DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 106, 236, and 274a

[CIS No. 2691–21; DHS Docket No. USCIS–2021–0006]

RIN 1615–AC64

Deferred Action for Childhood Arrivals

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: On June 15, 2012, the U.S. Department of Homeland Security (DHS) established the Deferred Action for Childhood Arrivals (DACA) policy. The policy—which describes the Secretary of Homeland Security's (Secretary's) exercise of her prosecutorial discretion in light of the limited resources that DHS has for removal of undocumented noncitizens—directed U.S. Citizenship and Immigration Services (USCIS) to create a process to defer removal of certain noncitizens who years earlier came to the United States as children, meet other criteria, and do not present other circumstances that would warrant removal. Since that time, more than 825,000 people have applied successfully for deferred action under this policy. On January 20, 2021, President Biden directed DHS, in consultation with the Attorney General, to take all appropriate actions to preserve and fortify DACA, consistent with applicable law. On July 16, 2021, the U.S. District Court for the Southern District of Texas vacated the June 2012 memorandum that created the DACA policy and what the court called the ''DACA program,'' and it permanently enjoined DHS from ''administering the DACA program and from reimplementing DACA without compliance with'' the Administrative Procedure Act (APA). However, the district court temporarily stayed its vacatur and injunction with respect to most individuals granted deferred action under DACA on or before July 16, 2021, including with respect to their renewal requests. The district court's vacatur and injunction were based, in part, on its conclusion that the June 2012 memorandum announced a legislative rule that required notice-and-comment rulemaking. The district court further remanded the ''DACA program'' to DHS for further consideration. DHS has appealed the district court's decision. Pursuant to the Secretary's broad authorities to administer and enforce the immigration laws, consistent with the district court's direction to consider a number of issues on remand, and after careful consideration of the arguments and conclusions on which the district court's decision is based, DHS puts forward for consideration the following proposed rule. DHS invites public comments on the proposed rule and possible alternatives.

DATES: Written comments and related material must be submitted on or before November 29, 2021.

ADDRESSES: You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. 2021–0006, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS also is not accepting mailed comments at this time. If you cannot submit your comment by using *https://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

For additional instructions on sending comments, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andria Strano, Acting Chief, Office of Policy and Strategy, Division of Humanitarian Affairs, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721–3000.

SUPPLEMENTARY INFORMATION:

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List of Abbreviations

APA Administrative Procedure Act
AST Autonomous Surveillance Tower
BLS Bureau of Labor Statistics
CBP U.S. Customs and Border Protection
CEQ Council on Environmental Quality
CFR Code of Federal Regulations
CLAIMS Computer-Linked Application Information Management System
CPI–U Consumer Price Index for All Urban Consumers
DACA Deferred Action for Childhood Arrivals
DAPA Deferred Action for Parents of Americans and Lawful Permanent Residents
DED Deferred enforced departure
DHS Department of Homeland Security
DOJ Department of Justice
DREAM Act Development, Relief, and Education for Alien Minors Act
EAD Employment authorization document
ELIS Electronic Immigration System
E.O. Executive Order
EOIR Executive Office for Immigration Review
EPS Egregious public safety
EVD Extended voluntary departure
FAIR Federation for American Immigration Reform
FLCRAA Farm Labor Contractor Registration Act Amendments of 1974

FR Federal Register
FY Fiscal Year
GED General Education Development
ICE U.S. Immigration and Customs Enforcement
IIRIRA Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IMMACT 90 Immigration Act of 1990
INA Immigration and Nationality Act of 1952
INS Immigration and Naturalization Service
IRCA Immigration Reform and Control Act of 1986
MPI Migration Policy Institute
NEPA National Environmental Policy Act
NOA Notice of action
NOIT Notice of intent to terminate
NTA Notice to appear
OCFO Office of the Chief Financial Officer
OI Operations Instructions
OIRA Office of Information and Regulatory Affairs
OIS Office of Immigration Statistics
OMB Office of Management and Budget
OPQ Office of Performance and Quality
PRA Paperwork Reduction Act of 1995
PRWORA Personal Responsibility and Work Opportunity Reconciliation Act of 1996
Pub. L. Public Law
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RIN Regulation Identifier Number
RTI Referral to ICE
SBREFA Small Business Regulatory Enforcement Fairness Act of 1996
Secretary Secretary of Homeland Security
SORN System of Record Notice
Stat. U.S. Statutes at Large
TPS Temporary Protected Status
UMRA Unfunded Mandates Reform Act of 1995
U.S.C. United States Code
USCIS U.S. Citizenship and Immigration Services
VAWA Violence Against Women Act of 1994
VPC Volume Projection Committee
VTVPA Victims of Trafficking and Violence Protection Act of 2000

I. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism effects of this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes will refer to a specific portion of the proposed rule; explain the reason for any recommended change; and include data, information, or authority that supports such recommended change. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2021–0006 for this rulemaking. All comments or materials submitted in the manner described above will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Notice available at *https://www.regulations.gov/privacy-notice.*

Docket: For access to the docket and to read background documents or comments received, go to *https://www.regulations.gov,* referencing DHS Docket No. USCIS–2021–0006. You also may sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

A. Purpose of the Regulatory Action

On June 15, 2012, then-Secretary Janet Napolitano issued a memorandum providing new guidance for the exercise of prosecutorial discretion with respect to certain young people who came to the United States years earlier as children, who have no current lawful immigration status, and who were already generally low enforcement priorities for removal.[1] The Napolitano Memorandum states that DHS will consider granting ''deferred action,'' on a case-by-case basis, for individuals who:

1. Came to the United States under the age of 16;

2. Continuously resided in the United States for at least 5 years preceding June 15, 2012, and were present in the United States on that date;

3. Are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

4. Have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety; and

5. Were not above the age of 30 on June 15, 2012.[2]

Individuals who request relief under this policy, meet the criteria above, and pass a background check may be granted deferred action.[3] Deferred action is a longstanding practice by which DHS and the former Immigration and Naturalization Service (INS) have exercised their discretion to forbear or assign lower priority to removal action in certain cases for humanitarian reasons, administrative convenience, or other reasonable prosecutorial discretion considerations.[4]

In establishing this policy, known as DACA, then-Secretary Napolitano emphasized that for the Department to use its limited resources in a strong and sensible manner, it necessarily must exercise prosecutorial discretion. Then-Secretary Napolitano observed that these ''young people . . . were brought to this country as children and know only this country as home'' and as a general matter ''lacked the intent to violate the law,'' reasoning that limited enforcement resources should not be expended to ''remove productive young people to countries where they may not have lived or even speak the language.'' [5] The Napolitano Memorandum also instructs that the individual circumstances of each case must be considered and that deferred action should be granted only where justified.[6]

Since 2012, more than 825,000 people have applied successfully for deferred action under the DACA policy.[7] On average, DACA recipients arrived in the United States in 2001 and at the age of 6.[8] In addition, 38 percent of recipients

[1] Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP), et al. (June 15, 2012), *https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf* (hereinafter Napolitano Memorandum).

[2] *Id.*

[3] *Id.*

[4] *See, e.g., Reno* v. *Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 484 (1999) (*AADC*); 8 CFR 274a.12(c)(14).

[5] Napolitano Memorandum.

[6] *Id.*

[7] *See* USCIS, DACA Quarterly Report (FY 2021, Q1), *https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr1.pdf.* As of the end of CY 2021, there were over 636,00 active DACA recipients in the United States. *See* USCIS, Count of Active DACA Recipients By Month of Current DACA Expiration (Dec. 31, 2020), *https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients%E2%80%93December31%2C2020.pdf.*

[8] DHS, USCIS, Office of Performance and Quality (OPQ), Electronic Immigration System (ELIS) and

Continued

arrived before the age of 5.[9] For many, this country is the only one they have known as home. In the nearly 10 years since this policy was announced, DACA recipients have grown into adulthood and built lives for themselves and their loved ones in the United States. They have gotten married and had U.S. citizen children. Over 250,000 children have been born in the United States with at least one parent who is a DACA recipient, and about 1.5 million people in the United States share a home with a DACA recipient.[10] DACA recipients have obtained driver's licenses and credit cards, bought cars, and opened bank accounts.[11] In reliance on DACA, its recipients have enrolled in degree programs, started businesses, obtained professional licenses, and purchased homes.[12] Depending on the health insurance that their deferred action allowed them to obtain through employment or State-sponsored government programs, DACA recipients have received improved access to health insurance and medical care and have sought treatment for long-term health issues.[13] For DACA recipients and their family members, the conferral of deferred action has increased DACA recipients' sense of acceptance and belonging to a community, increased their sense of hope for the future, and given them the confidence to become more active members of their communities and increase their civic engagement.[14]

The DACA policy has encouraged its recipients to make significant investments in their careers and education. Many DACA recipients report that deferred action—and the employment authorization that DACA permits them to request—has allowed them to obtain their first job or move to a higher paying position more commensurate with their skills.[15] DACA recipients are employed in a wide range of occupations, including management and business, education and training, sales, office and administrative support, and food preparation; thousands more are self-employed in their own businesses.[16] They have continued their studies, and some have become doctors, lawyers, nurses, teachers, or engineers.[17] About 30,000 are health care workers, and many of them have helped care for their communities on the frontlines during the COVID–19 pandemic.[18] In 2017, 72 percent of the top 25 Fortune 500 companies employed at least one DACA recipient.[19]

As a result of these educational and employment opportunities, DACA recipients make substantial contributions in taxes and economic activity.[20] According to one estimate, as of 2020, DACA recipients and their households pay about $5.6 billion in annual Federal taxes and about $3.1 billion in annual State and local taxes.[21] In addition, through their employment, they make significant contributions to Social Security and Medicare funds.[22] Approximately two-thirds of recipients purchased their first car after receiving DACA,[23] and an estimated 56,000 DACA recipients own homes and are directly responsible for $566.7 million in annual mortgage payments.[24] DACA recipients also are estimated to pay $2.3 billion in rental payments each year.[25] Because of this, the communities of DACA recipients—who reside in all 50 States and the District of Columbia [26]—in addition to the recipients themselves, have grown to rely on the economic contributions this policy facilitates.[27] In

Computer-Linked Application Information Management System (CLAIMS) 3 Consolidated (queried Mar. 2021).

[9] *Id.*

[10] Nicole Prchal Svajlenka and Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition,* Center for American Progress (Apr. 6, 2020), *https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition* (hereinafter Svajlenka and Wolgin (2020)).

[11] *See* Roberto G. Gonzales and Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA,* American Immigration Council (June 2014); Zenén Jaimes Pérez, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three Years Later,* United We Dream (Oct. 2015), *https://unitedwedream.org/wp-content/uploads/2017/10/DACA-report-final-1.pdf* (hereinafter Jaimes Pérez (2015)); Tom K. Wong, et al., *Results from Tom K. Wong et al., 2020 National DACA Study, https://cdn.americanprogress.org/content/uploads/2020/10/02131657/DACA-Survey-20201.pdf* (hereinafter Wong (2020)).

[12] *See* Roberto G. Gonzales, et al., *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty,* Immigration Initiative at Harvard (2019), *https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf* (hereinafter Gonzales (2019)); Wong (2020).

[13] Gonzales (2019).

[14] Gonzales (2019); Jaimes Pérez (2015); Wong (2020).

[15] Roberto G. Gonzales, et al., *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA),* 58 Am. Behav. Scientist 1852 (2014); Wong (2020); *see also* Nolan G. Pope, *The Effects of DACAmentation: The Impact of Deferred Action for Childhood Arrivals on Unauthorized Immigrants,* 143 J. of Pub. Econ. 98 (2016), *http://www.econweb.umd.edu/~pope/daca_paper.pdf* (hereinafter Pope (2016)) (finding that DACA increased participation in the labor force for undocumented immigrants).

[16] Nicole Prchal Svajlenka, *What We Know About DACA Recipients in the United States,* Center for American Progress (Sept. 5, 2019), *https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states;* Jie Zong, et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation,* Migration Policy Institute (Nov. 2017), *https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf* (hereinafter Zong (2017)).

[17] *See* Gonzales (2019); Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response,* Center for American Progress (April 6, 2020), *https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response* (hereinafter Svajlenka (2020)); Wong (2020); Zong (2017).

[18] Svajlenka (2020). DACA recipients who are health care workers also are helping to alleviate a shortage of health care professionals in the United States and they are more likely to work in underserved communities where shortages are particularly dire. Angela Chen, et al., *PreHealth Dreamers: Breaking More Barriers Survey Report* at 27 (Sept. 2019) (presenting survey data showing that 97 percent of undocumented students pursuing health and health-science careers planned to work in an underserved community); Andrea N. Garcia, et al., *Factors Associated with Medical School Graduates' Intention to Work with Underserved Populations: Policy Implications for Advancing Workforce Diversity,* Acad. Med. (Sept. 2017), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5743635* (finding that underrepresented minorities graduating from medical school are nearly twice as likely as white students and students of other minorities to report an intention to work with underserved populations).

[19] Tom K. Wong, et al., *DACA Recipients' Economic and Educational Gains Continue to Grow,* Center for American Progress (Aug. 28, 2017), *https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow* (hereinafter Wong (2017)).

[20] Please see the Regulatory Impact Analysis (RIA) for this proposed rule, which can be found in Section V.A. The RIA includes analysis and estimates of the costs, benefits, and transfers that DHS expects this rule to produce. Please note that the estimates presented in the RIA are based on the specific methodologies described therein. Figures may differ from those presented in the sources discussed here. As noted below, USCIS welcomes input on the methodologies employed in the RIA, as well as any other data, information, and views related to the costs, benefits, and transfers associated with this rulemaking.

[21] Svajlenka and Wolgin (2020). *See also* Misha E. Hill and Meg Wiehe, *State & Local Tax Contributions of Young Undocumented Immigrants,* Institute on Taxation and Economic Policy (Apr. 2017) (analyzing the State and local tax contributions of DACA-eligible noncitizens in 2017).

[22] Jose Magaña-Salgado and Tom K. Wong, *Draining the Trust Funds: Ending DACA and the Consequences to Social Security and Medicare,* Immigrant Legal Resource Center (Oct. 2017); *see also* Jose Magaña-Salgado, *Money on the Table: The Economic Cost of Ending DACA,* Immigrant Legal Resource Center (Dec. 2016) (analyzing the Social Security and Medicare contributions of DACA recipients in 2016).

[23] Wong (2017).

[24] Svajlenka and Wolgin (2020).

[25] *Id.*

[26] USCIS, *Deferred Action for Childhood Arrivals (DACA) Quarterly Report (Fiscal Year 21, Q1)* 6, *https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr1.pdf.*

[27] Reasonable reliance on the existence of the DACA policy is distinct from reliance on a grant of DACA to a particular person. Individual DACA grants are discretionary and may be terminated at any time but communities, employers, educational

sum, despite the express limitations in the Napolitano Memorandum, over the 9 years in which the DACA policy has been in effect, the good faith investments recipients have made in both themselves and their communities, and the investments that their communities have made in them, have been, in the Department's judgment, substantial.

This proposed rule responds to President Biden's memorandum of January 20, 2021, ''Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA),'' [28] in which President Biden stated:

> DACA reflects a judgment that these immigrants should not be a priority for removal based on humanitarian concerns and other considerations, and that work authorization will enable them to support themselves and their families, and to contribute to our economy, while they remain.[29]

This proposed rule embraces the consistent judgment that has been maintained by the Department—and by three presidential administrations since the policy first was announced—that DACA recipients should not be a priority for removal.[30] It is informed by the Department's experience with the policy over the past 9 years and the ongoing litigation concerning the policy's continued viability. It is particularly meant to preserve legitimate reliance interests in the continued implementation of the nearly decade-long policy under which deferred action requests will be considered, while emphasizing that individual grants of deferred action are, at bottom, an act of enforcement discretion to which recipients do not have a substantive right.

