AMA
AMERICAN MEDICAL ASSOCIATION

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November 29, 2021

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
2707 Martin L. King Avenue, SE
Washington, DC 20528

Tracy Renaud
Acting Director
U.S. Citizenship and Immigration Services
500 12th Street, SW
Washington, DC 20536

Samantha Deshommes
Chief, Regulatory Coordination Division
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U.S. Citizenship and Immigration Services
Department of Homeland Security
500 12th Street, SW
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RE: Deferred Action for Childhood Arrivals; CIS No. 2691-21; DHS Docket No. USCIS-2021-0006; RIN 1615-AC64

Dear Secretary Mayorkas, Acting Director Renaud, and Chief Deshommes:

On behalf of the physician and medical student members of the American Medical Association (AMA), I am writing to provide comment on the U.S. Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) proposed rule regarding Deferred Action for Childhood Arrivals (DACA) [DHS Docket No. USCIS–2021–0006]. The AMA strongly supports the intent to preserve and strengthen DACA through this rulemaking, as DACA provides baseline support for many individuals' careers, education, and personal growth.

DACA is an immensely valuable program that has had a quantifiable, significant, and long-lasting impact on families, local communities, and our nation. The number of people who are now working on the front lines of this nation's battle against COVID-19 as physicians, who would not be able to do so without DACA protections, are the most recent testaments to how this program benefits all Americans. More than that, DACA recipients are interwoven into our economy with approximately 254,000 U.S.-born children having at least one parent with DACA status, and 1.5 million people belonging to mixed-status families.[1] Ensuring the stability of the DACA initiative is vital to our economic stability and growth.

[1] https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-daca-overview.

Unfortunately, DACA's current volatility has caused tremendous harm to the undocumented individuals this program was designed to protect. Various efforts by the prior Administration to terminate the program have amplified the difficulties these individuals experience and forced them to live in a state of "liminal legality" which has had negative health implications for many of these undocumented people.[2]

The AMA supports DHS' decision to incorporate DACA and associated procedures into regulation. We offer our support for the continuation of the DACA initiative and encourage DHS to implement the below recommendations aimed at strengthening the program's administration and adjudication. Additionally, we encourage the Administration to work with Congress to pass legislation that would solidify the longevity and stability of DACA.

DACA recipients should be granted the ability to access federal student aid

Per the proposed rule, one of the goals of DACA is to "make recipients eligible for employment authorization, which would motivate DACA recipients to continue their education, graduate from high school, pursue post-secondary and advanced degrees, and seek additional vocational training, which ultimately would provide greater opportunities, financial stability, and disposable income for themselves and their families."[3] However, in order to ensure that DACA recipients are able to realize this goal through affordable post-secondary, vocational, and advanced degrees, it is imperative that DACA recipients be made eligible for federal education benefit programs.

The Association of American Medical Colleges (AAMC) predicts a shortage of 124,000 physicians by 2034.[4] This is due in part to the aging U.S. population, which is growing in size and has more complex health needs, and to our aging physician population, many of whom will soon retire, leaving gaps in community care.[5] In addition to this projected shortage, there are currently more than 7,200 federally-designated health professional shortage areas (HSPAs) where dire access issues persist for patients in both rural and urban communities, and in both primary and specialty care.[6] The Health Resources and Service Administration (HRSA) estimates that an additional 32,494 physicians are needed to eliminate all current primary care, dental, and mental health HSPAs.[7]

Despite this dire shortage of physicians, prior to DACA, medical school was not a realistic option for undocumented immigrants who were brought to the U.S. as children. Without formal recognition of deferred action status from the government, undocumented immigrants were legally foreclosed from working as licensed physicians and, thus, could not meet the technical standards for admission into most medical schools.[8] Consequently, before 2013, no medical school had any published policy allowing undocumented immigrants to be accepted into their programs.

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[2] https://www.tandfonline.com/doi/full/10.1080/01419870.2018.1540790.
[3] https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals.
[4] https://www.aamc.org/news-insights/press-releases/aamc-report-reinforces-mounting-physician-shortage.
[5] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7006215/.
[6] https://www.aamc.org/news-insights/attracting-next-generation-physicians-rural-medicine.
[7] https://data.hrsa.gov/topics/health-workforce/shortage-areas.
[8] https://www.ama-assn.org/system/files/2019-10/Dept-of-Homeland-Security-v-Regents-of-the-University-of-California.pdf.

