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November 29, 2021

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

RE: Comments in Response to the DHS/USCIS Notice of Proposed Rulemaking (NPRM or “Proposed Rule”) entitled Deferred Action for Childhood Arrivals; CIS No. 2691-21; DHS Docket No. USCIS-2021-0006; RIN 1615-AC64

Dear Chief Deshombres:

The Leadership Conference on Civil and Human Rights (“The Leadership Conference”) is pleased to provide comments to the U.S. Department of Homeland Security (DHS) in support of its notice of proposed rulemaking (NPRM), “Deferred Action for Childhood Arrivals, Deferred Action for Childhood Arrivals; CIS No. 2691-21; DHS Docket No. USCIS-2021-0006; RIN 1615-AC64.

The Leadership Conference is a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the civil and human rights of all persons in the United States. We support the intent of the proposed rule to preserve and bolster DACA. The comments submitted by the Leadership Conference are directed at one particular part of the proposed rule: the criminal exclusion grounds for DACA eligibility. In particular, we have serious concerns about the rule’s failure to address and eliminate exclusions from DACA for those who encounter the criminal justice system. These exclusions, if not addressed and removed, will undermine racial equity and exacerbate structural racial bias and racial discrimination in the criminal justice system with serious consequences for DACA recipients, their families, and their communities.

In Executive Order 13985, President Biden directed executive departments and agencies to “redress inequities in their policies and programs that serve as barriers to equal opportunity.” Within this order, the President also required an equity assessment in federal agencies to assess barriers underserved communities face in access to services. We believe the order provides an important context and backdrop to the following recommendations:

1. Reduce barriers to DACA eligibility for individuals impacted by the criminal legal system.
 - a. Eliminate categorical criminal conviction exclusions to DACA.

The Leadership Conference urges USCIS to revise the NPRM to decrease barriers incurred by individuals with criminal records seeking eligibility for DACA, in order to bring the program into compliance with basic tenets of racial equity. In Executive Order 13985, President Biden directed executive departments and agencies to “redress inequities in their policies and programs that serve as barriers to equal opportunity.”¹ Within this Order, the President also required an equity assessment in federal agencies to assess barriers underserved communities face for access to services. To comply with this directive, USCIS should revise the NPRM to eliminate categorical exclusions from the program based on misdemeanor or felony convictions and instead institute a case-by-case review for those with such convictions.

The NPRM currently precludes individuals entirely from eligibility on the basis of any felony, multiple misdemeanors, or any single misdemeanor if it falls within a broadly defined list of offenses regardless of the recency of a conviction. In other words, a sole misdemeanor off this list—even if from a decade or more ago—automatically disqualifies an individual from the program, regardless of any rehabilitative steps taken since and without opportunity to present mitigating circumstances and facts related to an underlying conviction.

Categorically disqualifying individuals from DACA based on criminal convictions unjustly transfers the racial inequities of the criminal legal system into the administration of DACA. Decades of over-policing in minority communities and racially discriminatory administration of the criminal legal system from the time of arrest through sentencing means that Black, Brown, and Indigenous immigrants are disproportionately involved in the criminal legal system as compared to white immigrants.² Specifically, these individuals face arrest, suffer convictions, and are subject to harsher sentences due to explicit and implicit racial biases and institutionalized discrimination. Despite increasing national awareness of the racism endemic to the criminal legal system, USCIS proposes to categorically deny individuals access to DACA on the basis of convictions from this flawed system, thereby disadvantaging those who are the target of discrimination in the criminal legal system. These categorical exclusions therefore impose a double-punishment disproportionately on immigrants of color who have already served their full sentences and complied with the requirements and consequences of the criminal legal system and are subsequently denied access to DACA.³

Such rules also deprive individuals of the opportunity to demonstrate any meaningful rehabilitation or contributions to their families and communities after involvement in the criminal legal system. Individualized review and case-by-case adjudication would allow consideration of a broader range of

¹ See President Joseph R. Biden, Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, (Jan. 25, 2021), 86 Fed. Reg. 7009.

² See, e.g., “Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System,” The Sentencing Project, April 19, 2018; <https://www.sentencingproject.org/publications/un-report-on-racialdisparities/>; “Black Lives Matter: Elimination Racial Inequity in the Criminal Justice System,” The Sentencing Project, February 2, 2015, <https://www.sentencingproject.org/publications/black-lives-mattereliminating-racial-inequity-in-the-criminal-justice-system/>; “Visualizing the racial disparities in mass incarceration,” Prison Policy Institute, July 27, 2020, <https://www.prisonpolicy.org/blog/2020/07/27/disparities/>.