The proposed rule recognizes that enforcement resources are limited, that sensible priorities must necessarily be set, and that it is not generally the best use of those limited resources to remove productive young people to countries where they may not have lived since early childhood and whose languages they may not even speak. It recognizes that, as a general matter, DACA recipients, who came to this country many years ago as children, lacked the intent to violate the law, have not been convicted of any serious crimes, and remain valued members of our communities. It reflects the conclusion that, while they are in the United States, they should have access to a process that, operating on a case-by-case basis, may allow them to work to support themselves and their families, and to contribute to our economy in multiple ways. This proposed rule also accounts for the momentous decisions DACA recipients have made in ordering their lives in reliance on and as a result of this policy, and it seeks to continue the benefits that have accrued to DACA recipients, their families, their communities, and to the Department itself that have been made possible by the policy. DHS emphasizes that the DACA policy as proposed in this rule is not a permanent solution for the affected population and does not provide lawful status or a path to citizenship for noncitizens who came to the United States many years ago as children. Legislative efforts to find such a solution remain critical. On July 16, 2021, the U.S. District Court for the Southern District of Texas vacated the 2012 DACA policy, finding, among other things, that it was contrary to the Immigration and Nationality Act of 1952 (INA).[31] DHS is carefully and respectfully considering the analysis in that decision and its conclusions about DACA's substantive legality and invites comment on how, if correct, those conclusions should affect this rulemaking.

B. Summary of Major Provisions of the Regulatory Action

This proposed rule would preserve and fortify DHS's DACA policy for the issuance of deferred action to certain young people who came to the United States many years ago as children, who have no current lawful immigration status, and who are generally low enforcement priorities. The proposed rule would include the following provisions of the DACA policy from the Napolitano Memorandum and longstanding USCIS practice:

- *Deferred Action.* The proposed rule would provide a definition of deferred action as a temporary forbearance from removal that does not confer any right or entitlement to remain in or re-enter the United States, and that does not prevent DHS from initiating any criminal or other enforcement action against the DACA recipient at any time.
- *Threshold Criteria.* The proposed rule would include the following longstanding threshold criteria: That the requestor must have (1) come to the United States under the age of 16; (2) continuously resided in the United States from June 15, 2007, to the time of filing of the request; (3) been physically present in the United States on both June 15, 2012, and at the time of filing of the DACA request; (4) not been in a lawful immigration status on June 15, 2012, as well as at the time of request; (5) graduated or obtained a certificate of completion from high school, obtained a GED certificate, currently be enrolled in school, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (6) not been convicted of a felony, a misdemeanor described in the rule, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety; and (7) been born on or after June 16, 1981, and be at least 15 years of age at the time of filing, unless the requestor is in removal proceedings, or has a final order of removal or a voluntary departure order. The proposed rule also would state that deferred action under DACA may be granted only if USCIS determines in its sole discretion that the requestor meets the threshold criteria and otherwise merits a favorable exercise of discretion.
- *Procedures for Request, Terminations, and Restrictions on Information Use.* The proposed rule would set forth procedures for denial of a request for DACA or termination of a grant of DACA, the circumstances that would result in the issuance of a notice to appear (NTA) or referral to U.S. Immigration and Customs Enforcement (ICE) (RTI), and the restrictions on use of information contained in a DACA request for the purpose of initiating immigration enforcement proceedings.

In addition to proposing the retention of longstanding DACA policy and procedure, the proposed rule includes the following changes:

- *Filing Requirements.* The proposed rule would modify the existing filing process and fees for DACA by making the request for employment authorization on Form I–765, Application for Employment Authorization, optional and charging a fee of $85 for Form I–821D, Consideration of Deferred Action for Childhood Arrivals. DHS would maintain the current total cost to DACA requestors who also file Form I–765 of

institutions, and State and local governments have come to rely on the existence of the policy itself and its potential availability to those individuals who qualify.

[28] 86 FR 7053 (hereinafter Biden Memorandum).

[29] *Id.*

[30] *See id.;* Sept. 5, 2017 Statement from President Donald J. Trump, *https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-7* (''I have advised [DHS] that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang.''); Napolitano Memorandum.

[31] *Texas* v. *United States,* No. 1:18–cv–00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021) (*Texas II* July 16, 2021 memorandum and order).

$495 ($85 for Form I–821D plus $410 for Form I–765).

• *Employment Authorization.* The proposed rule would create a DACA-specific regulatory provision regarding eligibility for employment authorization for DACA deferred action recipients in a new paragraph designated at 8 CFR 274a.12(c)(33). The new paragraph would not constitute any substantive change in current policy; it merely would create a DACA-specific provision in addition to the existing provision dealing with deferred action recipients more broadly. Like that provision, this one would continue to specify that the noncitizen [32] must have been granted deferred action and must establish economic need to be eligible for employment authorization.

• *Automatic Termination of Employment Authorization.* The proposed rule would automatically terminate employment authorization granted under 8 CFR 274.12(c)(33) upon termination of a grant of DACA.

• ''*Lawful Presence.*'' Additionally, the proposed rule reiterates USCIS' codification in 8 CFR 1.3(a)(4)(vi) of agency policy, implemented long before DACA, that a noncitizen who has been granted deferred action is considered ''lawfully present''—a specialized term of art that does not in any way confer authorization to remain in the United States—for the discrete purpose of authorizing the receipt of certain Social Security benefits consistent with 8 U.S.C. 1611(b)(2). The proposed rule also would reiterate longstanding policy that a noncitizen who has been granted deferred action does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9) (imposing certain admissibility limitations for noncitizens who departed after having accrued certain periods of unlawful presence in the United States).

[32] For purposes of this discussion, USCIS uses the term ''noncitizen'' to be synonymous with the term ''alien'' as it is used in the INA.

C. Costs and Benefits

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of DACA, DHS considers the potential impacts of this proposed rule relative to two baselines. The first baseline, the No Action Baseline, represents a state of the world under the current DACA policy; that is, the policy initiated by the guidance in the Napolitano Memorandum in 2012. For reasons explained in Section V.A.4.a.(1) below, this baseline does not directly account for the July 16, 2021 district court decision. The second baseline, the Pre-Guidance Baseline, represents a state of the world where the DACA policy does not exist, a world as it existed before the guidance in the Napolitano Memorandum. DHS emphasizes that the Pre-Guidance Baseline gives clarity about the impact of the DACA policy as such, and that it is, therefore, the more useful baseline for understanding the costs and benefits of that policy. Relative to that baseline, the monetized benefits, including above all income earnings, greatly exceed the monetized costs. DHS also notes that the Pre-Guidance Baseline analysis also can be used to better understand the state of the world under the July 16, 2021 district court decision, should the stay of that decision ultimately be lifted.

Table 1 provides a detailed summary of the proposed provisions and their potential impacts relative to the No Action Baseline. Table 2 provides a detailed summary of the proposed provisions and their potential impacts relative to the Pre-Guidance Baseline.

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Table 1. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2021–FY 2031 (Relative to the No Action Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will change from $0 to $85.	**Quantitative:** Cost Savings Part of the DACA requestor population might choose only to request deferred action through Form I-821D, thus forgoing the cost of applying for an EAD through Form I-765: • Annual undiscounted cost savings for no longer filing the Form I-765 for employment authorization could range from $0 to $43.9 million, depending on how many individuals choose this option. • Total cost savings over a 11-year period could range from: o $0 to $483.6 million for undiscounted cost savings; o $0 to $422.2 million at a 3-percent discount rate; and o $0 to $359.0 million at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765: • Annual undiscounted transfer payments could range from $0 to $34.9 million. • Total transfers over a 11-year period could range from: o $0 to $384.1 million undiscounted; o $0 to $335.4 million at a 3-percent discount rate; and
Amending 8 CFR 236.21(c)(2). Applicability.	DACA recipients who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33).	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include a request for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	

		○ $0 to $285.1 million at a 7-percent discount rate. **Qualitative:** Benefits • Having the option to file Form I-765 could incentivize requests by reducing some of the financial barriers to entry for some requestors who do not need employment authorization but who will still file Form I-821D for deferred action. • The proposed rule allows the active DACA-approved population to continue enjoying the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future, including by virtue of mitigating the risk of litigation resulting in termination of the DACA program.
Source: USCIS analysis. Note: The No Action Baseline refers to a state of the world under the current DACA program in effect under the guidance of the Napolitano Memorandum.		

Table 2. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2012–FY 2031 (Relative to the Pre-Guidance Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will be $85.	**Quantitative:** Benefits Income earnings of the employed DACA-approved requestors due to obtaining an approved EAD dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy: • Annual undiscounted benefits could be $22.8 billion. • Total benefits over a 20-year period could be: o $455.5 billion for undiscounted benefits; o $424.8 billion at a 3-percent discount rate; and o $403.6 billion at a 7-percent discount rate. Costs Costs to requestors associated with a DACA request, including filing Form I-821D, Form I-765, and Form I-765WS: • Annual undiscounted costs could range from $385.6 million to $476.1 million. • Total costs over a 20-year period could range from: o $7.7 billion to $9.5 billion for undiscounted costs; o $7.3 billion to $9.1 billion at a 3-percent discount rate; and o $7.2 billion to $8.8 billion at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would
Amending 8 CFR 236.21(c). Applicability, regarding forbearance, employment authorization, and lawful presence.	DACA approved requestors receive a time-limited forbearance from removal. Those who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33) and are considered lawfully present and not unlawfully present for certain purposes.	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include an application for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	

		result in a transfer from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765: • Annual undiscounted transfer payments could range from $0 to $30.9 million. • Total transfers over a 20-year period could range from: o $0 to $619.8 million undiscounted; o $0 to $589.9 million at a 3-percent discount rate; and o $0 to $574.9 million at a 7-percent discount rate. Employment taxes from the employed DACA recipients and their employers to the Federal Government dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy: • Annual undiscounted transfers could be $3.8 billion. • Total transfers over a 20-year period could be: o $75.5 billion undiscounted; o $70.4 billion at a 3-percent discount rate; and o $66.9 billion at a 7-percent discount rate. **Qualitative:** <u>Cost Savings</u> DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients. <u>Benefits</u> • The proposed rule results in more streamlined enforcement encounters and decision making, as well as avoided

		costs associated with enforcement action against low-priority noncitizens. • The proposed rule allows the DACA-approved population to enjoy the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future.
Source: USCIS analysis. Note: The Pre-Guidance Baseline refers to a state of the world as it was before the guidance of the Napolitano Memorandum.		

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III. Background, Authority, and Purpose

Section 102 of the Homeland Security Act of 2002 [33] and section 103 of the INA [34] generally charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[35] The INA further authorizes the Secretary to ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of'' the INA.[36] In the Homeland Security Act of 2002, Congress also provided that the Secretary ''shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities.'' [37] The Homeland Security Act also provides that the Secretary, in carrying out their authorities, must ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.'' [38]

The Secretary proposes in this rule to establish specified guidelines for considering requests for deferred action submitted by certain individuals who came to the United States many years ago as children. This proposed rule would help appropriately focus the Department's limited immigration enforcement resources on threats to national security, public safety, and border security where they are most needed. In doing so, the proposed rule also would serve the significant humanitarian and economic interests animating and engendered by the DACA policy. In addition, the proposed rule would preserve not only DACA recipients' serious reliance interests, but also those of their families, schools, employers, faith groups, and communities.[39] Above all, DHS is committed to a rulemaking process and outcome that is entirely consistent with the broad authorities and enforcement discretion conferred upon the Secretary in the INA and the Homeland Security Act.

As the head of the Department, and the official responsible for ''the administration and enforcement'' of the nation's immigration laws, the Secretary is directed to set national immigration enforcement policies and priorities.[40] While other officials, such as the Directors of ICE and USCIS and the Commissioner of CBP, may set policies within their respective spheres, and individual immigration officers are able to make case-by-case enforcement discretion decisions in the course of their duties, the Secretary holds the ultimate responsibility and authority for establishing the Department's priorities and for setting the parameters for other officials' exercise of discretion. Unlike officers in the field, the Secretary is uniquely positioned to make informed judgments regarding the humanitarian, public safety, border security, and other implications of national immigration enforcement policies and priorities. The Secretary is ultimately accountable for

[33] Public Law 107–296, sec. 102(a)(3), 116 Stat. 2135, 2143 (codified at 6 U.S.C. 112(a)(3)).

[34] Public Law 82–414, 66 Stat. 163 (as amended).

[35] INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also vests certain authorities in the President, Attorney General, and Secretary of State, among others. *See id.*

[36] INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

[37] Public Law 107–296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)).

[38] 6 U.S.C. 111(b)(1)(F).

[39] *See DHS* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1914 (2020) (*Regents*) (''DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission, respondents emphasize, would 'radiate outward' to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.'' (internal citations omitted)).

[40] INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1); *see also* 6 U.S.C. 202(5).

appropriately using the resources available to the Department as a whole and for taking a comprehensive view of the enforcement landscape. A regulation codifying a national enforcement discretion policy for the DACA population would reinforce the Department's focusing its resources on those noncitizens who pose a threat to national security, public safety, and border security.

Of course, there are many tools available to the Secretary to execute such policy choices. Historically, DHS has implemented deferred action policies with respect to identified groups via general statements of policy and rules of agency organization, procedure, or practice. Such policies are not legally binding on any private parties (and do not bind the agency from making changes), do not constitute legislative rules, and are not codified in the Code of Federal Regulations. In the case of DACA, DHS proposes to promulgate regulations to reflect the Secretary's enforcement priorities and implement the deferred action policy with respect to the DACA population. DHS has decided to propose this rule in consideration of the important reliance interests of DACA beneficiaries, their employers, and their communities; in response to the President's direction to take all actions appropriate to preserve and fortify DACA; and in light of the various issues and concerns raised in ongoing litigation challenging DACA.

DHS's decision to proceed by rulemaking, rather than the less formal procedures typically associated with the creation of policy guidance, represents a departure from previous practice in light of current circumstances. DHS emphasizes that its approach here has important benefits, such as providing a more formal opportunity for public participation. DHS also recognizes that the use of less formal procedures, and the absence of notice-and-comment rulemaking, has been challenged in court, in some cases successfully. But the approach here should not be interpreted as suggesting that DHS itself doubts the legality of the 2012 DACA policy or any other past, present, or future deferred action policy. It is consistent with section 553 of the APA, and a longstanding principle, that an agency may use non-binding, non-legislative guidance, lacking the force of law, ''to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'' [41] DHS has consistently maintained, and continues to maintain here, that it has such discretionary power with respect to deferred action.[42]

The proposed rule also would aid DHS's enforcement branches in identifying classes of noncitizens whose removal Congress has signaled should be prioritized [43] and focus a greater portion of their limited time, space, and funds on these higher risk situations that pose a threat to public safety or national security. While a grant of deferred action may have additional consequences under other provisions of law and regulation, including State law, at its core it reflects a decision made by the Executive to forgo removal against an individual for a limited period while the individual remains a low priority. It reflects a policy of forbearance. It is well within the Department's authority, and consistent with historical practice, for DHS to create a nationwide policy for efficiently allocating limited enforcement resources.[44]

A. History of Discretionary Reprieves From Removal

Since at least 1956, DHS and the former INS have issued policies under which groups of individuals without lawful status may receive a discretionary, temporary, and nonguaranteed reprieve from removal, even outside the context of immigration proceedings.[45] These policies have been implemented through a range of measures, including, but not limited to, extended voluntary departure (EVD) and deferred enforced departure (DED), indefinite voluntary departure, parole, and deferred action.[46] From at least the early 1980s, each such measure resulted in not only the termination of immigration proceedings, but also the availability of collateral ''benefits'' such as work authorization. A brief history of some such policies follows.

