by stakeholders. Continued administration of DACA will undoubtedly involve refining details informed by varying perspectives. Negotiated rulemaking will enable more targeted and fulsome discussions with stakeholders regarding proposed changes. Moreover, negotiated rulemaking for DACA is in the public interest. DACA has provided hope, tangible relief, and a means to an education and livelihood for thousands of undocumented individuals. It has also enabled institutions of higher education to enroll and employ DACA recipients. The public reliance on this program is tremendous, especially in defined settings such as colleges and universities, where many DACA recipients are professors, researchers, scholars, and students who are an integral part of the university ecosystem. Any future decisions to change the final rule should be informed by this wealth of experience under the program, which would result from the enhanced stakeholder input of negotiated rulemaking.

In conclusion, we applaud DHS for undertaking formal rulemaking on the DACA program in order to protect and fortify and further enshrine this longstanding policy. We offer these comments in the spirit of making the eventual rule as strong and effective as possible.

Sincerely,



Ted Mitchell  
President

On behalf of:

ACT

American Association of Colleges for Teacher Education

American Association of Collegiate Registrars and Admissions Officers

American Association of Community Colleges

American Association of State Colleges and Universities

American Association of University Professors

American Association of Veterinary Medical Colleges

American Council on Education

American Dental Education Association

Associated Colleges of the Midwest

Association of American Universities

Association of Catholic Colleges and Universities

Association of Community College Trustees

Association of Governing Boards of Universities and Colleges

Association of Independent California Colleges and Universities  
Association of Independent Colleges and Universities in Massachusetts  
Association of Independent Colleges and Universities in Pennsylvania  
Association of Independent Colleges and Universities of Rhode Island  
Association of Jesuit Colleges and Universities  
Association of Public and Land-grant Universities  
Association of Vermont Independent Colleges  
College and University Professional Association for Human Resources  
Connecticut Conference of Independent Colleges  
Council for Christian Colleges & Universities  
Council of Graduate Schools  
Council of Independent Colleges in Virginia  
Council of Independent Nebraska Colleges  
EDUCAUSE  
ETS  
Great Lakes Colleges Association  
Higher Education Consultants Association  
Hispanic Association of Colleges and Universities  
Independent Colleges of Washington  
Michigan Independent Colleges and Universities  
NAFSA: Association of International Educators  
National Association for College Admission Counseling  
National Association for Equal Opportunity in Higher Education (NAFEO)  
National Association of College and University Business Officers  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators  
New England Commission of Higher Education  
North Carolina Independent Colleges and Universities  
Southern Association of Colleges and Schools Commission on Colleges  
Tennessee Independent Colleges and Universities Associations  
Western Association of Schools and Colleges Senior College & University Commission  
Wisconsin Association of Independent Colleges and Universities