³ Jeremy Raff, The ‘Double Punishment’ for Black Undocumented Immigrants, Atlantic (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-blackimmigrants/549425/>.

factors, offer a fuller picture of an applicant seeking to benefit from DACA, and bring racial equity to the program.

b. Prohibit consideration of expunged or juvenile delinquency records.

Under current DACA guidance, an expunged conviction or juvenile adjudication cannot be an absolute bar to eligibility for DACA. In other words, expunged convictions or a juvenile delinquency do not “automatically disqualify” noncitizens from the program; instead, they are subject to a discretionary case-by-case review. The Leadership Conference urges USCIS to adopt a clearer rule that prohibits consideration of expunged convictions and juvenile delinquency adjudications for DACA decisions altogether, rather than leaving it to individual adjudicators to make a determination.

The process of expunging criminal records recognizes the capacity of rehabilitation for individuals with criminal convictions by offering them an opportunity via judicial decision making to remove a conviction from public record in light of rehabilitative steps or other factors occurring after an individual serves a sentence for a conviction. Expunged, sealed, or otherwise vacated records are a powerful indicia of change in an individual.⁴ Relegating those records to case-by-case review not only leads to differential decisions based on the adjudicating officer, but also undermines the finality of a state or local judicial decision to set aside and expunge an individual’s criminal conviction. The very reason a conviction is expunged is to eliminate collateral consequences arising from the existence of the conviction on an individual’s record. DACA decisions should respect the expungement process and this local decision-making by exempting such convictions from consideration altogether.

The adjudication process for juveniles in delinquency proceedings is markedly different from the process in the adult criminal legal system in recognition of the special vulnerability and ongoing development of youth. The immigration system recognizes this special position of juveniles in immigration court proceedings where a juvenile delinquency adjudication is not considered to be a criminal conviction for immigration purposes and does not trigger adverse immigration consequences that typically flow from an adult criminal conviction. *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135, 138 (BIA 1981); *Matter of CM*, 5 I. & N. Dec. 327, 335 (BIA 1953). Additionally, the Board of Immigration Appeals (BIA) has rejected the argument that Congress’ 1996 statutory definition of a “conviction” in immigration legislation passed at that time⁵ changed this long-standing rule. The BIA has repeatedly affirmed that: juvenile delinquency proceedings are not criminal proceedings; acts of juvenile delinquency are not crimes; and, findings of juvenile delinquency are not convictions for immigration purposes.⁶ Given this case law, there is no reason for USCIS to consider juvenile records in adjudicating a DACA application.

⁴ J.J. Prescott and Sonja Starr, “The Power of a Clean Slate,” Cato Institute, 2020, <https://www.cato.org/regulation/summer-2020/power-clean-slate> (study in Michigan validates this statement with only 4% of all expungement recipients being convicted again within five years, with most of the reconvictions being for nonviolent misdemeanors).

⁵ INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

⁶ *Matter of Devison*, 22 I. & N. Dec. 1362, 1364 (BIA 2000); *Matter of De La News*, 18 I. & N. Dec. 140 (1981); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (1981).

2. The final rule should not allow ICE or CBP to force USCIS to automatically terminate DACA by issuing and filing a Notice to Appear, or to prevent renewal by keeping an individual in detention. The agency should reject these two proposed policies for the following reasons.
 - a. Individual ICE and CBP officers should not be permitted to unilaterally force USCIS to make consequential DACA decisions by issuing and filing NTAs or holding someone in immigration detention.

These decisions often have been based solely on reports of minor interactions with the criminal legal system and made without the benefit of complete or accurate information. Such a rule is inconsistent with the core principle of the proposed DACA regulations: allowing USCIS to make considered decisions based on the totality of the circumstances. As the proposed rule recognizes, USCIS is in the best position to make DACA determinations based on considered agency policy. 86 Fed. Reg. at 53,815–16. And yet, the proposed rules, as currently drafted, would allow ICE and CBP to overrule USCIS’s determinations about a person’s suitability for DACA with the stroke of a pen, based on limited information and without accountability, creating arbitrary results. Requiring USCIS to provide process and make a separate, independent judgment about whether to continue deferred action in a given case ensures that the agency’s discretion is exercised in a consistent manner and in keeping with adjudication guidance.