1. Extended Voluntary Departure and Deferred Enforced Departure

Beginning in the Eisenhower administration, a string of executive actions authorized various classes of noncitizens to stay in the United States and work under the rubric of EVD. From 1956 to 1972, the INS offered EVD to certain noncitizen professionals and those with exceptional ability in the sciences or arts who were otherwise subject to deportation due to visa quotas applicable to natives of the Eastern Hemisphere.[47] Through this policy, although a noncitizen's lawful status might have lapsed, ''[d]eportation, or even departure from the United States, was . . . entirely avoided.'' [48] And beginning in 1978, the INS offered EVD to certain former H–1 nurses whose ''lack of lawful immigration status [was] due only to the nurse's having changed employer without authority, or to his/her having failed the licensure examination.'' [49] From at least 1960

[41] *See Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302 n.31 (1979) (quoting *Attorney General's Manual on the Administrative Procedure Act* (1947)).

[42] That DHS has determined voluntarily to use notice-and-comment procedures does not reflect any legal determination by the executive branch that it must do so or that it will be required to do so in the future. *See, e.g., Hoctor* v. *U.S. Dep't of Agric.,* 82 F.3d 165, 171–72 (7th Cir. 1996) (observing that courts should ''attach no weight to [an agency]'s inconsistency'' in deciding whether to use notice-and-comment procedures for similar rules and that ''there is nothing in the [APA] to forbid an agency to use the notice and comment procedure in cases in which it is not required to do so''); *Indep. Living Res.* v. *Oregon Arena Corp.,* 982 F. Supp. 698, 744 n.62 (D. Or. 1997) (''There are many reasons why an agency may voluntarily elect to utilize notice and comment rulemaking: The proposed rule may constitute a material amendment to the old rule, the agency may wish to avoid potential litigation over whether the new rule is legislative or interpretive, or the agency may simply wish to solicit public comment.''); *cf. Perez* v. *Mort. Bankers Ass'n,* 575 U.S. 92, 101 (2015) (''Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.'').

[43] *See, e.g.,* INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1) (establishing ''expedited removal'' for certain noncitizens arriving in the United States); INA sec. 236(c), 8 U.S.C. 1226(c) (providing mandatory detention for certain criminal noncitizens); INA sec. 236A, 8 U.S.C. 1226a (providing mandatory detention of suspected terrorists); *see also, e.g.,* Public Law 114–113, 129 Stat. 2241, 2497 (providing that ''the Secretary . . . shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime''); Public Law 113–76, 128 Stat. 5, 251 (same); Public Law 113–6, 127 Stat. 198, 347 (same).

[44] *See Regents of the Univ. of Cal.* v. *DHS,* 908 F.3d 476, 487 (9th Cir. 2018) (deferred action ''arises . . . from the Executive's inherent authority to allocate resources and prioritize cases''), *aff'd,* 140 S. Ct. 1891 (2020).

[45] *See generally* Ben Harrington, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others,* Congressional Research Service, No. R45158 (Apr. 10, 2018) (hereinafter CRS Report on Discretionary Reprieves from Removal). *See also* American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956–Present* (Oct. 2, 2014), *https://www.americanimmigrationcouncil.org/research/executive-grants-temporary-immigration-relief-1956-present* (identifying 39 examples of temporary immigration relief); Sharon Stephan, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation,* Congressional Research Service, No. 85–599 EPW (Feb. 23, 1985) (hereinafter CRS Report on EVD).

[46] *See* CRS Report on Discretionary Reprieves from Removal (cataloguing types of discretionary reprieves from removal, including reprieves that are generally only available in conjunction with the removal process, such as voluntary departure, stays of removal, orders of supervision, and administrative closure). *See also generally* Geoffrey Heeren, *The Status of Nonstatus,* 64 Am. U. L. Rev. 1115 (2015).

[47] *See United States ex rel. Parco* v. *Morris,* 426 F. Supp. 976, 979–80 (E.D. Pa. 1977).

[48] *Id.* at 980.

[49] *See, e.g.,* 43 FR 2776 (Jan. 19, 1978) (announcing a period of discretionary ''extended voluntary departure'' or ''deferred departure'' for

until 1990, executive agencies granted EVD to nationals of at least 14 countries.[50] EVD was invoked repeatedly to allow discretionary reprieves from removal for groups of individuals without lawful status.

The use of EVD abated following the passage of the Immigration Act of 1990 (IMMACT 90), which expressly authorized the Attorney General (whose authorities in this respect are now assigned to the Secretary), following consultation with the Secretary of State, to designate a foreign country for Temporary Protected Status (TPS) in certain circumstances.[51] But even after 1990, Presidents of both parties have extended similar treatment to nationals of certain countries under the rubric of DED.[52]

2. Indefinite ''Voluntary Departure'' Under the ''Family Fairness'' Policies

In 1987, the INS announced a policy known as ''family fairness'' to allow for indefinite residence in the United States and work authorization [53] for spouses and children of certain noncitizens who had been made eligible for legal immigration in the Immigration Reform and Control Act of 1986 (IRCA).[54] In IRCA, Congress made millions of noncitizens eligible for temporary residency, lawful permanent residency, and eventually naturalization,[55] but it did not similarly provide for such noncitizens' spouses and children who had arrived too recently or were otherwise ineligible.[56] Notwithstanding the apparently intentional gap in eligibility,[57] the INS provided for a discretionary reprieve from removal for many such spouses and children.[58] Under the policy, the INS announced that it would ''indefinitely defer deportation'' for (1) ineligible spouses and children who could show compelling or humanitarian factors; and (2) ineligible unmarried minor children who could show that both parents (or their only parent) had achieved lawful temporary resident status.[59] Those individuals also could obtain work authorization.[60] Ultimately such spouses and children might be able to benefit from an immediate relative petition filed on their behalf.

The INS expanded the family fairness policy in 1990, ''to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens,'' and ''to respond to the needs'' of legalized noncitizens and their family members ''in a consistent and humanitarian manner.'' [61] As expanded, the policy provided indefinite voluntary departure for any ineligible spouse or minor child of a legalizing noncitizen who showed that they (1) had been residing in the country by the date of IRCA's 1986 enactment; (2) were otherwise inadmissible; (3) had not been convicted of a felony or three misdemeanors; and (4) had not assisted in persecution.

Estimates of the potentially eligible population varied, but many were very large.[62] The INS Commissioner testified that 1.5 million people were estimated to be eligible.[63] Congress ultimately responded by ratifying the family fairness program and by authorizing an even broader group to obtain lawful status beginning 1 year thereafter.[64] Congress stated that this 1-year delay ''shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.'' [65]

3. Deferred Action

Beginning as early as 1959, INS Operations Instructions (OI) referred to ''nonpriority'' cases—a category that later became known as ''deferred action.'' [66] In 1959, such instructions identified top priorities for investigative case assignments and provided that, ''[i]n every case involving appealing humanitarian factors, appropriate measures must be taken to insure that action taken by [INS] will not subject the law, its administration, or the Government of the United States to public ridicule. Form G–312 shall be used to report each such nonpriority

certain H–1 nurses who no longer had lawful immigration status); 44 FR 53582 (Sept. 14, 1979) (extension of same).

[50] *See* Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law Redux,* 125 Yale L.J. 104, 122–24 (2015) (discussing the origins and various applications of EVD); *see also* CRS Report on EVD; Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters,* 85 Mich. L. Rev. 152, 152 n.1 (1986) (cataloguing grants of EVD based on nationality).

[51] *See* Public Law 101–649, sec. 302, 104 Stat. 4978, 5030–36 (codified as amended at 8 U.S.C. 1254a). In fact, in establishing TPS in IMMACT 90, Congress understood that the Attorney General (now Secretary) had continuing authority to establish such policies on grounds other than the individuals' nationality, providing that TPS would be the exclusive authority for the Attorney General to permit otherwise removable aliens to remain temporarily in the United States ''because of their particular nationality.'' INA sec. 244(g), 8 U.S.C. 1254a(g); *see* Statement by President George H.W. Bush upon Signing S. 358, 26 Weekly Comp. Pres. Doc. 1946 (Dec. 3, 1990), 1990 U.S.C.C.A.N. 6801 (Nov. 29, 1990) (expressing concern with INA sec. 244(g) because it would impinge on the Executive's prosecutorial discretion).

[52] *See, e.g.,* 57 FR 28700 (June 26, 1992) (President George H.W. Bush directing DED for certain Salvadorans); 86 FR 6845 (Jan. 25, 2021) (President Trump directing DED for certain Venezuelans); 86 FR 43587 (Aug. 10, 2021) (President Biden directing DED for certain Hong Kong residents).

[53] The family fairness policies referred to this reprieve as indefinite voluntary departure or voluntary departure.

[54] *See* Alan C. Nelson, Commissioner, INS, *Legalization and Family Fairness—An Analysis* (Oct. 21, 1987) (hereinafter 1987 Family Fairness Memorandum), *reprinted in* 64 No. 41 Interpreter Releases 1191, App. I (Oct. 26, 1987); *see also* Memorandum to INS Regional Commissioners from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) (hereinafter 1990 Family Fairness Memorandum).

[55] *See* 1987 Family Fairness Memorandum.

[56] *See* S. Rep. No. 132, 99th Cong., 1st Sess., at 16 (1985) (''It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning rights by virtue of the legalization.'').

[57] *See* Paul W. Schmidt, Acting General Counsel, INS, *Legal Considerations On The Treatment Of Family Members Who Are Not Eligible For Legalization* (May 29, 1987) (''[IRCA] does not cover spouses and children of legalized aliens. . . . The legislative history on this issue is crystal clear.''). Two weeks prior to the announcement of the family fairness policy, Senator John Chafee proposed a legislative path to legalization for the spouses and children excluded from IRCA; however, the proposal was rejected. *See* Record Vote No. 311, S. Amend. 894 to S. 1394, 100th Cong. (1987), *https://www.congress.gov/amendment/100th-congress/senate-amendment/894/actions.* A narrower effort to block funding for deportations of such individuals was introduced soon after the 1987 Family Fairness Memorandum but also did not become law. *See* H.J. Res. 395, 100th Cong. § 110 (as introduced Oct. 29, 1987); Act of Dec. 22, 1987, Public Law 100–202, 101 Stat. 1329; *see also* 133 Cong. Rec. 12,038–43 (1987) (statement of Rep. Roybal).

[58] *See* 1987 Family Fairness Memorandum.

[59] *See id.*

[60] *See* Recent Developments, 64 No. 41 Interpreter Releases 1191, App. II, at 1206 (Oct. 26, 1987).

[61] *See* 1990 Family Fairness Memorandum. *See also* Record Vote No. 107, S. Amend. 244 to S. 358, 101st Cong. (1989), *https://www.congress.gov/amendment/101st-congress/senate-amendment/244/actions;* IRCA Amendments of 1989, H.R. 3374, 101st Cong. (1989), *https://www.congress.gov/bill/101st-congress/house-bill/3374/all-actions* (reflecting subcommittee hearings held as last action on the bill).

[62] *See, e.g.,* Recent Developments, 67 No. 8 Interpreter Releases 201, 206 (Feb. 26, 1990); *see also, e.g.,* 55 FR 6058 (Feb. 21, 1990) (anticipating requests from ''approximately one million'' people); J.A. 646 (internal INS memorandum estimating ''greater than one million'' people ''will file''); J.A. 642 (''potentially millions''); 67 No. 8 Interpreter Releases 206 (''no more than 250,000''); Tim Schreiner, ''INS Reverses Policy That Split Alien Families,'' S.F. Chron., Feb. 3, 1990, at A15 (''more than 100,000 people'' estimated to file); Paul Anderson, ''New Policy on Illegal Immigrants,'' Phila. Inquirer, Feb. 3, 1990, at A10 (it ''may run to a million'').

[63] *Immigration Act of 1989: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary,* 101st Cong., 2d Sess. Pt. 2, at 49, 56 (1990).

[64] *See* IMMACT 90, Public Law 101–649, sec. 301(g), 104 Stat. 4978, 5030 (1990).

[65] *Id.*

[66] *See AADC,* 525 U.S. at 484.

case.'' [67] In 1972, the INS OI provided that

> [i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority. . . . If the recommendation is approved the alien shall be notified that no action will be taken by [INS] to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.[68]

A 1975 version of the same policy called for interim or biennial reviews of each case in deferred action status, and further provided, inter alia, that

> [w]hen determining whether a case should be recommended for deferred action category, consideration should include the following: (1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations—recent conduct.[69]

In short, from at least 1959 until the late 1990s,

> deferred-action decisions were governed by internal INS guidelines which considered, *inter alia,* such factors as the likelihood of ultimately removing the alien, the presence of sympathetic factors that could adversely affect future cases or generate bad publicity for the INS, and whether the alien had violated a provision that had been given high enforcement priority.[70]

Although such internal guidelines were moved to the INS's Interim Enforcement Procedures in June 1997, the following year the Supreme Court noted that ''there is no indication that the INS has ceased making this sort of determination on a case-by-case basis.'' [71] On the contrary, by the time of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[72] ''the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising [enforcement] discretion for humanitarian reasons or simply for its own convenience.'' [73]

4. More Recent Deferred Action Policies

In recent years, the INS and DHS have established a number of specific policies for consideration of deferred action requests by members of certain groups. For instance, in 1997, the INS established a deferred action policy for self-petitioners under the Violence Against Women Act of 1994 (VAWA).[74] The INS policy required immigration officers who approved a VAWA self-petition to assess, ''on a case-by-case basis, whether to place the alien in deferred action'' while the noncitizen waited for a visa to become available.[75] The INS noted that, ''[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action.'' [76] Under this policy, from 1997 to 2000, no approved VAWA self-petitioner was removed from the country.[77] In the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Congress expanded the availability of this type of deferred action, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be ''eligible for deferred action and work authorization.'' [78]

In 2001, the INS instituted a similar deferred action policy for applicants for nonimmigrant status made available under the VTVPA's new nonimmigrant classifications for certain victims of human trafficking and their family members (T visas) and certain victims of other crimes and their family members (U visas).[79] The INS issued a memorandum directing immigration officers to locate ''possible victims in the above categories,'' and to use ''[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal'' to prevent those victims' removal ''until they have had the opportunity to avail themselves of the provisions of the VTVPA.'' [80] The INS later instructed officers to consider deferred action for ''all [T visa] applicants whose applications have been determined to be bona fide,'' [81] as well as for all U visa applicants ''determined to have submitted *prima facie* evidence of [their] eligibility.'' [82] In 2002 and 2007, INS and DHS promulgated regulations implementing similar policies.[83]

These policies, as well, were later ratified by Congress. In 2008, when Congress authorized DHS to grant an administrative stay of removal to a T or U visa applicant whose application sets forth a prima facie case for approval, Congress ratified the existing deferred action policies by clarifying that the denial of a request for an administrative stay of removal under this new authority would ''not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.'' [84] And Congress also required DHS to submit a report to Congress covering, inter alia, ''[i]nformation on the time in which it takes to adjudicate victim-based immigration applications, including the issuance of visas, work authorization and deferred action in a timely manner consistent with the safe and competent processing of such applications, and steps taken to improve in this area.'' [85]

In 2005, following Hurricane Katrina, DHS issued another deferred action policy applicable to foreign students who lost their lawful status as F–1 nonimmigrant students by virtue of failing to pursue a ''full course of study'' following the disaster.[86] Eligible F–1

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[67] INS OI 103.1(a)(1) (Jan. 15, 1959).

[68] INS OI 103.1(a)(1)(ii) (Apr. 5, 1972).

[69] INS OI 103.1(a)(1)(ii) (Dec. 31, 1975).

[70] *See AADC,* 525 U.S. at 484 n.8 (citing 16 C. Gordon, S. Mailman, and S. Yale-Loehr, *Immigration Law and Procedure* § 242.1 (1998)).

