



Agency Update: Department of Homeland Security Publishes Notice of Proposed Rulemaking on DACA

Lewis-Burke Associates LLC – September 29, 2021

On September 28, 2021, the U.S. Department of Homeland Security (DHS) published a notice of proposed rulemaking (NPRM) to preserve the Deferred Action for Childhood Arrivals (DACA) program. The NPRM was published in response to President Biden’s “Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)” memorandum and emphasizes the opinion of DHS that DACA recipients should not be prioritized for removal from the United States. The NPRM hopes to fortify DACA after a federal court in Texas ruled it to be unlawful and suspended the ability for DHS to process new DACA applications in July 2021.

Through engaging in negotiated rulemaking, the Biden Administration hopes to counter the main pillar of Judge Andrew Hanen’s July 2021 ruling that the DACA program is unlawful because the Obama Administration violated the *Administrative Procedures Act* when it created DACA through an executive order. DHS has opened a 60-day comment period for the public to submit comments regarding the proposed rule. After the comment period closes, the agency will consider all submitted comments and issue a final rule. Written comments must be submitted **on or before November 29, 2021**.

Within the NPRM, DHS does not expand DACA and largely reflects the guidelines defined by former Secretary of Homeland Security Janet Napolitano when the program was established in 2012. The most notable change is the separation of work authorization and deportation protection under DACA. The proposed rule would decouple the process of applying for deportation protections under DACA and work authorization in response to Judge’s Hanen’s ruling, which indicated it was unlawful to apply work authorization to DACA recipients. Under the proposed rule, DACA applicants would need to apply for work authorization separately. The NPRM does not alter the eligibility requirements for DACA, which are as follows: applicants need to have been born after June 1981 and were under the age of 30 on June 15, 2012; who came to the United States when they were under the age of sixteen and who resided in the United States “continuously for at least five years preceding June 15, 2012 and were present in the United States on that date;” are in school, have a high school diploma/GED, or have been honorably discharged from the military; and do not have a criminal record. Other minor modifications to the program include improving the existing filing process and clarifying DHS’s information sharing and use policy in relation to DACA requests.

Although this rule seeks to preserve the current DACA program, DHS recognizes that only legislative action by Congress can provide permanent protection for undocumented youth. The Biden Administration is expected to continue to push Congress to authorize the DACA program through legislation as it engages in the NPRM process through DHS and appeals the Texas court’s decision regarding the legality of the program.

Due Date: Written comments should be submitted by November 29, 2021. Those interested in submitting comments should do so through the Federal eRulemaking Portal at <http://www.regulations.gov> using the DHS docket number 2021-0006.



Sources and Additional Information

- The full notice of proposed rulemaking, including instructions for submitting comments, can be found at <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>
- [President Biden's](#) "Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)" memorandum is available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/>.