DACA changed this calculus. As related by one department chair, DACA provided the "missing link" for medical schools to accept qualified noncitizens because it offered a route to work permits for recipients.[9] In the autumn of 2013, the first DACA recipients entered medical school, and in the ensuing years the number of DACA applicants and matriculants has steadily grown. Now, according to the AAMC, 69 U.S. allopathic medical schools reported that they would consider applications from students with DACA status for the 2021/2022 academic year.[10] Moreover, since 2017, 236 DACA status individuals have been accepted to medical school, and during that same timeframe, 221 DACA status individuals have graduated from medical school.[11] In addition to physicians, about 27,000 individuals with DACA status are health care workers in the U.S., and have served on the front lines fighting the COVID-19 pandemic.[12] These individuals help contribute to a diverse and culturally responsive physician workforce and are statistically highly likely to work in medically underserved areas, such as rural settings and poor neighborhoods.[13] According to a survey of undocumented youth interested in health careers conducted in 2016, 97 percent expressed plans to ultimately work in the neighborhoods in which they grew up, or other underserved areas.[14] That number is consistent with other studies demonstrating that individuals who are under-represented in medicine are twice as likely to pursue careers working with underserved populations.[15]

Unsurprisingly, these individual benefits accumulate to result in greater economic and social benefits to all Americans. If the above noted medical students and physicians retain their work eligibility, each will care for an average of between 1,533 and 4,600 patients a year.[16] That means that together, over the course of one year, DACA-status physicians will care for between approximately 700,000 and 2.1 million patients. Over the course of their careers, DACA status physicians will touch the lives of over 5.1 million U.S. patients.[17]

More broadly, DACA recipients, like their citizen counterparts, were selected for admission to medical school because of their academic and personal achievements. Many were high school valedictorians. Most have undergraduate degrees in complex sciences, such as integrative biology, neurology, physics, and molecular and cellular biology. Many have impressive volunteer and leadership experiences. All

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[9] Sarah Conway & Alex V. Hernandez, Loyola's DACA Medical Students, Largest Group in the Country, Plagued with Uncertainty, Chicago Trib. (Sept. 13, 2017), https://tinyurl.com/y485wmxu.
[10] https://students-residents.aamc.org/media/7031/download.
[11] https://www.aamc.org/media/57166/download?attachment.
[12] https://www.americanprogress.org/issues/immigration/news/2020/04/03/482637/dreamers-help-keep-country-running-coronavirus-pandemic/
[13] https://static1.squarespace.com/static/5b453764f93fd480d1fcc9f9/t/5d8d4b07b186dc15e9595a8f/1569540877197/BMB+Final+Copy.pdf.
[14] Angela Chen, PhD et al., PreHealth Dreamers: Breaking More Barriers Survey Report at 27 (Sept. 2019), https://tinyurl.com/y436och3.
[15] https://www.semanticscholar.org/paper/Factors-Associated-With-Medical-School-Graduates%E2%80%99-Garcia-Kuo/e44d369432243ef41ef429f6eb149841501b193d.
[16] https://www.aafp.org/fpm/2007/0400/fpm20070400p44.pdf.
[17] This calculation is based on 14.3% of patients being new patients during any given year, see Nat'l Ctr. for Health Stat., Ctr. for Disease Control, National Ambulatory Medical Care Survey: 2016 National Summary Tables (2016), https://www.cdc.gov/nchs/data/nhamcs/web_tables/2016_ed_web_tables.pdf?rel=outbound and an average career length of 35 years, using data from the AAMC's 2019 National Sample Survey of Physicians, (publication forthcoming; data on file with AAMC).

scored competitively on the Medical College Admission Test.[18] However, these individuals, despite being some of the top students in the U.S., are not eligible for many of the financial assistance programs that are provided to other students.

Nearly 75 percent of medical school graduates have outstanding medical school debt, with the median amount being $200,000.[19, 20] This number will only continue to significantly increase as the cost of medical school continues to rise. In fact, for first year students attending medical school during the 2020-2021 academic year, the average cost of attendance increased from the prior year for public medical schools by 10.3 percent, making it likely that medical students will have to carry even larger student loans in the future in order to graduate.[21] Despite the dire need for additional physicians in the U.S. and the expense of medical school, "[u]ndocumented students, including DACA recipients, are not eligible for federal student aid" including federal student loans or Pell Grants.[22] Although in some states DACA students may be eligible for state financial aid, college financial aid, and private scholarships, these options are not sufficient to pay for the incredibly high costs of medical education.[23] Additionally, the inability for DACA recipients to access federal loans means, that although DACA students are statistically highly likely to work in underserved areas, they will never be eligible for Public Service Loan Forgiveness (PSLF). With the existing and projected physician shortage, and the increased demands that have been placed on physicians during the pandemic, every physician is needed, and we cannot afford to alienate our DACA status medical students and physicians. **Therefore, we urge the Administration to take action—including working with Congress—to expand eligibility for federal student aid and education loans to DACA recipients.**

<u>USCIS should extend the length of time of deferred action and work authorization, issue automatic extensions, and modify the process for dating DACA renewals</u>

USCIS should grant deferred action and work authorization for an expanded timeframe, such as five years, rather than two. Currently, individuals with DACA status fear being subject to imminent deportation or losing their jobs, schooling, and future roughly every year. This creates a volatile atmosphere that undermines the very goals of the program. Expanding the length of time that deferred status and work authorization are valid for DACA recipients would bring greater stability to DACA individuals, their families, and their employers.