[71] *Id.* The INS began rescinding OI on an ongoing basis as it moved to a Field Manual model for policies and procedures for officers. *See INS Field Manual Project to Eventually Replace Operations Instructions;* 77 No. 3 Interpreter Releases 93 (Jan. 14, 2000). The OI on deferred action were rescinded when the procedures were moved to the Interim Enforcement Procedures in June 1997, though the procedures remained substantively the same. *See Interim Enforcement Procedures: Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal* (June 5, 1997) (accessed via USCIS historical archive).

[72] Public Law 104–208, 110 Stat. 3009.

[73] *See AADC,* 525 U.S. at 483–84.

[74] Public Law 103–322, tit. IV, 108 Stat. 1796.

[75] *See* Memorandum to INS Regional Directors, et al., from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997).

[76] *Id.*

[77] *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary,* 106th Cong., at 43 (July 20, 2000).

[78] *See* Public Law 106–386, sec. 1503(d), 114 Stat. 1464, 1521–22.

[79] *See* 8 U.S.C. 1101(a)(15)(T)(i) and (U)(i).

[80] *See* Memorandum for Michael A. Pearson, INS Executive Associate Commissioner, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—''T'' and ''U'' Nonimmigrant Visas* at 2 (Aug. 30, 2001).

[81] Memorandum for Johnny N. Williams, INS Executive Associate Commissioner, from Stuart Anderson, INS Executive Associate Commissioner, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002) (hereinafter Williams Memorandum).

[82] *See* Memorandum for the Director, Vermont Service Center, INS, from USCIS Associate Director of Operations William R. Yates, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* (Oct. 8, 2003).

[83] *See* 67 FR 4784 (Jan. 31, 2002) (providing for deferred action for certain T visa applicants) (codified as amended at 8 CFR 214.11(j)); 72 FR 53014 (Sept. 17, 2007) (same for certain U visa applicants) (codified as amended at 8 CFR 214.14(d)).

[84] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457, sec. 204, 122 Stat. 5044, 5060 (codified as amended at 8 U.S.C. 1227(d)).

[85] *See id.* at sec. 238(b)(7), 122 Stat. at 5085.

[86] USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions*

students were allowed to request deferred action individually by letter, which was required to include a written affidavit or unsworn declaration confirming that the applicant met eligibility requirements.

In 2009, DHS implemented a deferred action policy for (1) surviving spouses of U.S. citizens whose U.S. citizen spouse died before the second anniversary of the marriage and who are unmarried and residing in the United States; and (2) their qualifying children who are residing in the United States.[87] USCIS explained that ''no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death'' and USCIS had not yet adjudicated an immigrant petition on the spouse's behalf.[88] Congress subsequently eliminated the requirement that a noncitizen be married to a U.S. citizen ''for at least 2 years at the time of the citizen's death'' to retain their eligibility for lawful immigration status.[89] USCIS later withdrew its guidance and treated all pending applications for deferred action under this policy as widow(er)s' petitions.[90]

In sum, for more than 60 years, executive agencies have issued policies under which deserving groups of individuals without lawful status may receive a discretionary, temporary, and nonguaranteed reprieve from removal. Many of these policies, including all the deferred action policies, resulted in collateral ''benefits,'' such as eligibility to apply for work authorization. Many of these policies, including those involving the use of deferred action, also were subsequently ratified by Congress. The policy in this proposed rule is another such act of enforcement discretion and is similarly within the Executive's authority to implement.[91]

B. Litigation History

When DACA was first implemented in 2012, 10 ICE officers and the State of Mississippi challenged both the Napolitano Memorandum and then-ICE Director John Morton's previously issued memorandum on prosecutorial discretion, ''Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens'' (Morton Memorandum).[92] The plaintiffs in those cases were found to lack standing.[93]

In 2014, DHS sought to implement the policy Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and to expand DACA to a larger population by removing the age cap for filing, providing grants of deferred action for a longer period of time, and making certain other adjustments (Expanded DACA).[94] The State of Texas and 25 other States brought an action for injunctive relief to prevent implementation of DAPA and Expanded DACA, alleging that they violated the APA, the Take Care Clause of the Constitution, and the INA.[95] On February 16, 2015, the U.S. District Court for the Southern District of Texas entered a nationwide preliminary injunction barring implementation of the policies in the 2014 DAPA Memorandum, which included both DAPA and Expanded DACA. On November 9, 2015, the Fifth Circuit affirmed the preliminary injunction, finding that the plaintiff States were substantially likely to establish that (1) DAPA and Expanded DACA required notice-and-comment rulemaking; and (2) DAPA and Expanded DACA violated the INA.[96] On June 23, 2016, an equally divided Supreme Court affirmed, leaving the nationwide injunction in place.[97] In the summer of 2017, Texas and the other plaintiff States voluntarily dismissed *Texas I*.

On September 5, 2017, then-Acting Secretary Elaine Duke issued a memorandum rescinding and beginning a wind-down of the 2012 DACA policy, citing the Supreme Court and Fifth Circuit decisions in *Texas I* and a letter from then-Attorney General Jefferson Sessions recommending rescission and an orderly wind-down of the 2012 DACA policy as it was likely to receive a similar decision in ''imminent litigation.'' [98] In response to the Duke Memorandum, the Regents of the University of California, several States, a county, city, union, and individual DACA recipients brought suit in the U.S. District Court for the Northern District of California challenging the rescission as arbitrary and capricious under the APA, claiming that the rescission of DACA required notice and comment, violated the Regulatory Flexibility Act, and denied plaintiffs equal protection and due process.[99] Other groups of plaintiffs filed similar challenges, or amended existing lawsuits, in the U.S. District Courts for the Eastern District of New York,[100] the District of Columbia,[101] the Southern District of Florida,[102] and the District of Maryland.[103]

In two separate orders in January 2018, in *Regents* v. *DHS,* the U.S. District Court for the Northern District of California denied the Government's motion to dismiss, and, finding plaintiffs had a likelihood of success in proving the rescission was arbitrary and capricious, entered a preliminary nationwide injunction requiring DHS to maintain the DACA policy largely as it

(FAQ) at 1 (Nov. 25, 2005) (quoting 8 CFR 214.2(f)(6)).

[87] Memorandum to USCIS Field Leadership from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 4 (June 15, 2009).

[88] *Id.* at 1.

[89] *See* Department of Homeland Security Appropriations Act, 2010, Public Law 111–83, sec. 568(c), 123 Stat. 2142, 2186–87.

[90] *See* Memorandum to USCIS Executive Leadership from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

[91] *See* Section II.A above for a description of DACA's creation.

[92] *See Crane* v. *Napolitano,* 920 F. Supp. 2d 724, (N.D. Tex. 2013).

[93] *See Crane* v. *Johnson,* 783 F.3d 244, 255 (5th Cir. 2015).

[94] Memorandum from Jeh Johnson, Secretary, DHS, to León Rodriguez, Director, USCIS, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014) (hereinafter 2014 DAPA Memorandum). The policy memorandum was rescinded on June 15, 2017. Memorandum from John Kelly, Secretary, DHS, to Kevin McAleenan, Acting Commissioner, CBP, et. al., *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)* (June 15, 2017).

[95] *See Texas* v. *United States,* 86 F. Supp. 3d 591 (S.D. Tex. 2015) (*Texas I*).

[96] *Texas* v. *United States,* 809 F.3d 134 (5th Cir. 2015) (*Texas I*). The Fifth Circuit included the directives of Expanded DACA as part of DAPA for purposes of its decision. *See id.* at 147 n.11.

[97] *United States* v. *Texas,* 136 S. Ct. 2271 (2016) (per curiam).

[98] *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* from Elaine Duke, Acting Secretary, DHS (Sept. 5, 2017), *https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca* (hereinafter Duke Memorandum); *see also Letter from Attorney General Sessions to Acting Secretary Duke on the Rescission of DACA* (Sept. 4, 2017), *https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.*

[99] *Regents of the Univ. of Cal.* v. *DHS,* No. 17–cv–5211 (N.D. Cal. 2017) (*Regents* v. *DHS*).

[100] *See Batalla Vidal* v. *Nielsen,* No. 16–cv–4756 (E.D.N.Y.). Mr. Batalla Vidal's original complaint challenged DHS's revocation of the 3-year EAD issued under Expanded DACA and the Government's application of the *Texas I* preliminary injunction to New York residents such as himself. Compl., *Vidal* v. *Baran,* No. 16–cv–4756 (E.D.N.Y.) (Aug. 25, 2016).

[101] *See NAACP* v. *Trump,* No. 17–cv–1907 (D.D.C.).

[102] *See Diaz* v. *DHS,* No. 17–cv–24555 (S.D. Fla.).

[103] *See Casa de Maryland* v. *DHS,* No. 17–cv–2942 (D. Md.).

was in effect prior to rescission.[104] The injunction did not require the Government to accept requests from individuals who had never received DACA before, nor to provide advance parole to DACA recipients. In February 2018, in *Batalla Vidal* v. *Nielsen,* the U.S. District Court for the Eastern District of New York also entered a nationwide preliminary injunction on the basis that DHS's rescission of the DACA policy was likely arbitrary and capricious.[105]

In April 2018, in *NAACP* v. *Trump,* the U.S. District Court for the District of Columbia granted plaintiffs partial summary judgment on one of their APA claims, finding the Government failed to explain the rescission adequately. The court vacated the Duke Memorandum, but it stayed its order for 90 days so that DHS could provide additional explanation of its action.[106] Then-Secretary Kirstjen Nielsen issued a second memorandum (Nielsen Memorandum) further explaining DHS's decision to rescind DACA.[107] Upon consideration of the Nielsen Memorandum, the *NAACP* v. *Trump* court declined to reconsider its order vacating the Duke Memorandum, again finding the rescission arbitrary and capricious under the APA.[108]

The Government appealed the orders to the U.S. Courts of Appeals for the Ninth, Second, and D.C. Circuits. While awaiting those courts' decisions, the Government petitioned the Supreme Court for a writ of certiorari before judgment in each case,[109] asking the Court to grant similar petitions and consolidate the rescission cases.[110] Before the Supreme Court acted on the Government's petitions, the Ninth Circuit affirmed the preliminary injunction in *Regents,* and the Supreme Court granted certiorari in that case and certiorari before judgment in the Second Circuit and D.C. Circuit cases. Over the course of the litigation, DHS continued to adjudicate DACA requests from previous DACA holders as required by the nationwide injunctions.

The Supreme Court heard the consolidated rescission cases to determine the issues of (1) whether the rescission was reviewable; (2) whether it was arbitrary and capricious under the APA; and (3) whether it violated the equal protection principles of the Fifth Amendment's Due Process Clause.[111] On June 18, 2020, the Court issued its decision and found the policy's rescission reviewable under the APA.[112] The Court found that the decision to rescind DACA was arbitrary and capricious under the APA because then-Acting Secretary Duke had not adequately considered alternatives to rescission, nor had she considered the reliance interests of DACA recipients. The Court held that plaintiffs failed to state a cognizable equal protection claim. And the Court declined to consider the Nielsen Memorandum. Ultimately, the Court remanded the matter to DHS ''to consider the problem anew.'' [113] In a letter to then-Acting Secretary Chad Wolf, then-Attorney General William Barr withdrew the September 4, 2017 Sessions letter, in order to ''facilitate that consideration.'' [114]

Subsequently, then-Acting Secretary Chad Wolf issued a memorandum limiting grants of DACA to those individuals who had previously held DACA and reducing the grant from 2- to 1-year increments, while DHS considered the future of the policy.[115] The Wolf Memorandum also required rejection of all pending and future advance parole applications from DACA recipients and a refund of the associated fees, absent ''exceptional circumstances.'' [116] The plaintiffs in *Batalla Vidal* v. *Nielsen* and *New York* v. *Trump* amended their complaints to challenge the Wolf Memorandum.[117] The U.S. District Court for the Eastern District of New York vacated the Wolf Memorandum after finding that Mr. Wolf had not been lawfully serving as the Acting Secretary under the Homeland Security Act at the time of the memorandum's issuance.[118] The court ordered DHS to post public notice on DHS and USCIS websites that it was accepting initial DACA requests and applications for advance parole documents under the terms in place prior to the September 5, 2017 rescission, as well as to notify and provide a remedy to those applicants affected by processing under the now-vacated Wolf Memorandum.[119] USCIS then returned to operating DACA in accordance with the Napolitano Memorandum, as a result of the *Batalla Vidal* court's order.[120]

Meanwhile, in May 2018 and prior to the Supreme Court's decision in *Regents,* Texas and nine other States filed suit in the U.S. District Court for

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[104] The Northern District of California previously consolidated the following cases: *California* v. *DHS,* No. 17–cv–5235 (N.D. Cal.); *Garcia* v. *United States,* No. 17–cv–5380 (N.D. Cal.); *City of San Jose* v. *Trump,* No. 17–cv–5329 (N.D. Cal.); *Regents* v. *DHS;* and *County of Santa Clara* v. *Trump,* No. 17–cv–5813 (N.D. Cal.).

[105] *See Batalla Vidal* v. *Nielsen,* 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *see also Batalla Vidal* v. *Trump,* No. 18–485 (2d Cir.) (consolidating appeals from *New York* v. *Trump,* No. 17–cv–5228 (E.D.N.Y.) and *Batalla Vidal* v. *Baran,* No. 16–4756 (E.D.N.Y.)).

[106] *NAACP* v. *Trump,* 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

[107] Memorandum from Kirstjen M. Nielsen, Secretary, DHS (June 22, 2018).

[108] *NAACP* v. *Trump,* 315 F. Supp. 3d 457, 474 (D.D.C. 2018).

[109] The Ninth Circuit later affirmed the district court's preliminary injunction, 908 F.3d 476 (9th Cir. 2018), and the Government converted its petition to a petition for a writ of certiorari. *DHS* v. *Regents of the Univ. of Cal.,* No. 18–587 (Supreme Court) (petition for writ of certiorari before judgment filed Nov. 5, 2018; request to convert to petition for writ of certiorari filed Nov. 19, 2018).

[110] *McAleenan* v. *Vidal,* No. 18–589 (Supreme Court) (petition for writ of certiorari before judgment filed Nov. 5, 2018); *Batalla Vidal* v. *Trump,* No. 18–485 (2d Cir.) (consolidating appeals from *New York* v. *Trump,* 17–cv–5228 (E.D.N.Y.) and *Batalla Vidal* v. *Baran,* No. 16–04756 (E.D.N.Y.)) (appeal filed Feb. 20, 2018); *Trump* v. *NAACP,* No. 18–588 (Supreme Court) (petition for writ of certiorari before judgment filed Nov. 5, 2018); *Trustees of Princeton Univ.* v. *United States,* No. 18–5245 (D.C. Cir.) (appeal filed Aug. 13, 2018) (*Trustees of Princeton Univ.* v. *United States,* No. 17–cv–2325 (D.D.C.) consolidated with *NAACP* v. *Trump,* No. 17–cv–1907 (D.D.C.)). Although the district court granted the Government's motion for summary judgment in part in *Casa de Maryland,* the Fourth Circuit reversed, vacating the Duke Memorandum, though it stayed its order, and the Supreme Court denied cert. *DHS* v. *Casa De Maryland,* 18–1469 (petition for writ of certiorari); *Casa de Maryland* v. *DHS,* 18–1521 (4th Cir. May 17, 2019) (appeal and cross-appeal filed May 8, 2018) *(Casa de Maryland* v. *DHS,* No. 17–cv–2942 (D. Md.)).

[111] *Regents,* 140 S. Ct. 1891 (2020).

[112] *Id.* at 1907, 1910.

[113] *Id.* at 1916.

[114] *Attorney General William P. Barr's letter to Acting Secretary Chad F. Wolf on DACA* (June 30, 2020), *https://www.dhs.gov/sites/default/files/publications/20_0630_doj_aj-barr-letter-as-wolf-daca.pdf.*

[115] *See Reconsideration of the June 15, 2012 Memorandum Entitled ''Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,''* Memorandum from Chad F. Wolf, Acting Secretary, to heads of immigration components of DHS, dated July 28, 2020, at p. 7 (hereinafter Wolf Memorandum).