- b. Permitting ICE and CBP to take DACA decisions away from USCIS unfairly reproduces racial inequities from the criminal legal system.

ICE and CBP have frequently issued NTAs or made detention decisions following a DACA recipient’s contact with the criminal legal system—in many cases in response to arrests or other contacts with local law enforcement that do not ultimately result in a disqualifying conviction. Indeed, statistics show that criminal charges are frequently dismissed or lowered. For example, a 2013 report shows that a quarter of felony charges in the 75 largest counties in the U.S were outright dismissed within a year.⁷ Yet even if a DACA recipient is never ultimately convicted of anything, let alone a disqualifying offense, the proposed termination rules would mean they would still automatically lose DACA with no opportunity for reconsideration. This reliance on contact with law enforcement is especially troubling because many DACA recipients are Black, Latinx, and/or other people of color and part of communities that experience high rates of policing. Automatically terminating DACA in response to these contacts—especially without a conviction—unfairly perpetuates the deeply flawed criminal legal system’s significant racial disparities in arrest and charging decisions. As just one common example, studies across the country have continued to find persistent racial bias in police traffic stop and search decisions,⁸ which extends

⁷ Brian A. Reaves, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *Felony Defendants in Large Urban Counties, 2009—Statistical Tables 22, 24* (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

⁸ 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) (detailing results of analysis of “approximately 95 million traffic stops from 21 state patrol agencies and 35 municipal police departments” from 2011 through 2018); *see also* Alex Chohlas-Wood, et al., *An Analysis of the Metropolitan Nashville Police Department’s Traffic Stop Practices*, STAN. COMPUTATIONAL POL’Y LAB 2 (Nov. 19, 2018), <https://policylab.stanford.edu/media/nashville-traffic-stops.pdf> (noting that “the stop rate for black drivers in Nashville in 2017 was 44% higher than the stop rate for white



throughout the various stages of the criminal legal system.⁹ The agency should not create rules that amplify these significant racial disparities.

- c. Automatically terminating DACA based on someone's placement in removal proceedings is also arbitrary and irrational in light of the DACA program's eligibility criteria.

As courts have recognized, having DACA and being in removal proceedings are not incompatible.¹⁰ In fact, many DACA and other deferred action recipients are simultaneously in removal and even have final removal orders. Moreover, all DACA recipients by definition lack lawful immigration status and are subject to removal. Thus, the mere fact that someone is in removal proceedings does not provide a reasoned basis to automatically terminate DACA.

- d. At the very least, prior automatic termination should not lead to automatic renewal denial.

USCIS previously followed a practice of automatically denying renewal where an individual's DACA was previously terminated at any point. As experience has demonstrated, however, many DACA grants have been terminated based on arrests or charges that ultimately did not result in any disqualifying or serious criminal conviction, and other factors going to the totality of the circumstances may shift over time. Thus, a prior automatic termination may not accurately reflect an individual's fitness for another discretionary grant of deferred action and is not sufficient on its own to justify the denial of a renewal request. USCIS should adopt a rule that requires USCIS to independently decide whether to renew an individual's DACA, based on a *de novo* review of the totality of circumstances and the submitted evidence.

Conclusion

Thank you for your consideration of our views. If you have any questions or need additional information, please contact Rob Randhava, at randhava@civilrights.org.

Sincerely,

Wade Henderson
Interim President and CEO

Jesselyn McCurdy
Executive Vice President of Government Affairs

drivers," and the disparity increased to 68% for non-moving violations, e.g., broken taillights or expired registration tags.)

⁹ Nick Petersen, et al., *Unequal Treatment: Racial and Ethnic Disparities in Miami-Dade Criminal Justice*, ACLU, FLA. GREATER MIA. 39 (Jul. 2018), https://www.aclufil.org/sites/default/files/aclufil_unequaltreatmentreport2018.pdf (finding racial and ethnic disparities within Miami-Dade County's criminal justice system at arrest, bond and pretrial detention, charging and disposition, and sentencing).

¹⁰ *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX, 2018 WL 1061408, at *18 (C.D. Cal. Feb. 26, 2018); *Gonzalez v. Garland*, No. 20-1924, 2021 WL 4888394, at *9 (4th Cir. Oct. 20, 2021).