Not considering the significant personal expense of medical school, and the average medical student debt of $200,000,[24] teaching hospitals have invested substantial time and money in training residents with DACA-dependent work authorization. The direct training costs for these residents has been estimated at

[18] https://www.ama-assn.org/system/files/2019-10/Dept-of-Homeland-Security-v-Regents-of-the-University-of-California.pdf.
[19] https://www.aamc.org/system/files/2020-07/2020%20GQ%20All%20Schools%20Summary.pdf.
[20] https://www.aamc.org/system/files/2020-07/2020%20GQ%20All%20Schools%20Summary.pdf.
[21] https://www.aamc.org/data-reports/reporting-tools/report/tuition-and-student-fees-reports.
[22] https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens.
[23] https://studentaid.gov/sites/default/files/financial-aid-and-undocumented-students.pdf
[24] https://store.aamc.org/downloadable/download/sample/sample_id/468/

$157,602 per resident, per year.[25] The AAMC estimates that, as of February 2019, hospitals in the U.S. had invested approximately $5 million training medical residents with DACA status.[26] Accompanying this significant financial investment is an investment of tens of thousands of hours in supervision, training, and administration. As such, if a medical student, resident, or physician is not able to receive timely review of their DACA application, as was seen during the COVID-19 pandemic when review of all applications slowed significantly, dire consequences could result. Therefore, DACA medical school and resident applicants, and programs that accept DACA applicants, should be able to rely on the fact that DACA status will remain in effect for the length of the individual's schooling and training.

Unfortunately, the current two-year DACA renewal timeline does not cover the amount of time it takes to graduate from medical school (4 years) or the length of a residency (3-7 years). Consequently, if at any time there is a delay in DACA authorization, or a lapse in employment eligibility, these students, residents, and physicians could be removed from school, their residency program, or their job at great personal and program cost.

As noted below, it currently takes eight months or longer for a DACA renewal applicant to receive their work permit.[27] This is before taking into account possible delays, and the USCIS recommendation that DACA renewals be submitted four to five months in advance of the expiration of the individual's current DACA validity period.[28, 29] This equates to DACA recipients having to apply and wait for a response to their renewal request at least every other year, not including any of the delays that often occur throughout this process. As such, the current two-year timeframe of this rule places a tremendous burden on DACA applicants and their employers. With the current rule, teaching hospitals face a sustained state of uncertainty due to concerns that the processing of renewals will not keep pace with training program start dates. Students fear that they will not be eligible to finish school, and physicians fear having to disrupt patient care if renewals are not processed in a timely manner. To provide the needed stability that is required for a medical student, resident, and physician to finish their education and training the Administration should grant deferred action and work authorization for an expanded timeframe.

Additionally, USCIS should issue automatic extensions of employment authorization for DACA based employment authorization renewal receipts. The 180-day automatic extension of a timely field employment authorization renewal is the existing process that currently includes Temporary Protected Status (TPS) grantees.[30] Doing this would be in line with DHS' rationale for the rule that implemented

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[25] Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., Cost Estimates for Training Residents in a Teaching Health Center at 2 (last visited Sept. 24, 2019), https://bhw.hrsa.gov/sites/default/files/bhw/grants/thc-costingfact-sheet.pdf. This number does not include indirect costs or those associated with the physical space and equipment retrofitting required to host and train medical residents.

[26] According to available self-reported AAMC data, most recently updated in February 2019, there was one DACA resident in 2016-2017, eight DACA residents in 2017-2018, and twenty DACA residents in 2018-2019. Because the AAMC has not collected data on DACA status consistently across programs, these numbers are not comprehensive. The five million dollar figure quoted above does not include costs associated with an additional 20 or more DACA residents who began residencies in 2019. (Data on file with AAMC).

[27] https://egov.uscis.gov/processing-times/historic-pt.

[28] https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.

[29] https://egov.uscis.gov/processing-times/historic-pt.