[116] *Id.* at p. 8.

[117] Plaintiffs in the previously consolidated cases in *Regents* v. *DHS* likewise filed amended complaints in the Northern District of California, challenging the Wolf Memorandum and the subsequent implementing guidance (Joseph Edlow, Deputy Director of Policy, USCIS, to Associate Directors and Program Office Chiefs, *Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum, ''Reconsideration of the June 15, 2012 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'''* (Aug. 21, 2020)) on the basis that the memoranda were ultra vires and violated the APA, and also challenging then-Acting Secretary Wolf's appointment. *See, e.g.,* Pls.' First Am. Compl. For Declaratory and Injunctive Relief, *Regents* v. *DHS,* No. 17–cv–5211, 2020 WL 8270391 (N.D. Cal. Nov. 2, 2020). The parties stipulated to stay proceedings pending DHS's actions pursuant to the Biden Memorandum.

[118] *Batalla Vidal* v. *Wolf,* 501 F. Supp. 3d 117, 129–33 (E.D.N.Y. 2020).

[119] *See Batalla Vidal* v. *Wolf,* No. 16–cv–4756, 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020).

[120] DHS expects that the proposed rule would supersede both the Napolitano Memorandum and, to the extent necessary, the vacated Wolf Memorandum.

the Southern District of Texas, challenging the legality of the Napolitano Memorandum [121] (which, despite the rescission, remained in place due to numerous court orders [122]). As the States had waited 6 years to file suit, the court declined to enter a preliminary injunction against DACA ''due to their delay.'' [123] The court explained that the plaintiff States could not show irreparable harm from continuation of the policy during the litigation.[124] But the court found that the States had a likelihood of success on the merits on their substantive and procedural APA claims.[125] After discovery, the court stayed the case awaiting the then-forthcoming decision in *DHS* v. *Regents.*

Following the Supreme Court's decision in *Regents,* and after additional discovery, the parties in *Texas II* filed cross-motions for summary judgment. On July 16, 2021, the court in *Texas II* issued its memorandum and order on the motions for summary judgment, holding that the Napolitano Memorandum is contrary to the APA's rulemaking requirements and the INA, and vacating the Napolitano Memorandum.[126] The court remanded the Napolitano Memorandum to DHS for further consideration. The court further issued a permanent injunction prohibiting DHS's continued administration and reimplementation of DACA without compliance with the APA, but temporarily stayed the vacatur and permanent injunction as to most individuals granted DACA on or before July 16, 2021, including with respect to renewal requests. The *Texas II* court also held that while DHS may continue to accept both DACA initial and renewal filings, DHS is prohibited from granting initial DACA requests and accompanying requests for employment authorization.

Currently, termination of an individual's grant of deferred action under DACA must adhere to the requirements of the nationwide preliminary injunction issued by the U.S. District Court for the Central District of California in *Inland Empire-Immigrant Youth Collective* v. *Nielsen.*[127] The *Inland Empire* court certified a limited class of DACA recipients whose DACA grants had been or would be terminated without notice under particular circumstances, and it required USCIS to reinstate their deferred action under DACA and provide advance notice and an opportunity to respond prior to terminating a class member's grant of DACA. In accordance with the preliminary injunction and modified class definition and implementation procedures, USCIS is required to issue a notice of intent to terminate (NOIT) if it decides to terminate an individual's DACA grant, unless the individual (1) has a criminal conviction that is disqualifying for DACA; (2) has a charge for a crime that falls within the egregious public safety (EPS) grounds referenced in the USCIS 2011 NTA policy memorandum; [128] (3) has a pending charge for certain terrorism and security crimes described in 8 U.S.C. 1182(a)(3)(B)(iii) and (iv) or 8 U.S.C. 1227(a)(4)(A)(i); (4) departed the United States without advance parole; (5) was physically removed from the United States pursuant to an order of removal, voluntary departure order, or voluntary return agreement; or (6) maintains a nonimmigrant or immigrant status. As the *Inland Empire* class does not include these categories of DACA recipients, a NOIT is not required to terminate DACA. DHS is preliminarily enjoined from terminating a grant of DACA based solely on the issuance of an NTA that charges the individual as overstaying an authorized period of admission or being present without inspection and admission. DHS appealed the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit, which heard oral arguments on the appeal on June 13, 2019. The Ninth Circuit placed the case in abeyance on April 7, 2021, pending the present rulemaking.[129]

C. Forbearance From Enforcement Action

In every area of law enforcement—both civil and criminal—executive agencies exercise enforcement discretion.[130] When, as is the norm, legislatures provide law enforcement agencies with only enough resources to arrest, detain, or prosecute a fraction of those who are suspected of violating the law, these agencies must establish priorities. DHS and its predecessor agencies have long exercised enforcement discretion, prioritizing national security, border security, and public safety mandates over civil infractions that do not represent a similar threat to the United States and its citizens.[131] Given DHS's limited resources to pursue immigration enforcement and the approximately 11 million noncitizens estimated to reside in the United States without legal status,[132] the use of discretion and prioritization is a necessary element of fulfilling the DHS mission.

In Fiscal Year (FY) 2016–FY 2020, DHS resources appropriated by Congress allowed ICE to conduct an

[121] *Texas* v. *United States,* 328 F. Supp. 3d 662 (S.D. Tex. 2018) (*Texas II* denial of motion for preliminary injunction).

[122] *See, e.g., NAACP* v. *Trump,* 315 F. Supp. 3d 457, 474 (D.D.C. 2018).

[123] *See Texas II* denial of motion for preliminary injunction at 740.

[124] *Id.*

[125] *Id.* at 736.

[126] *Texas II* July 16, 2021 memorandum and order.

[127] Order Granting Preliminary Injunction and Class Certification, *Inland Empire-Immigrant Youth Collective* v. *Nielsen,* 17–cv–2048, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018), *modified by* Modified Class Definition and Implementation Procedures—Corrected, *Inland Empire-Immigrant Youth Collective* v. *Nielsen,* 17–cv–2048 (C.D. Cal. Mar. 20, 2018).

[128] For an individual with an EPS charge for a crime of violence, as set forth in section IV(A)(1)(d) of the USCIS 2011 NTA policy memorandum, the minimum sentence for that charge must be at least 1 year of imprisonment before the individual will be deemed excluded from the class definition in *Inland Empire. See id.,* Modified Class Definition and Implementation Procedures—Corrected, at pp. 2–3.

[129] Order Holding Appeal in Abeyance, *Inland Empire-Immigrant Youth Collective* v. *Mayorkas,* 18–55564 (9th Cir. Apr. 7, 2021).

[130] *See Heckler* v. *Chaney,* 470 U.S. 821, 831 (1985).

[131] While the priorities have shifted between administrations, DHS and its components have issued enforcement priority and prosecutorial discretion policy memoranda since at least 1976, including in 2017 and 2021. *See, e.g.,* Sam Bernsen, General Counsel, INS, *Legal Opinion Regarding [Immigration and Naturalization] Service Exercise of Prosecutorial Discretion* (July 15, 1976); John Kelly, Secretary, DHS, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017); Memorandum from Acting Secretary David Pekoske to Senior Official Performing the Duties of the CBP Commissioner, et al., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021) (hereinafter Pekoske Memorandum); Acting ICE Director Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). On September 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially stayed a preliminary injunction issued by the U.S. District Court for the Southern District of Texas with respect to the latter two policies. *See State of Texas* v. *United States,* No. 21–40618 (5th Cir. Sept. 15, 2021).

[132] *See* DHS, Office of Immigration Statistics (OIS), *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018* (Jan. 2021), *https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf (hereinafter OIS Report)* (''*DHS estimates that 11.4 million unauthorized immigrants were living in the United States on January 1, 2018, roughly unchanged from 11.4 million on January 1, 2015*''*);* Randy Capps, et al., *Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins,* Migration Policy Institute (2020), *https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf* (hereinafter Capps (2020)) (''As of 2018 . . . there were 11 million unauthorized immigrants in the country, down slightly from 12.3 million in 2007.'').

average of 235,120 removals of noncitizens per fiscal year, a small proportion of the roughly 11 million undocumented noncitizens present in the United States.[133] Because of this mismatch between available resources and the number of potential enforcement targets, DHS must prioritize those that pose the greatest risk to public safety, national security, and border security. For instance, in FY 2020, 92 percent of the noncitizens that ICE removed after arrest by ICE Enforcement and Removal Operations (as opposed to those arrested by CBP at or near the border) had criminal convictions or pending criminal charges.[134] By contrast, USCIS data released in 2019 on arrests of DACA recipients reflect that just 10 percent of DACA recipients had ever been so much as arrested or apprehended for a criminal or immigration-related civil offense. Of those arrests, the most common offenses were non-DUI-related driving offenses and immigration-related civil or criminal offenses.[135] This suggests that even in the absence of the DACA policy, the vast majority of DACA recipients would not be enforcement targets and likely would remain in the country without becoming the subject of enforcement action.

ICE is currently further focusing resources on the identification of those individuals with serious criminal convictions and those individuals who pose a threat to national security, border security, and public safety.[136] DHS's focus on high-priority cases generally, as well as the DACA policy in particular, provides additional reassurance to people who present low or no risk to the United States, their families, and their communities. (This, in turn, has larger societal benefits, as discussed in Section V.A.4.b.(6) and elsewhere in this proposed rule.)

Adopting the proposed regulatory provisions would fortify DHS's prioritized approach to immigration and border enforcement by allowing DHS to continue to realize the efficiency benefits of the DACA policy. USCIS' determination that an individual meets the DACA guidelines and merits a favorable exercise of discretion assists law enforcement activities in several areas by streamlining the review required when officers encounter a DACA recipient. For example, when a CBP law enforcement officer encounters a DACA recipient in the course of their activities, they can see that USCIS confirmed that the noncitizen did not recently cross the border and had no significant criminal history at the time of the most recent DACA adjudication. Rather than conducting a full review of the DACA recipient's immigration and criminal history, in some circumstances, such as at the primary inspection booth at a checkpoint, the officer may be able to make a determination without necessitating further investigation (such as secondary inspection)—an effort that could involve multiple officers, with time costs ranging from minutes to hours.[137] Additionally, while officers must exercise their judgment based on the facts of each individual case, the prior vetting of DACA recipients provides a baseline that can streamline an enforcement officer's review of whether a DACA recipient is otherwise an enforcement priority.

Similarly, when ICE encounters a DACA recipient in the course of operations, ICE may review that person's history to ascertain if a disqualifying conviction has been rendered against them since the granting or renewal of DACA and proceed with an appropriate law enforcement resolution in each case. As appropriate, a law enforcement action, such as an arrest or immigration detainer being issued, may be avoided if someone is a DACA recipient or eligible individual and has no disqualifying convictions subsequent to the granting or renewal of DACA and continues to merit a favorable exercise of prosecutorial discretion.

In either scenario, DACA helps save time and resources, which then could be spent on priority matters. At the same time, the DACA recipient could avoid time in DHS custody, resulting in lower costs for the DACA recipients and greater resource availability for DHS.

Likewise, ICE relies on the fact that a noncitizen has received DACA in determining whether to place the noncitizen into removal proceedings or, if the noncitizen is already in removal proceedings, in determining whether to agree to continue, administratively close, or dismiss the removal proceedings without prejudice.[138] Depending on the surrounding circumstances, such decisions could allow priority cases to move through the overloaded immigration courts more quickly, reduce resource burdens on ICE attorneys and the immigration courts, provide more immediate respite to those who present low or no risk to the country, or avoid costs associated with detaining and ultimately removing a noncitizen.

As was the case when the DACA policy was first established in 2012, DHS recognizes that it is unable now, or in the foreseeable future, to take enforcement action against every noncitizen who resides in the United States without legal status. Given this reality, it is necessary for DHS to focus its resources and efforts on higher priority cases, such as those individuals who present a threat to national or border security. DHS policy long has reflected a determination that strong humanitarian and practical considerations make these noncitizens, who entered the United States as children and were not aware of, or in control of, the manner or means of their entry, excellent candidates for designation as low enforcement priorities. Enforcement actions against this population are not aligned with a prioritization of border or national security or public safety, or with DHS's commitment to values-based enforcement policies.

[133] ICE, *Fiscal Year 2020 Enforcement and Removal Operations Report* 4 (2020); ICE, *Fiscal Year 2019 Enforcement and Removal Operations Report* 19 (2019); ICE, *Fiscal Year 2018 Enforcement and Removal Operations Report* 10 (2018); ICE, *Fiscal Year 2017 Enforcement and Removal Operations Report* 12 (2017); ICE, *Fiscal Year 2016 Enforcement and Removal Operations Report* 2 (2016).

[134] *See ICE Annual Report: Fiscal Year 2020, https://www.ice.gov/doclib/news/library/reports/annual-report/iceReportFY2020.pdf.* ICE's interior enforcement operations are most likely to encounter the DACA-eligible population because DACA recipients must have been continuously physically present in the United States since June 15, 2012, and, therefore, generally are not encountered by CBP's border security actions.

[135] *See* USCIS, *DACA Requestors with an IDENT Response* (Nov. 2019), *https://www.uscis.gov/sites/default/files/document/data/DACA_Requestors_IDENT_Nov._2019.pdf.*

[136] *See* Acting ICE Director Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). As noted above, on September 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially stayed a preliminary injunction issued by the U.S. District Court for the Southern District of Texas with respect to this policy. *See State of Texas* v. *United States,* No. 21–40618 (5th Cir. Sept. 15, 2021).

[137] In the U.S. Border Patrol (USBP) context, subject-matter experts estimate that potential time savings could range from 30 minutes to 2 hours, depending on the circumstances of the encounter and available staff and resources. Time savings would accrue to the agent in the field as well as radio operators who work to confirm identity. Specific data on this point are not available because USBP does not separately collect data on this type of encounter.

[138] DHS cannot quantify the frequency with which ICE makes such decisions, because ICE does not track enforcement discretion decisions made based on DACA. Source: Enforcement and Removal Operations; Office of the Principal Legal Advisor. In addition, such decisions also can be affected by other policies (*e.g.,* overall enforcement priorities), such that in some cases, the decision to forbear from enforcement action could be attributed to either DACA or those other policies. But even when DHS is operating under enforcement priorities that generally would produce the same decision to forbear from enforcement action, ICE benefits from being able to rely on the fact that USCIS already has vetted the noncitizen via the DACA framework.