[30] https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension.

these 180-day extensions, which states that the automatic extension "provide[s] additional stability and certainty to U.S. employers and individuals eligible for employment authorization in the United States, this final rule changes several DHS regulations governing the processing of applications for employment authorization."[31] Allowing the receipt notice for a DACA-based employment authorization renewal application to serve as temporary work authorization would be a proactive step in avoiding an inevitable increase in DACA based work authorization lapses and would reduce the number of inquiries on cases pending past the posted processing times, thus freeing up precious USCIS resources. It would also prevent disruption in the workforce due to delays in adjudicating employment authorization. Therefore, **the AMA urges USCIS to add DACA recipients to the list of employment authorization categories that receive an automatic 180-day extension of their timely filed employment authorization renewal.**

Moreover, DHS should issue sequential periods for DACA validity instead of overlapping time periods. Currently, when USCIS approves a request for DACA renewal, the renewal begins on the date of approval, instead of the date that a requestor's current grant expires. Under this practice, individuals with DACA lose months of DACA eligibility where it overlaps. While the time the application is pending is not unlawful presence if timely filed, over multiple renewals, these periods of "lost" DACA eligibility can add up to significant periods of time. This is an inefficient use of agency resources and can cost DACA applicants more in filing fees over the course of their DACA periods. Instead, if a requester currently has DACA status, then the renewal should begin on the day their current DACA status expires. The AMA therefore urges DHS to issue sequential, consecutive periods of DACA validity instead of overlapping time periods.

<u>DHS should be cautious and provide additional guidance if it separates deferred action and employment authorization applications</u>

In the NPRM, USCIS proposes to decouple the DACA application (Form I-821D) from the application process for employment authorization (Forms I-765 and I-765WS). Applicants would be able to file for an employment application document (EAD) either at the time they filed the deferred action request or after DHS approves the deferred action request. The current fee structure would remain the same. The AMA encourages the Administration to carefully consider and address any confusion that may arise due to the proposed rule change and to ensure that processing times for EADs do not increase due to this proposed change.

Currently, the DACA program is associated with automatically conferring work authorization. Work authorization is critical to anyone seeking to practice medicine or otherwise work in the health care sector in the United States since federal law prohibits anyone from hiring or from continuing to employ any person who is not authorized by the federal government to work.[32] Only three classes of noncitizens are eligible for work authorization: those who are lawfully admitted to the United States, those who have visas, and those eligible to apply for work authorization owing to specific circumstances.[33] By definition, DACA recipients have entered the country without legal authorization, and thus are only eligible—if at all—for work authorization under the third category. Therefore, the work authorization aspect of DACA

[31] https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.
[32] See 8 U.S.C. §§ 1324a(a)(1)-(2), (h)(3).
[33] See 8 C.F.R. § 274a.12.

is essential for a significant portion (if not all) of DACA recipients; if the Administration does not provide adequate information to individual applicants, it is possible that rather than making the program more accessible, this proposed decoupling could cause confusion and lead to individuals losing their work authorization. As such, the AMA encourages the Administration to provide ample information and additional help for DACA applicants if the work authorization and the authorized status applications are separated.

Additionally, it is important that current processing times for the employment authorization applications do not change and that the decoupling does not impact the ability of DACA recipients to obtain EADs in a timely manner. Even with the concurrent filing of the I-821D and I-765, USCIS does not begin to adjudicate the employment authorization application until the I-821D is approved.[34] With average processing times for the I-821D at nearly six months and the I-765 at nearly two months, it can take eight months or longer before a DACA renewal applicant receives their work permit.[35] We are concerned that separating the I-821D and I-765 completely may lead to additional delays in the EAD adjudication process, causing disruptions for employers across the country and harming DACA recipients and their families. EAD delays are already a reality for most applicants who are applying for work authorization based on applications and petitions other than DACA, with some EAD applications taking up to or over a year to adjudicate.[36] Thus, **if the applications are decoupled, we urge USCIS to ensure that DACA-based EAD processing times do not increase substantially.**

The AMA also notes that the Administration should consider and provide an alternative method for DACA recipients to receive a form of identification if the work authorization and the authorized status applications are separated. EADs often function as the foundational or only form of identification for DACA recipients. Without the EAD, many individual recipients cannot obtain another form of identification, such as a driver's license. As a result, separating DACA from access to a work permit undermines access to a range of critical social benefits which require a driver's license and are necessary for building stability including bank accounts, school registration for children, or home utilities such as heating and electricity. Therefore, if the application is decoupled the Administration should consider allowing DACA recipients to receive an alternative form of identification when their DACA application is authorized.

<u>Individuals granted DACA status should continue to have lawful presence and should be granted the ability to purchase Affordable Care Act (ACA) marketplace coverage</u>

The AMA strongly opposes any version of the regulation that does not include lawful presence. Deferred action historically includes lawful presence, and any other formulation would be an unacceptable break from precedence.