Therefore, in accordance with relevant statutory provisions, DHS's duty to enforce the immigration laws, and a long history of court decisions upholding acts of prosecutorial discretion, DHS is proposing this rule to continue and fortify its policy of exercising its enforcement discretion to defer removal as to a particular, identified class of noncitizens, so as to allow limited appropriated resources to be applied to higher priority cases.[139]

1. The Secretary Is Authorized by Statute To Establish This Deferred Action Policy

When Congress created DHS in 2002, it gave the Secretary authority over most immigration matters and placed both ICE and CBP, the two agencies responsible for immigration enforcement, under the Secretary's direction.[140] Section 103(a)(1) of the INA states that ''the [Secretary] shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens.'' [141] This sweeping grant includes authority to issue enforcement discretion policies such as the one proposed here.[142] Congress also explicitly charged that ''the Secretary shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities,'' recognizing that the Secretary must provide guidance on the proper exercise of the Department's immigration enforcement authorities and on the allocation of scarce resources.[143]

The review of historical practice above shows that deferred action has played an important role in immigration enforcement for more than 60 years. Congress has affirmatively encouraged its use in various settings. In INA sec. 204(a)(1)(D)(i)(II) and (IV), 8 U.S.C. 1154(a)(1)(D)(i)(II) and (IV), for example, Congress called attention to deferred action as a remedy for certain domestic violence victims and their children, by expressly providing that children who no longer could self-petition under VAWA because they were over the age of 21 nonetheless would be ''eligible for deferred action and work authorization.'' Similarly, in INA sec. 237(d)(2), 8 U.S.C. 1227(d)(2), Congress clarified that a denial of a request for a temporary stay of removal does not preclude deferred action for pending T and U nonimmigrant applicants. And through IMMACT 90, Congress provided post-hoc ratification of the use of indefinite voluntary departure in the family fairness policy, stating that a delay in the effective date ''shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.'' [144] Provisions like these reflect Congress' recognition—acting after the executive branch already has implemented such a policy—that identifying classes of individuals who may be eligible for deferred action, as an act of enforcement discretion,[145] is both lawful and appropriate.[146] Moreover, numerous regulations refer to deferred action, some which have been in force for nearly 40 years, and Congress has allowed them to remain in force.[147]

[139] There are roughly 636,410 active DACA recipients and an estimated total of 1.3 million individuals who could meet the criteria set out in this proposed rule. Migration Policy Institute, *DACA Recipients & Eligible Population by State, https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles.* Even if all such individuals are granted deferred action, that number represents only a small portion of the estimated 11 million undocumented noncitizens present in the United States and the available appropriated resources would remain grossly inadequate to the task of prosecuting and removing the estimated remaining 9.7 million undocumented individuals. This means that the proposed rule will not prevent DHS from continuing to enforce the immigration laws to the full extent that the resources Congress has given it will permit; to the contrary, as discussed below, these policies will facilitate still more effective use of the Department's finite resources.

[140] *See* Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2136.

[141] *See* 8 U.S.C. 1103(a)(1).

[142] *See Ariz. Dream Act Coal.* v. *Brewer,* 855 F.3d 957, 967 (9th Cir. 2017) (''[T]he INA explicitly authorizes the [Secretary] to administer and enforce all laws relating to immigration and naturalization. INA 103(a)(1), 8 U.S.C. 1103(a)(1). As part of this authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion . . . .'').

[143] 6 U.S.C. 202(5).

[144] *See* IMMACT 90 sec. 301(g). As noted above, *supra* note 57, the 1987 Family Fairness Memorandum was promulgated against a backdrop of a failed legislative effort to provide a pathway to legalization for IRCA-excluded spouses and children. The 1990 Family Fairness Memorandum came amidst rejection of protection from deportation in a House bill mirroring a Senate provision. *See supra* note 61. As such, while Congress later ratified INS's administrative practice, there was little to no apparent prospect for legislative action prompting the family fairness policies at the time they were promulgated in 1987 and 1990. *But see Texas I,* 809 F.3d at 185 (''Although the 'Family Fairness' program did grant voluntary departure to family members of legalized aliens while they 'waited for a visa preference number to become available for family members,' that program was interstitial to a statutory legalization scheme. DAPA is far from interstitial: Congress has repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA.'') (footnotes omitted); *Texas II* July 16, 2021 memorandum and order at 66 (citing *Texas I,* 809 F.3d at 185) (''Family Fairness was 'interstitial to a statutory legalization scheme,' because its purpose was to delay prosecution until Congress could enact legislation providing the same benefits, which it did when it passed [IMMACT 90].''). To whatever extent the 1990 Family Fairness Memorandum can be described as ''interstitial'' due to earlier passage of the Senate provision, DACA now occupies a similar interstitial space—the American Dream and Promise Act of 2021 passed the House in March 2021, and the bill is currently under consideration in the Senate. *See* H.R. 6, 117th Cong., American Dream and Promise Act of 2021 (as passed by House, Mar. 18, 2021), *https://www.congress.gov/bill/117th-congress/house-bill/6* (last visited Sept. 16, 2021). The Department maintains, however, that the DACA policy fits within the longstanding administrative practice of deferred action and is authorized by statute regardless of whether it is ''interstitial'' to a bill that is under active consideration by Congress.

[145] In the *Texas II* district court's July 16, 2021 memorandum and order, the court distinguished between ''prosecutorial discretion'' and ''adjudicative discretion,'' citing a past statement in congressional testimony by Secretary Napolitano and a memorandum from an INS General Counsel. DHS respectfully disagrees with the court's interpretation of those statements—which do not draw the distinction made by the district court—and also disagrees with the court's legal conclusions on this point. It is true, of course, that under the proposed rule, DHS does not simply forbear from initiating proceedings; it also creates a process by which applicants must seek forbearance through an adjudicative proceeding. But that process is designed to answer one question: is forbearance appropriate? Whenever an agency decides to exercise forbearance, it must engage in some kind of process. The process in the proposed rule is more formal and structured than many exercises of prosecutorial discretion, but that is deliberate and serves important goals; it ensures appropriate, consistent, and efficient consideration of the equities deemed most relevant by the Secretary.

[146] For other statutory references to deferred action, *see, e.g.,* REAL ID Act of 2005, Public Law 109–13, div. B, sec. 202(c)(2)(B)(viii), 119 Stat. 231, 313 (49 U.S.C. 30301 note) (including deferred action recipients among the classes of individuals with ''lawful status'' eligible for REAL ID-compliant driver's licenses or identification cards); National Defense Authorization Act for Fiscal Year 2004, Public Law 108–136, sec. 1703(c)(1)(A) and (2), 117 Stat. 1693, 1694–95 (2003) (providing that the spouse, parent, or child of a U.S. citizen who died as a result of honorable service in combat and who was granted posthumous citizenship may self-petition for permanent residence and ''shall be eligible for deferred action, advance parole, and work authorization'').

[147] *See, e.g.,* 8 CFR 109.1(b)(7) (1982); 8 CFR 274a.12(c)(14) (2014); 8 CFR 1.3(a)(4)(vi) (including noncitizens granted deferred action among categories of those deemed ''lawfully present in the United States'' for purposes of eligibility for benefits under title II of Social Security Act); 8 CFR 214.11(m)(2) (deferred action for trafficking victims who are provisionally approved for T nonimmigrant status and on waiting list for available visa number); 8 CFR 214.14(d)(2) and (3) (same for U nonimmigrant status); 8 CFR 245.24(a)(3) (''U Interim Relief means deferred action and work authorization benefits provided by USCIS or [INS] to applicants for U nonimmigrant status deemed prima facie eligible for U nonimmigrant status prior to publication of the U nonimmigrant status regulations.''); 8 CFR 245a.2(b)(5) (including among noncitizens eligible for adjustment to temporary resident status those who were granted deferred action before 1982); 28 CFR 1100.35(b) (encouraging the granting of deferred action and other forms of ''continued presence'' for victims of severe forms of trafficking in persons who are potential witnesses to that trafficking); 45 CFR 152.2 (noncitizens ''currently in deferred action status'' —except those ''with deferred action under [DHS's] deferred action

Continued

Finally, the fact that Congress has repeatedly considered but failed to enact legislative proposals to give legal status to a population that substantially overlaps with the population eligible for DACA does not call into question the Secretary's statutory authority to establish this deferred action policy. As the Supreme Court often has made clear, Congress can legislate only by following the constitutional procedure for enactment of law.[148] The non-actions of a subsequent Congress, including its failure to do something significantly different from an agency action, are not themselves legislation, and they are ''a hazardous basis for inferring the intent of an earlier one,'' particularly with respect to determining whether the agency action is authorized by statutes that an earlier Congress enacted.[149] When Congress does not act, it might be for a wide variety of reasons, including competing priorities and the sheer press of business.[150] In any case, the DREAM Act [151] is a substantially different policy from DACA. The DREAM Act proposed to grant individuals lawful status, first conditional and then permanent, which DHS cannot do and is not proposing here. By declining to enact the DREAM Act, then, Congress has not rejected or otherwise spoken to the Secretary's authority to establish the DACA policy. It bears repeating that, though well aware of DHS's longstanding administrative practice, including the Napolitano Memorandum, Congress has not taken any action to override or prohibit this use of deferred action.[152]

2. The Courts Have Long Recognized the Executive's Authority To Establish Enforcement Priorities and Grant Deferred Action

It long has been recognized that executive agencies are entitled to exercise their discretion in setting enforcement priorities when they have limited resources. The Supreme Court explicitly recognized that authority in *Heckler* v. *Chaney,* when the Food and Drug Administration declined to proceed against an allegedly unlawful use of a particular drug for lethal injections.[153] The decision whether to enforce was, the Court held, ''committed to agency discretion by law'' within the meaning of the APA.[154] The Court said: ''This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.'' [155] The Court added that

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall priorities, and, indeed, whether the agency has enough resources to undertake the action at all.[156]

Regarding immigration enforcement, in *Arizona* v. *United States,* the Supreme Court relied on the Federal Government's broad immigration enforcement discretion to declare several provisions of an Arizona immigration enforcement statute unconstitutional.[157] The Court described the scope of that enforcement discretion in sweeping terms: ''A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.'' [158] Over a decade earlier, the Court emphasized that even after choosing to initiate enforcement action, immigration officials may ''abandon the endeavor'' of immigration enforcement ''at each stage'' of the process.[159] Several Federal courts of appeals have made similar statements, recognizing that the Executive has extremely broad discretionary authority when deciding how to allocate enforcement resources, including when to forbear removal on humanitarian grounds.[160]

Indeed, for more than 20 years the Supreme Court specifically has recognized deferred action—that is, the decision to temporarily forbear from pursuing the removal of a noncitizen—as a core feature and ''regular practice'' of the Executive's discretionary authority.[161] The Court confirmed this understanding in the context of the 2012 DACA policy, stating that ''[t]he defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision).'' [162] One Federal court aptly described deferred action this way:

> [T]he executive branch has long used an enforcement tool known as ''deferred action'' to implement enforcement policies and priorities, as authorized by statute. Deferred action is simply a decision by an enforcement agency not to seek enforcement of a given statutory or regulatory violation for a limited period of time. In the context of the immigration laws, deferred action represents a decision by DHS not to seek the removal of an alien for a set period of time. In this sense, eligibility for deferred action represents an acknowledgment that those qualifying individuals are the lowest priority for enforcement.[163]

The Court in *Arizona* recognized the Federal Government's appropriate focus on just the type of criteria for forbearance policies found in the 2012 DACA policy and in this proposed rule:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including . . . long ties to the community, or a record of distinguished

for childhood arrivals process, as described in the [Napolitano Memorandum]''—are deemed ''lawfully present'' for purposes of the Pre-Existing Condition Insurance Plan Program).

[148] *See, e.g., INS* v. *Chadha,* 462 U.S. 919, 951 (1983).

[149] *Mackey* v. *Lanier Collection Agency & Serv., Inc,* 486 U.S. 825, 840 (1988) (quoting *United States* v. *Price,* 361 U.S. 304, 313 (1960)); *see also, e.g., Cal. Div. of Labor Stds. Enf.* v. *Dillingham Constr., N.A.,* 519 U.S. 316, 331 n.8 (1997).

[150] *See, e.g., Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994).

[151] The DREAM Act was first introduced in 2001 (*see* DREAM Act, S. 1291, 107th Cong., 1st Sess. (2001)) and subsequently has been reintroduced several times.

[152] Indeed, Congress has taken up, but never passed, bills to defund DACA processing by DHS. *See, e.g.,* H.R. 5160, 113th Cong. (2014).

[153] 470 U.S. 821 (1985) (*Chaney*).

[154] 5 U.S.C. 701(a)(2).

[155] *Chaney,* 470 U.S. at 831.

[156] *Id.*

[157] 132 S. Ct. 2492 (2012).

[158] *Id.* at 2499, citing Brief for Former Commissioners of the United States Immigration and Naturalization Service as Amici Curiae 8–13.

[159] *AADC,* 525 U.S. at 483–84.

[160] *See AADC,* 525 U.S. at 483–84 (''[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience.''); *Regents of the Univ. of Cal.* v. *DHS,* 908 F.3d 476, 487 (9th Cir. 2018) (''Deferred action refers to an exercise of administrative discretion by the [immigration agency] under which [it] takes no action to proceed against an apparently deportable alien based on a prescribed set of factors generally related to humanitarian grounds.'' (internal quotation marks omitted)); *Arpaio* v. *Obama,* 797 F.3d 11, 16 (D.C. Cir. 2015) (''Whether to initiate removal proceedings and whether to grant relief from deportation are among the discretionary decisions the immigration laws assign to the executive.''); *Crane* v. *Johnson,* 783 F.3d 244, 247 (5th Cir. 2015) (''Under the INA, the [Secretary] is 'charged with the administration and enforcement of the INA and all other laws relating to the immigration and naturalization of aliens. . . .' Although the [Secretary] is charged with enforcement of the INA, 'a principal feature of the removal system is the broad discretion exercised by immigration officials.' In fact, the Supreme Court has recognized that the concerns justifying criminal prosecutorial discretion are 'greatly magnified in the deportation context.' '' (internal brackets and citations omitted)).

[161] *See AADC,* 525 U.S. at 483–84.

[162] *Regents,* 140 S. Ct. at 1911.

[163] *Arpaio* v. *Obama,* 27 F. Supp. 3d 185, 192–93 (D.D.C. 2014), *aff'd,* 797 F.3d 11 (D.C. Cir. 2015).

military service. . . . Returning an alien to his own country may be deemed inappropriate even where he . . . fails to meet the criteria for admission.[164]

The Supreme Court's 8–1 decision in *AADC,* cited above, is noteworthy. Emphasizing the breadth of the Executive power to decide whether to grant deferred action, the Court observed that ''[a]t each stage the Executive has discretion to abandon [the removal process], and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience.'' [165]

The lower courts have described this specific form of enforcement discretion in equally broad terms. In *Regents of the Univ. of Cal.* v. *DHS,* the U.S. Court of Appeals for the Ninth Circuit stated that ''[d]eferred action is a decision by Executive Branch officials not to pursue deportation proceedings against an individual or class of individuals otherwise eligible for removal from this country.'' [166] It likewise found that ''it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby [DHS] declines to pursue the removal of a person unlawfully present in the United States.'' [167] The Fifth and Eleventh Circuits also have acknowledged deferred action as an appropriate exercise of enforcement discretion.[168] Indeed, the courts' acceptance of this type of policy announcing enforcement discretion long predates DACA, including several cases that refer to deferred action by name (or in some cases by its earlier name, ''non-priority status'') as a nonreviewable exercise of immigration enforcement discretion.[169]

Of course, as explained above, the DAPA and Expanded DACA policies were subjected to court challenges and ultimately were not implemented, and the Napolitano Memorandum recently was vacated by a district court. But to the extent that courts have found substantive flaws in those policies, they have not found that DHS may not forbear from removing certain noncitizens, or identifying policy considerations and criteria relevant to such forbearance, because forbearance from removal is so strongly rooted in long-recognized executive enforcement discretion authorities.[170] In focusing on those individuals who came to the country many years ago as children, have grown up here, have gone to school here, in some cases have served honorably in the Armed Forces, and do not pose a threat to public safety, national security, or border security, the DACA policy appropriately affords deferred action to some of the lowest priority removable noncitizens in the immigration system.

3. This Deferred Action Policy Conforms to Legal Limitations on the Executive's Enforcement Discretion

DHS recognizes that the Executive's enforcement discretion is not unlimited. Respect for Article I of the Constitution, the bedrock principles of separation of powers, and the rule of law compels careful consideration of the legal limits on all executive action, including enforcement discretion. After careful consideration, DHS proposes a rule that fully respects those limits.[171]

One limit, as the Supreme Court has observed, is that an agency may not ''disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.'' [172]

The proposed rule does not ''disregard'' legislative direction; it affirmatively effectuates it. As the Court pointed out in *Chaney,* Congress can limit executive discretion by ''setting substantive priorities.'' With respect to immigration enforcement, Congress in fact has directed the Secretary to prioritize three missions: National security, public safety through the removal of serious criminal offenders (by level of severity of the crime), and border security.[173] Those are precisely the central priorities that the proposed rule expressly incorporates. Nor does any statutory provision attempt to ''limit [DHS's] exercise of enforcement power'' by ''otherwise circumscribing [DHS's] power to discriminate among issues or cases it will pursue.''

Further, as noted earlier, INA sec. 103(a), 8 U.S.C. 1103(a), confers broad powers on the Secretary in connection with ''the administration and enforcement'' of the immigration laws, and section 402(5) of the Homeland Security Act, 6 U.S.C. 202(5), charges the Secretary with the more specific duty of ''establishing national immigration enforcement policies and priorities.'' In discharging that responsibility to establish immigration enforcement policies and priorities, the Secretary exercises their ''control, direction, and supervision'' over DHS employees, INA sec. 103(a)(2), 8 U.S.C. 1103(a)(2), and may ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority,'' INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3). The proposed rule is thus consistent with another important congressional policy—the decision to entrust the optimal allocation of finite immigration enforcement resources to the Secretary's broad discretion.

As discussed above, the enforcement priorities that animate the proposed rule include national security, public safety through the removal of serious criminal

[164] *Arizona,* 132 S. Ct. at 2499. *See also Casa de Maryland* v. *DHS,* 924 F.3d 684, 691 (4th Cir. 2019) (''Because of the 'practical fact,' however, that the government can't possibly remove all such noncitizens, the Secretary has discretion to prioritize the removal of some and to deprioritize the removal of others.'').

[165] *AADC,* 525 U.S. at 483–84.

[166] 908 F.3d at 487.

[167] *Ariz. Dream Act Coal.* v. *Brewer,* 818 F.3d 901 (9th Cir. 2016).

[168] *Pasquini* v. *Morris,* 700 F.2d 658, 662 (11th Cir. 1983) (granting or withholding deferred action ''is firmly within the discretion of the INS'' and, therefore, can be granted or withheld ''as [the relevant official] sees fit, in accord with the abuse of discretion rule when any of the [then] five determining conditions is present''); *Soon Bok Yoon* v. *INS,* 538 F.2d 1211, 1213 (5th Cir. 1976) (''The decision to grant or withhold non-priority status [the former name for deferred action] therefore lies within the particular discretion of the INS, and we decline to hold that the agency has no power to create and employ such a category for its own administrative convenience without standardizing the category and allowing applications for inclusion in it.'').

[169] *See, e.g., AADC,* 525 U.S. at 483–84; *Botezatu* v. *INS,* 195 F.3d 311, 314 (7th Cir. 1999); *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1008 (9th Cir. 1987); *Pasquini* v. *Morris,* 700 F.2d 658, 661 (11th Cir. 1983); *David* v. *INS,* 548 F.2d 219, 223 (8th Cir. 1977); *Soon Bok Yoon* v. *INS,* 538 F.2d 1211, 1213 (5th Cir. 1976).

[170] *See Texas I* at 655–56. *Texas* v. *United States,* 787 F.3d 733 (5th Cir. 2015), *aff'd by equally divided Court,* 136 S. Ct. 2271 (2016); *see also Texas II* July 16, 2021 memorandum and order at 74.

[171] Other cogent discussions of the legal constraints on enforcement discretion in immigration reach analogous conclusions. *See* Written Testimony of Stephen H. Legomsky, Washington University School of Law, in *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the House Comm. on the Judiciary,* 114th Cong., at 74–76 (2015), *https://www.govinfo.gov/content/pkg/CHRG-114hhrg93526/pdf/CHRG-114hhrg93526.pdf.*

[172] *Chaney,* 470 U.S. at 833.

[173] A mandate to prioritize the removal of criminal offenders, taking into account the severity of the crime, has been included in every annual DHS appropriations act since 2009. *See, e.g.,* Consolidated Appropriations Act, 2014, Public Law 113–76, div. F, tit. II, 128 Stat. 5, 251; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law 110–329, div. D, tit. II, 122 Stat. 3574, 3659 (2008); *see also* INA secs. 235(b)(1) and (c) and 236(c)(1)(D), 8 U.S.C. 1225(b)(1) and (c) and 1226(c)(1)(D) (prioritizing national security and border security).

offenders based on the severity of the particular crimes, and border security. At the same time, when resources do not permit universal enforcement, prioritizing some goals requires deprioritizing others. The proposed rule deprioritizes the removal of those individuals who came to the United States many years ago as children; have lived in the United States peacefully and productively for substantial periods; and have been or are likely to be productive contributors to American society, via education, employment, and national service.

The use of deferred action as the particular vehicle for exercising this enforcement discretion is equally rational. This proposed deferred action policy would (1) encourage undocumented noncitizens to come forward, identify and present themselves to the Department, provide their addresses and other personal information, and supply fingerprints that will permit background checks; (2) enable USCIS—using funds raised by fees, provided in part by the deferred action requestors themselves—periodically to identify and investigate a large class of undocumented noncitizens who do not pose a threat to national security, border security, or public safety, thus permitting the DHS immigration enforcement agencies to focus their resources on the remaining higher priority individuals; (3) make communities safer by further enabling undocumented noncitizens who are crime victims or witnesses to report crimes to the police without fear of being arrested, detained, and removed; (4) significantly increase tax revenues as the wages and tax filing rates of deferred action recipients rise; and (5) protect the reliance interests of current DACA recipients—as well as their family members, employers, and educational institutions, among others—who have built lives and structured programs based on the existence of a national enforcement discretion program for this low-priority population.[174]

A second limit, to quote the Supreme Court's *Chaney* decision once more, is that an agency's enforcement policy cannot amount to an ''abdication of its statutory responsibilities.'' [175] The proposed rule comes nowhere close to an abdication, given the enormous resources that the Department would continue to dedicate toward immigration enforcement during implementation of the proposed rule, and the basic practical reality that Congress has not appropriated sufficient resources for DHS to pursue all immigration enforcement that is available.[176] Indeed, the proposed rule would not prevent DHS from continuing to use all the resources Congress has appropriated for immigration enforcement. There can thus be no suggestion of abdication; DHS will continue to enforce the immigration laws as fully as its appropriated resources allow.

In view of these two limits, the Department does not believe that it could grant deferred action to every noncitizen in the United States who lacks lawful status, whether all at once or ''in smaller numbers, group-by-group.'' [177] But the proposed rule, limited in nature and scope, would stop far short of such drastic action. And after careful consideration, the Department believes it does possess the authority to adopt the deferred action policy reflected in the proposed rule.[178]

D. Employment Authorization

Since the inception of DACA in 2012, DACA recipients—like all other deferred action recipients—have been eligible for employment authorization under 8 CFR 274a.12(c)(14), a decades-old regulation that allows noncitizens who are provided deferred action from immigration enforcement the opportunity to apply for such authorization and receive an EAD if they establish an economic necessity for employment.[179] ''Economic necessity'' is based on the Federal Poverty Guidelines at 45 CFR 1060.2, and existing regulations at 8 CFR 274a.12(e) define the criteria necessary to establish the noncitizen's economic need to work. This proposed rule would not change the eligibility of DACA recipients to apply for work authorization or alter the existing general rule for establishing economic necessity. This rule proposes to codify DACA-related employment authorization in a new paragraph designated 8 CFR 274a.12(c)(33).[180] As with 8 CFR 274a.12(c)(14), the new paragraph (c)(33) would continue to specify that the noncitizen must have been granted deferred action and must establish economic need to be eligible for employment authorization.

This rule also proposes a relatively modest change to existing DACA practice, which requires all DACA requestors to submit the Form I–765,

[174] *See Regents,* 140 S. Ct. at 1914 (''DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission, respondents emphasize, would 'radiate outward' to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.'' (internal citations omitted)).

[175] *Chaney,* 470 U.S. at 833 n.4.

[176] The ''abdication'' standard was tested in *Texas* v. *United States,* 106 F.3d 661 (5th Cir. 1997). The State of Texas sued the Federal Government, alleging that the Government had failed to control undocumented immigration and that the State had incurred economic costs as a result. A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit dismissed the claim. The court held: ''We reject out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty.'' 106 F.3d at 667. The claim failed because ''[t]he State does not contend that federal defendants are doing nothing to enforce the immigration laws or that they have consciously decided to abdicate their enforcement responsibilities. Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty.'' *Id.; see also id.* (''The State candidly concedes . . . that [INA sec. 103] places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion.'').

[177] *Texas II* July 16, 2021 memorandum and order at 64.

[178] The district court in *Texas II* also concluded that ''DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA.'' The Department respectfully disagrees and reiterates that its authority to create and implement DACA is vested in the Secretary's broad authority under the INA and the Homeland Security Act of 2002 to administer the immigration laws of the United States and establish national immigration enforcement policies and priorities, as explained above.

Relying on a Supreme Court case, *Arizona* v. *United States,* 567 U.S. 387, 406 (2012), the *Texas II* court concluded that the Department's interpretation of its authority is unreasonable because ''Congress intended to completely preempt further regulation in the area of immigration,'' including regulation by the Department with respect to employment authorization of noncitizens. In the Department's view, the *Texas II* court's reliance on *Arizona* was misplaced. There, the Court held that an Arizona statute that made it a criminal offense for a noncitizen without work authorization to seek or engage in employment was preempted by Federal law because ''it would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.'' The DACA policy gives rise to no such interference. DACA is not a State statute that impinges or usurps Congress' plenary power over the ''field'' of immigration. Rather, DACA is a policy created by a department of the executive branch of government that, under Federal law, is vested with the authority to act on immigration matters.

[179] As discussed below, such discretionary employment authorization for individuals provided deferred action has been codified in similar regulations since publication of the predecessor regulation at 8 CFR 109.1(b)(6) in 1981. *See Employment Authorization to Aliens in the United States,* 46 FR 25079 (May 5, 1981).

[180] Although currently issued under 8 CFR 274a.12(c)(14), a DACA-related EAD does not have the ''C–14'' code on its face, but rather ''C–33'' to assist DHS in distinguishing DACA recipients' EADs for operational and statistical tracking purposes.

Application for Employment Authorization, and the Form I–765WS, Employment Authorization Worksheet. DHS proposes instead to make it optional for each DACA requestor to apply for employment authorization and an EAD. DHS proposes as well to modify the Form I–821D, Consideration of Deferred Action for Childhood Arrivals, to contain a place for the requestor to indicate whether they also are filing the Form I–765 and the Form I–765WS concurrently. A DACA requestor may also wait until after receiving a DACA approval notice before applying for employment authorization. A DACA requestor or recipient who chooses to request employment authorization must file Form I–765 and Form I–765WS and pay all associated fees.[181] This rule does not propose any changes to the existing general rule for establishing economic necessity, which will continue to be determined on a case-by-case basis pursuant to 8 CFR 274a.12(e). This rule further proposes that the termination of a noncitizen's DACA, in accordance with 8 CFR 274a.14(a), would result in the automatic termination of any DACA-related employment authorization and employment authorization documentation obtained by the noncitizen.

Since at least the 1970s, the INS and later DHS have made employment authorization available for noncitizens without lawful immigration status who nevertheless are provided deferred action or certain other forms of prosecutorial discretion.[182] Although there was no general Federal prohibition on employing noncitizens without work authorization until the enactment of IRCA in 1986,[183] working without authorization nevertheless could cause certain categories of nonimmigrants to violate their status. INS thus had a long practice of notating the I–94 of a nonimmigrant provided such authorization,[184] and it continued the practice for certain categories of noncitizens without nonimmigrant status.[185] In 1972, Congress made work authorization a prerequisite for certain noncitizens to obtain a Social Security number.[186] Congress ratified the INS's position that it had discretion under the INA to authorize noncitizens to work in enacting the Farm Labor Contractor Registration Act Amendments of 1974 (FLCRAA).[187] The FLCRAA made it unlawful for farm labor contractors to employ knowingly any ''alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.'' [188]

In 1975, INS's General Counsel explained that INS authorized certain noncitizens to work in cases ''when we do not intend or are unable to enforce the alien's departure . . . .'' [189] The broad authority in section 103(a) of the INA, 8 U.S.C. 1103(a), charging the ''Attorney General'' and, ever since 2003, the Secretary, with ''the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens'' consistently has been interpreted to allow for the granting of such discretionary employment authorization to noncitizens.[190]

By the late 1970s, INS work authorizations commonly were issued. In 1979, the INS published a proposed rule that for the first time sought to codify its existing employment authorization practices.[191] In the preamble, the INS stated that ''[t]he Attorney General's authority to grant employment authorization stems from section 103(a) of the Immigration and [Nationality] Act[,] which authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and administration of the Act.'' [192] The INS also noted additional recognition by Congress of this authority in the enactment of an amendment that barred from adjustment of status to permanent residence any noncitizen (with certain exceptions) who after January 1, 1977, engages in unauthorized employment prior to filing an application for adjustment of status.[193] The preamble further noted that employment authorization could be obtained by noncitizens who were prima facie entitled to an immigration benefit such as adjustment of status, suspension of deportation, or asylum, as well as

> [a]n alien who, as an exercise of [INS's] prosecutorial discretion, has been allowed to remain in the United States for an indefinite or extended period of time . . . . The proposed regulation states that the application for employment authorization may be granted if the alien establishes that he is financially unable to maintain himself during the applicable period.[194]

When the final rule was published in 1981 as new part 109 to title 8 of the Code of Federal Regulations,[195] it not only enabled various classes of noncitizens authorized by specific statutes to work, but also permitted discretionary work authorization for certain other noncitizens without lawful status, such as those who (1) had pending applications for asylum, adjustment of status, or suspension of deportation; (2) had been granted voluntary departure; or (3) had been recommended for deferred action.[196] The new 8 CFR 109.1(b)(6) published in 1981 specifically listed the following as a class of noncitizens who could apply for work authorization to the INS district director for the district in which the noncitizen resided:

> Any alien in whose case the district director recommends consideration of deferred action, an act of administrative convenience to the government which gives some cases lower priority: Provided, the alien

[181] *See* discussion of fees at Section IV.A below.

[182] *See generally* Sam Bernsen, *Employment Rights of Aliens Under the Immigration Laws, In Defense of the Alien,* Vol. 2 (1979), at pp. 21, 32–33 (collecting former INS OI on employment authorization), *reprinted at https://www.jstor.org/stable/23142996.* For example, the former INS's OI in 1969 allowed for discretionary employment authorization to be issued to individuals who were provided voluntary departure, which permitted certain deportable noncitizens to remain in the United States until an agreed-upon date at which point they had to leave at their own expense but without the INS needing to obtain an order of removal. *See* INS OI 242.10(b) (Jan. 29, 1969).

[183] Public Law 99–603, 100 Stat. 3359.

[184] *See, e.g.,* INS OI 214.2(j) (Nov. 16, 1962) and 214.2(f) (Aug. 15, 1958). *See generally* Sam Bernsen, *Lawful Work for Nonimmigrants,* 48 No. 21 Interpreter Releases, 168 (June 21, 1971) (noting that nonimmigrants were not subject to numerical limitations but were subject to work restrictions).

[185] *See supra* note 182.

[186] *See* Social Security Amendments of 1972, Public Law 92–603, sec. 137, 86 Stat. 1329, 1364–65 (codified as amended at 42 U.S.C. 405(c)(2)(B)(i)(I) (1979)); *see also* Sam Bernsen, *Leave to Labor,* 52 No. 35 Interpreter Releases 291, 294 (Sept. 2, 1975).

[187] Public Law 93–518, sec. 11(a)(3), 88 Stat. 1652, 1655.

[188] 7 U.S.C. 1045(f) (Supp. IV 1974); *see* 7 U.S.C. 2044(b) (1970 and Supp. IV 1974) (contractor's license could be revoked on same basis).

[189] Sam Bernsen, *Leave to Labor;* 52 No. 35 Interpreter Releases 291, 294–95 (Sept. 2, 1975).