The proposed rules at 8 C.F.R. § 236.21 (c)(3) and (4) helpfully confirm that DACA recipients will continue to be considered "lawfully present" for the purposes of two provisions governed by DHS: the longstanding definition of lawful presence in the Title II Social Security regulations, which specifically list "deferred action," at 8 C.F.R. § 1.3(a)(4)(vi); and for determining inadmissibility under section

[34] https://egov.uscis.gov/processing-times/i765.
[35] https://egov.uscis.gov/processing-times/historic-pt.
[36] https://egov.uscis.gov/processing-times/historic-pt.

212(a)(9) of the INA. The preamble to the regulations notes that "DHS has treated persons who receive a period of deferred action under DACA like other deferred action recipients for these purposes."[37]

We strongly agree that DACA recipients should be treated as lawfully present for purposes of Social Security eligibility and the accrual of unlawful presence for the three- and ten-year bars.[38] We also agree that there is no basis for treating DACA recipients differently from others who are granted deferred action.

DHS was careful to define the scope of lawful presence as it applies to the programs or provisions under its jurisdiction. But further clarification is needed to ensure that other federal and state agencies understand the impact of a DACA grant, how it relates to deferred action granted to other individuals, as well as related interpretations of immigration law - such as whether these individuals are precluded by law from establishing domicile in the U.S. As DHS explains, federal and state public benefits programs are governed by a variety of laws, including some that use the term "lawfully present." Not all programs have interpreted the term identically to the list in the Social Security regulations. Since 1996, some federal agencies have updated the definition of "lawfully present," for example, in implementing the Affordable Care Act and coverage of children and pregnant persons under Medicaid and the Children's Health Insurance Program (CHIP).[39] Although federal and state benefits agencies may have authority to define terms in programs under their jurisdiction, there are some limits to that discretion. For example, they cannot independently determine whether an individual is "authorized under federal law to be present in the United States,"[40] or is precluded under federal law from establishing domicile,[41] and generally may not discriminate between similarly situated lawfully residing immigrants,[42] and its progeny.

During the nine years that the DACA program has been in effect, opportunities for immigrant youth to participate in the economy, pursue educational and professional programs, obtain a driver's license or other essential services has been negotiated in multiple forums. As DHS explained, not only DACA recipients, but their family members, employers, schools, and neighbors, as well as many states and their residents have relied on the DACA program: "Some States have relied on the existence of DACA in setting policies regarding eligibility for driver's licenses, in-state tuition, state-funded health care benefits, and professional licenses. Other States may have relied on certain aspects of DACA—such as employment authorization or lawful presence—in making other policy choices."[43] DHS recognized that it would be inappropriate to "single out DACA recipients—alone among other recipients of deferred action, as well as others whose continued presence DHS has chosen to tolerate for a period of time—for differential treatment." 86 Fed. Reg. at 53811. The agency reiterated that "some States have keyed benefits eligibility to lawful presence and may experience unintended indirect impacts if DHS, a decade

[37] 86 Fed. Reg. at 53762.
[38] DACA recipients significantly contribute to Social Security and Medicare, as shown by studies that found that ending DACA would result in "$39.3 billion in losses to Social Security and Medicare contributions over ten years, half of which represents lost employee contributions and half employer contributions." *See*, https://www.ilrc.org/report-daca-economic-cost.
[39] 45 C.F.R. §152.2; https://www.medicaid.gov/federal-policy-guidance/downloads/sho10006.pdf.
[40] *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957, 975 (9th Cir. 2017), *cert. denied* 138 S. Ct. 1279 (2018).
[41] *Toll v. Moreno*, 458 U.S. 1, 17 (1982).
[42] *Graham v. Richardson*, 403 U.S. 365, 376 (1971).
[43] 86 Fed. Reg. at 53803.

after issuance of the memorandum issued by Secretary Janet Napolitano, revises that aspect of the policy."[44]

We agree that individuals, communities, educational institutions, businesses, and states have relied on the DACA program which, as implemented to date, has produced numerous concrete benefits. These individuals and entities, however, also suffer continued harm from remaining inequities in access to services. Additional clarifications such as those outlined below by USCIS' Consideration of Deferred Action for Childhood Arrivals: Frequently Asked Questions USCIS (DACA FAQs)[45] could aid other federal and state agencies in making decisions informed by an understanding of federal immigration law:

- While distinguishing lawful presence from lawful status, USCIS clarifies that "[a]n individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect." (A. 1)
- USCIS explains that "[t]he relief an individual receives under DACA is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion." (A. 3)
- USCIS confirms that "[i]ndividuals granted deferred action are not precluded by federal law from establishing domicile in the U.S." (A. 5)

These clarifications have been critical in assisting state and federal agencies in making decisions about eligibility for services over which they have control. By contrast, some language in the proposed rule's preamble could contribute to confusion on this topic, such as the notation that the term lawful presence does not confer authorization or authority to remain in the United States.[46] We assume the agency meant "beyond the period of the grant" or as it clarified in other parts of the preamble, that individuals granted DACA do not have an absolute right to remain, and (like others authorized to be present in the U.S.) may nevertheless be removed under certain conditions. USCIS should clarify that its interpretation of authorized or lawful presence is at least as broad as under previous DACA guidance.

To assist the States and other agencies, USCIS should confirm that (a) individuals granted DACA are federally authorized to be present in the United States, and are therefore considered by DHS to be lawfully present during the period of their grant; (b) the relief that DACA grantees receive is identical for immigration purposes to the relief obtained by any other person granted deferred action; and (c) individuals granted deferred action are not precluded by federal law from establishing domicile in the U.S.

DHS invited comments on whether there is any basis or reason for treating deferred action under DACA differently from other instances of deferred action with respect to granting access to employment authorization or where applicable, treatment as "lawfully present" in the U.S. Our answer, from a legal and policy perspective, is a resounding "no." As DHS notes, "the provision of employment authorization and consideration of 'lawful presence' for DACA recipients is pursuant to longstanding and independent

[44] 86 Fed. Reg. at 53803.
[45] https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-askedquestions.
[46] 86 Fed. Reg at 53740, 53773.

DHS regulations and implementing guidance promulgated for all recipients of deferred action."[47] We agree with DHS that it is in the interests of both DACA recipients and the nation for the noncitizens granted deferred action under the proposed rule to be able to work lawfully and to be treated as lawfully present during the period of deferred action. While DHS focuses on the specific regulations and provisions under its jurisdiction, its guidance to other agencies on immigration matters is critical. Although DHS does not dictate what other agencies may do in implementing programs under their jurisdiction, its guidance can help ensure that agencies make informed decisions regarding the treatment of DACA recipients and others granted deferred action, consistent with federal law, in advancing the country's public health, community safety and public policy goals.

The AMA urges DHS to confirm that there is no basis for treating DACA recipients differently from other deferred action recipients for any purpose. Failure to do so could have harmful repercussions for individuals, families, businesses, and states that have relied on their access to driver's licenses and other critical services to protect public health and safety, and to promote social and economic well-being.

With this continuity of the definition of lawful presence in mind, **the AMA urges DHS to work with HHS to extend eligibility to purchase Affordable Care Act (ACA) marketplace coverage to DACA recipients.** Almost four million of the nonelderly uninsured are ineligible for ACA financial assistance due to their immigration status.[48] Overall, lawfully present, and undocumented immigrants were significantly more likely to be uninsured than citizens in 2019. Among the nonelderly population, 25 percent of lawfully present immigrants and 46 percent of undocumented immigrants were uninsured, compared to nine percent of citizens. Critically, noncitizen children are more likely to be uninsured than citizen children.[49] The higher uninsured rate among noncitizens is partially rooted in eligibility restrictions for ACA marketplace coverage. DACA recipients are currently ineligible to purchase coverage through the ACA marketplaces, even if they pay the full cost, because they are not considered lawfully present. [50] Due to the negative health implications of not having health insurance the AMA urges the Administration to make the DACA recipients eligible to purchase ACA marketplace coverage.

Protecting DACA recipients by strengthening data privacy

The AMA's approach to privacy is governed by our *Code of Medical Ethics* and long-standing policies adopted by our policymaking body, the House of Delegates, which support strong personal privacy protections. AMA policy and ethical opinions on privacy and confidentiality provide that an individual's privacy should be honored unless waived by the person in a meaningful way, is de-identified, or in rare instances when strong countervailing interests in public health or safety justify invasions of privacy or breaches of confidentiality. When breaches of confidentiality are compelled by concerns for public health and safety, these breaches must be as narrow in scope and content as possible, must contain the least identifiable and sensitive information possible, and must be disclosed to the fewest entities and individuals as possible to achieve the necessary end. However, the proposed rule does not fall within this narrowly defined exception. The AMA supports extending eligibility to purchase ACA marketplace

[47] 86 Fed. Reg. at 53765.
[48] https://www.kff.org/health-reform/issue-brief/how-the-american-rescue-plan-act-affects-subsidies-for-marketplace-shoppers-and-people-who-are-uninsured/.
[49] https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/.
[50] https://www.healthcare.gov/immigrants/immigration-status/.

coverage (including unsubsidized coverage) to undocumented immigrants and DACA recipients, with the guarantee that health plans and ACA marketplaces will not collect and/or report data regarding enrollee immigration status. Without that guarantee in place, fear of immigration enforcement could preclude a segment of the immigrant population from enrolling in health care coverage. In addition, the AMA also strongly supports protections that prohibit ICE, CBP, or other federal, state, or local law enforcement agencies from utilizing information from medical records to pursue immigration enforcement actions against patients who are undocumented.

A significant consideration for individuals who are deciding whether to request or renew their DACA grant is whether their information will be protected or will be shared with immigration enforcement agencies such as Immigration and Customs Enforcement (ICE) or Customs and Border Patrol (CBP).[51] USCIS has long maintained that information submitted by applicants who submit a DACA request on Form I-821D would be "protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings" unless the requestor meets the 2011 NTA guidelines.[52] In addition to codifying longstanding policy and practice regarding information provided in DACA requests, the proposed rule reframes USCIS' approach to information privacy and confidentiality from a "policy governing information sharing" to an affirmative "restriction on the use of information provided in DACA requests."[53] The AMA urges USCIS to take the following steps to achieve such restrictions: :

- The provisions should be expanded to cover restrictions on information use and sharing in contexts beyond the initiation of immigration enforcement proceedings. Specifically, the provisions should prohibit the disclosure, dissemination, or use of any and all past or future information provided through the DACA request process for purposes other than implementing the DACA program.
- Prior to another agency disclosing, disseminating, or accessing information provided in a DACA request or through the application process or USCIS using or allowing such information to be used for any purpose other than implementing the DACA program, USCIS should notify the DACA requestor or recipient to obtain consent for sharing such information, explaining the reason for its requested use.
- The provisions should also include requirements on information storage and electronic access. Databases used to store the information of DACA requestors and other USCIS benefits should be protected by strict protocols on who may be granted access to the information and for what purpose, as well as transparency and oversight measures—such as requirements to maintain access logs that include who accessed what information, when, and for what lawful purpose—to ensure protocols are being followed.

The AMA remains deeply concerned for the data privacy of DACA recipients. As Administrations turnover and change, DACA recipients year after year continue living their lives, but in constant fear of mass deportations. Additionally, information in government databases could be retained and used to

[51] Form I-821D Instructions, "Instructions for Consideration of Deferred Action for Childhood Arrivals," Department of Homeland Security, U.S. Citizenship and Immigration Services (last updated Aug. 31, 2021), https://www.uscis.gov/sites/default/files/document/forms/i-821dinstr.pdf; see also NPRM, 86 Fed. Reg. at 53771. (reiterating USCIS' information sharing policy "has not changed in any way since [DACA] was first announced in 2012").
[52] 86 Fed. Reg. at 53771.
[53] *Id*.

target the DACA recipients. Thus, the same data these individuals willingly provided to protect their futures could instead be used to target or deport them if appropriate protections are not ensured.

The final rule should provide for notice of the proposed grounds for termination and a fair opportunity to respond before the agency terminates any DACA grant

Providing a reliable process is essential to ensure fairness and accuracy in the decision to terminate a person's DACA status. The proposed rule recognizes that USCIS should have all the information that is necessary to accurately make a "totality of the circumstances" determination. Providing notice and a chance to respond before any termination decision is made is vital to that objective. Moreover, these procedural protections account for important reliance interests. As the Supreme Court has recognized, the consequences of any DACA rescissions are significant and "radiate outward" beyond DACA recipients to their families, employers, schools, and local and state governments.[54] Therefore, notice and an opportunity to respond would ensure due process for all DACA recipients as well as provide the agency an early opportunity to correct errors. This is especially important since during the first year of the prior Administration alone, USCIS terminated the DACA status of more than a thousand individuals without notice and a chance to respond. As such, safeguards should be provided to DACA-eligible individuals that the agency has presented allegedly derogatory information on so that applicants can correct inaccuracies, demonstrate extenuating circumstances, and provide information about positive equities to allow for a fully informed and accurate adjudication.[55, 56]

Additionally, the final rule should not allow ICE or CBP to force USCIS to automatically terminate DACA by issuing and filing a Notice to Appear (NTA) or prevent renewal by keeping an individual in detention. 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 and, therefore, the AMA believes that NTAs and detention should not automatically terminate an individual's DACA status.[57]

USCIS should be given authority to fully adjudicate DACA applications for detained individuals separate from ICE decision-making regarding release

We appreciate ICE's recent efforts to exercise prosecutorial discretion against known beneficiaries of victim-based immigration benefits and those known to have a pending application for such benefits.[58] However, the number of people detained by ICE continues to grow exponentially, ensuring that many individuals eligible for DACA will end up in immigration detention. The NPRM would permit detained

[54] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914 (2020).
[55] The *IE-IYC* class covers DACA recipients who (1) have not been convicted of a disqualifying criminal offense; (2) do not have certain pending criminal charges referenced in the USCIS 2011 NTA policy memorandum or for certain terrorism and security crimes; (3) have not departed the United States without advance parole or have been removed under an order of removal, voluntary departure, or voluntary return agreement; and (4) have not obtained immigration status. 86 Fed. Reg. at 53,751.
[56] 86 Fed. Reg. at 53,751.
[57] 86 Fed. Reg. at 53,815–16.
[58] https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf.

individuals to apply for DACA with USCIS but forbear the adjudication until ICE grants release from detention.[59]

This bifurcation will deny detained individuals the main benefit DACA provides: demonstrating that the individual is in fact low-priority for removal and eligible for deferred action. This will lead to prolonged detention of DACA-eligible individuals who will suffer the harms of continued detention[60] and will add to an already inefficient and overburdened detention system.[61] Additionally, ICE's decision-making process regarding releases from detention is notoriously arbitrary and disorganized—meaning that securing release could take months or never happen at all-depriving an eligible individual of DACA status.

This also makes DACA's codification largely inefficient as it leaves the grant of DACA relief in the hands of two DHS component sub-agencies rather than one. USCIS is the agency already tasked with and experienced in adjudicating many DACA applications. As such, **the AMA urges the agency to extend its jurisdiction to permit full and immediate adjudication of both detained and non-detained DACA applicants alike without reliance on decisions by ICE.**

DHS should harmonize Advance Parole Applications for DACA holders with Temporary Protected Status holders

Currently, DACA recipients may request advance parole only on employment, educational, or humanitarian grounds, despite there being no such statutory or regulatory restriction of advance parole for others such as TPS holders. Like TPS, DACA is a form of humanitarian relief, expressing the administration's compassion for children who grew up in the United States and lack legal status through no fault of their own. Requiring a different standard for two forms of humanitarian relief is not only arbitrary but increases USCIS's adjudication burden. Harmonizing advance parole for DACA with the advance parole requirements for TPS will also increase the receipts and revenues as it would remove barriers to applying for advance parole and increase the number of individuals eligible to apply. Accordingly, **the AMA urges DHS to expand the grounds for advance parole to include any reason for travel, similar to TPS.**

DHS should narrowly construe disqualifying criminal convictions especially when it comes to minor traffic offenses

DHS seeks input on its definition of "minor traffic offenses." The proposed rule states for "minor traffic offenses" to be "considered under a review of the totality of the circumstances." Currently, USCIS' DACA FAQ states: "a minor traffic offense will not be considered a misdemeanor for purposes of this process. However, your entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, you warrant an exercise of prosecutorial discretion." The totality of circumstances approach can easily over-emphasize certain offenses, such as driving without a license, which could be a felony in states such as Florida, Georgia, Illinois, Indiana, Kentucky, and Missouri.

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[59] See proposed 8 C.F.R. § 236.23(a)(2).
[60] https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20First%20Ten%20to%20Communities%20Not%20Cages.pdf.
[61] https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrantdetention.

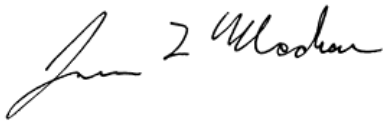
The AMA urges the Administration to exclude from the definition of minor traffic offenses any traffic related infraction, misdemeanors, or felonies where there was no serious bodily injury to a third party. For offenses where there was serious bodily injury to a third party, adjudicators could continue using the "totality of the circumstances" analysis to determine if an individual warrants prosecutorial discretion. Certain offenses, such as driving without a license or with a suspended license, should always be considered minor traffic offenses due to the difficulties undocumented individuals can face in obtaining a license, regardless of any criminal implications on a state-by-state level.

DACA applications should be included on the list of applications eligible for an I-912 Fee Waiver

Currently, DHS does not allow for DACA recipients to apply for an I-912 fee waiver. The current renewal fee is a barrier to DACA renewal, with the majority of DACA holders describing the $495 filing fee as "a financial hardship on themselves or their families." Given that 35 percent of DACA eligible individuals live in families with incomes less than 100 percent of the federal poverty level and two-thirds live in households with incomes less than 200 percent of the federal poverty level, the data demonstrates that the filing fee is a significant financial burden on individuals already facing poverty.[62] Therefore**, the AMA urges the Administration to allow DACA applicants and renewals to apply for the existing I-912 fee waiver.**

The AMA applauds the Administration for beginning the process of strengthening the DACA program. We also urge DHS to take the additional steps outlined above to improve the proposed rule to better protect DACA recipients from uncertainty and legal limbo. Thank you for considering the AMA's comments. If you have any questions, please feel free to contact Margaret Garikes, Vice President, Federal Affairs, at margaret.garikes@ama-assn.org or 202-789-7409.

Sincerely,



James L. Madara, MD

[62] https://www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and?.