[190] *See Proposed Rules for Employment Authorization for Certain Aliens,* 44 FR 43480 (July 25, 1979) (first regulation collecting employment authorization policies). These provisions grant the Secretary broad discretion to determine the most effective way to administer the laws. *See Narenji* v. *Civiletti,* 617 F.2d 745, 747 (D.C. Cir. 1979) (observing that the INA ''need not specifically authorize each and every action taken by the Attorney General [(now Secretary)], so long as his action is reasonably related to the duties imposed upon him'').

[191] 44 FR 43480 (July 25, 1979).

[192] *Id.* (further noting that the Attorney General had delegated the authority to the Commissioner of the INS).

[193] *Id.* (citing Pub. L. 94–571, sec. 6, 90 Stat. 2703, 2705–06 (1976), which amended INA sec. 245(c) regarding adjustment of status to permanent resident—the INS mistakenly cited the law as ''Pub. L. 95–571'').

[194] *Id.*

[195] In 1980, the INS had issued a second proposed rule for notice and comment after modifying the initial rule based on public comments. *See Employment Authorization,* 45 FR 19563 (March 26, 1980) (preamble continued to note that INA sec. 103(a) provides legal authority for issuance of employment authorization).

[196] *See Employment Authorization to Aliens in the United States,* 46 FR 25079 (May 5, 1981).

establishes to the satisfaction of the district director that he/she is financially unable to maintain himself/herself and family without employment.[197]

In November 1981, the INS moved the employment authorization provision for individuals granted deferred action to 8 CFR 109.1(b)(7) when it further expanded the categories of noncitizens who could be granted employment authorization to include paroled noncitizens and deportable noncitizens granted voluntary departure, either prior to or at the conclusion of immigration proceedings.[198]

When Congress passed IRCA in 1986,[199] making it unlawful for the first time for employers knowingly to hire ''an unauthorized alien'' for employment, Congress was well aware of the INS's longstanding practice of granting employment authorization to noncitizens, including the regulations permitting the agency to provide employment authorization to certain categories of noncitizens who had no lawful immigration status.[200] During the extensive legislative deliberations leading to IRCA, the INS also was considering a petition for rulemaking from the Federation for American Immigration Reform (FAIR) that directly challenged the 1981 employment authorization regulations as ultra vires, particularly INS's authority to provide such authorization to noncitizens who had not been specifically authorized by statute to work, which the INS had published for public comment.[201] FAIR's petition sought to have the INS rescind 8 CFR 109.1(b) through a new rulemaking.

Before the agency acted on FAIR's petition, Congress intervened and ratified the INS's interpretation of its legal authority to provide employment authorization by providing in IRCA that:

> the term ''unauthorized alien'' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by [the INA] or by the Attorney General.[202]

At the very same time that Congress made it unlawful for an employer knowingly to hire a person who is unauthorized to work, Congress recognized that a person could be authorized to work by the Attorney General.

After publishing proposed regulations to implement IRCA and soliciting extensive public comment, including extending the comment period on the still-pending FAIR petition, the INS ultimately denied that petition.[203] In its denial, the INS noted both its broad authority in section 103(a) of the INA, 8 U.S.C. 1103(a), to administer the immigration laws and the new definition of ''unauthorized alien'' in section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), by explaining that

> the only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined ''unauthorized alien'' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.[204]

This contemporaneous interpretation—which has remained undisturbed by Congress for nearly 35 years—is entitled to considerable weight.

The final IRCA regulations incorporated the statutory definition of ''unauthorized alien'' from section 274a(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), for employment purposes at 8 CFR 274a.1. The rules also redesignated the employment authorization regulations in part 109, with amendments, as part 274a, subpart B, in title 8 of the Code of Federal Regulations, with work authorization made available for noncitizens with deferred action who establish an economic necessity in 8 CFR 274a.12(c)(14).[205] In 8 CFR 274a.12(d) (1987), the rules further described the basic criteria and procedures to establish ''economic necessity'' as based on the Federal Poverty Guidelines. The new rules also included employment authorization for noncitizens who were members of a nationality group granted EVD, a form of prosecutorial discretion described in greater detail above.[206]

In the years following the enactment of IRCA and promulgation of the employment authorization regulations, the provisions relating to employment authorization for noncitizens with deferred action have remained substantively the same. As noted above, under subsequent administrations since the 1987 promulgation of 8 CFR 274a.12(c)(14), the INS and then DHS have continued to provide deferred action to individuals who are members of specific groups and to grant them eligibility for employment authorization on a case-by-case basis.[207]

After IRCA, Congress made certain limited amendments to the employment-related provisions in the INA,[208] but Congress never has modified INA sec. 274a(h)(3), 8 U.S.C. 1324a(h)(3), the provision that recognizes that the Attorney General (now the Secretary) may authorize noncitizens to be lawfully employed.[209] Congress also periodically has limited the classes of noncitizens who may receive employment authorization,[210]

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[197] *Id.* at 25081.

[198] *See Employment Authorization; Revision to Classes of Aliens Eligible,* 46 FR 55920 (Nov. 13, 1981).

[199] Public Law 99–603, 100 Stat. 3359.

[200] *See* 8 U.S.C. 1324a(a)(1).

[201] *See Employment Authorization,* 51 FR 39385, 39386–39387 (Oct. 28, 1986).

[202] *See* IRCA sec. 101(a)(1), 100 Stat. 3359, 3368 (codified at INA sec. 274a(h)(3), 8 U.S.C. 1324a(h)(3)).

[203] *See Employment Authorization; Classes of Aliens Eligible,* 51 FR 45338 (Dec. 18, 1986); *Control of Employment of Aliens,* 52 FR 8762 (Mar. 19, 1987); and *Employment Authorization; Classes of Aliens Eligible,* 52 FR 46092 (Dec. 4, 1987) (denial of FAIR petition).

[204] *See Employment Authorization; Classes of Aliens Eligible,* 52 FR at 46093 (Dec. 4, 1987).

[205] *See* 52 FR 16216 (May 1, 1987).

[206] *See* 8 CFR 274a.12(a)(11) (1987). *See also* general discussion above of EVD and its successor, DED. After the term EVD became obsolete, the employment authorization provision was amended to cover noncitizens provided DED pursuant to a directive from the President to the Secretary and under the conditions established by the Secretary in accord with the presidential directive. *See* current 8 CFR 274a.12(a)(11).

[207] *See, e.g.,* Memorandum for Regional Directors, et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997) (directing individualized determinations of deferred action for pending self-petitioners under VAWA); *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina,* press release, dated Nov. 25, 2005; Memorandum from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (Sept. 4, 2009) (directing deferred action and employment authorization for widows and widowers whose immigrant petitions had not been decided before their spouses died); Napolitano Memorandum (establishing DACA and directing that determinations be made as to whether eligible individuals qualify for work authorization during their period of deferred action).

[208] *See, e.g.,* IMMACT 90, Public Law 101–649, tit. V, subtit. C, 104 Stat. 4978 (1990) (codified as amended at various sections of 8 U.S.C. 1324a and 1324b—additional provisions related to employer sanctions and anti-discrimination in employment of noncitizens); IIRIRA, Public Law 104–208, div. C, tit. IV, 110 Stat. 3009, 3009–655–3009–670 (codified as amended at various sections of 8 U.S.C. 1324a and 1324b—adding provisions for pilot programs on identity and employment eligibility verification, amendments regarding employer sanctions, and amendments regarding unfair immigration-related employment practices).

[209] Section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), recognizes that employment may be authorized by statute or by the Secretary. *See, e.g., Ariz. Dream Act Coal.* v. *Brewer,* 757 F.3d 1053, 1062 (9th Cir. 2014) (''Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States.''); *Perales* v. *Casillas,* 903 F.2d 1043, 1050 (5th Cir. 1990) (noting the broad, discretionary employment authorization authority in INA sec. 274A(h)(3) and the implementing EAD regulations).

[210] *See, e.g.,* 8 U.S.C. 1158(d)(2) (asylum applicants not otherwise eligible for employment

but it never has altered the policy in existence since at least the 1970s (and codified in regulations since 1981) that noncitizens granted deferred action may apply for and obtain discretionary employment authorization. In fact, as noted above, Congress has enacted statutes that recognized and adopted existing USCIS deferred action practices for certain noncitizens, such as pending T and U nonimmigrant applicants and petitioners, without altering 8 CFR 274a.12(c)(14), which provided for their ability to apply for employment authorization.[211]

The Department has carefully considered, but respectfully disagrees with, the *Texas II* court's decision finding that it is unlawful to provide employment authorization to persons who receive deferred action under DACA.[212] The *Texas II* court found that DACA recipients are not in the categories of noncitizens whom Congress specifically has authorized to be employed, nor in the categories of noncitizens for whom Congress has allowed DHS to provide discretionary employment authorization.[213] The Department believes that the court's conclusion is inconsistent with the long history of Congress' recognition of the former INS's and DHS's practice of providing discretionary employment authorization to individuals granted deferred action both before and after IRCA, as described earlier in this section, and the best interpretation of the Secretary's broad authorities under INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3), and INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3), which indicates that with respect to employment, an ''unauthorized alien'' may be eligible and authorized to work either by the INA or ''by the Attorney General,'' now the Secretary. Nothing in INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3), indicates that there must be some underlying statute that separately provides the Secretary with discretion to authorize employment for a given category of noncitizens before the Secretary may exercise the discretion that is provided directly to the Secretary through INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3).[214] In addition to individuals granted deferred action, DHS notes that DHS, and the Department of Justice (DOJ) before it, long has authorized employment for many categories of noncitizens for whom no additional statute expressly provides for employment authorization.[215] Although these categories of noncitizens whom the Attorney General and later the Secretary have authorized for employment eligibility have been placed into regulations at various times, many of them were in the 1981 codification of the former INS employment authorization rules, while others were added later.[216] The regulatory employment authorization categories have continued to exist to this day. Were DHS to adopt the interpretation of the *Texas II* court, many of these other employment authorization categories that also rely on the Secretary's broad authorities under INA secs. 103(a)(3) and 274a(h)(3) might be called into question. DHS respectfully declines to adopt such a restrictive interpretation. In noting that DACA also applies to individuals in removal proceedings, the *Texas II* court interpreted INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3), as making ''aliens not lawfully admitted for permanent residency with pending removal proceedings . . . *ineligible* for work authorization.'' [217] But the last clause of INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3), recognizes such an individual may have employment authorization even if they have not been afforded lawful permanent resident status:

> [The Secretary] . . . may not provide the alien with work authorization (including an ''employment authorized'' endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence *or otherwise would (without regard to removal proceedings) be provided such authorization.* (Emphasis added)

The Department interprets the last clause of INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3), to represent a further recognition by Congress that noncitizens who are not permanent residents also can be authorized to work by other means, and that there must necessarily be categories of noncitizens other than lawful permanent residents who can obtain work authorization under these circumstances. Moreover, the *Texas II* court's reading would render superfluous provisions of the INA that explicitly bar employment authorization for certain categories of noncitizens in the United States without lawful status.[218] Read as a whole, the INA most naturally would permit work authorization for those individuals covered either by statute specifically or as authorized by the Secretary pursuant to INA sec. 103(a)(3), 8 U.S.C.

authorization shall not be eligible for employment authorization prior to 180 days after filing asylum application if regulations authorize such employment); 8 U.S.C. 1226(a)(3) (detained noncitizen may not be provided work authorization, even if released, unless the noncitizen is lawfully admitted for permanent residence or otherwise would—without regard to removal proceedings—be provided such authorization); 8 U.S.C. 1231(a)(7) (limiting circumstances in which noncitizens ordered removed may be eligible to receive employment authorization). Indeed, those provisions restricting employment authorization reasonably can be construed as reflecting Congress' general understanding that the Attorney General, now the Secretary, otherwise has statutory authority to provide employment authorization to noncitizens, including those who do not have a lawful immigration status, except where expressly proscribed in the INA.

[211] *See, e.g.,* INA sec. 237(d)(2), 8 U.S.C. 1227(d)(2) (law enacted in 2008 following INS policy of using deferred action and other measures to forbear removing individuals who demonstrate eligibility for T or U nonimmigrant status).

[212] *See Texas II* July 16, 2021 memorandum and order at 76–77 (granting summary judgment to plaintiff States and enjoining administration and implementation of DACA, but staying injunction with respect to DACA renewal requestors). *See also* Section III.B above.

[213] *Texas II* July 16, 2021 memorandum and order at 54–55.

[214] The *Texas II* court relied heavily on the opinion of the U.S. Fifth Circuit Court of Appeals decision in *Texas I,* which was based in part on that court's views that INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3), would not support DAPA and its attendant employment authorization. *See Texas*. v. *United States,* 809 F.3d 134, 179–86 (5th Cir. 2015), *aff'd by equally divided court, United States* v. *Texas,* 136 S. Ct. 2271 (2016) (*Texas I*). The Department has considered the Fifth Circuit's opinion, and for the reasons stated in this section, the Department respectfully disagrees with this single appellate court. In particular, the Fifth Circuit's view that INA sec. 274A(h)(3) was a miscellaneous definitional provision (*i.e.,* a provision that could not plausibly grant DHS the authority to grant work authorization) is contradicted by the statutory context recited above. That definition was added as part of the IRCA reforms (*i.e.,* reforms to make it unlawful to knowingly employ unauthorized aliens). In that context, the definition of ''unauthorized alien'' is an essential feature on which Congress acted with intentionality.

[215] *See, e.g.,* 8 CFR 274a.12(a)(11) (noncitizens provided DED pursuant to a presidential directive); 8 CFR 274a.12(c)(9) (certain pending applicants for adjustment of status); 8 CFR 274a.12(c)(1) (foreign national spouses or unmarried dependent children of foreign government officials present on A–1, A–2, G–1, G–3, or G–4 visas); 8 CFR 274a.12(c)(3)(i)(B) (nonimmigrant students present on an F–1 visa seeking Optional Practical Training); 8 CFR 274a.12(c)(10) (noncitizens provided suspension of deportation/Cancellation of Removal (including NACARA)); 8 CFR 274a.12(c)(11) (noncitizens paroled in the public interest); 8 CFR 274a.12(c)(16) (foreign nationals who have filed ''application[s] for creation of record'' of lawful admission for permanent residence); 8 CFR 274a.12(c)(21) (S nonimmigrants who assist law enforcement in prosecuting certain crimes); and 8 CFR 274a.12(c)(26) (certain H–4 nonimmigrant spouses of H–1B nonimmigrants). This is a nonexhaustive list only.

[216] *See* 46 FR 15079 (May 5, 1981) (final rule codifying categories of employment-authorized noncitizens in former 8 CFR part 109, later moved, as amended, to 8 CFR 274a.12).

[217] *Texas II* July 16, 2021 memorandum and order at 55 (emphasis in original).

[218] *See, e.g.,* 8 U.S.C. 1226(a)(3) (barring employment authorization for noncitizens released on bond or recognizance during removal proceedings); 8 U.S.C. 1231(a)(7) (barring employment authorization for noncitizens released on orders of supervision after final order of removal).

1103(a)(3), and INA sec. 274A(h)(3), 8 U.S.C 1324a(h)(3).

To be clear, however, under the proposed rule DACA recipients would not ''have the 'right''' to employment authorization.[219] While DACA recipients are eligible to request employment authorization, they never have been in the category of individuals who are automatically authorized to work ''incident to status,'' such as asylees, TPS beneficiaries, and other groups identified in 8 CFR 274a.12(a) whose employment authorization is a component of their immigration status. DACA recipients have no lawful immigration status and have always been within the categories of noncitizens who apply for a discretionary grant of employment authorization under 8 CFR 274a.12(c). The *Texas II* court also was influenced by the fact that DACA requestors thus far have been required to apply for employment authorization when they seek DACA.[220] However, the Department is proposing to change that practice in this rule by no longer making it compulsory for a DACA requestor to apply for employment authorization. Under the proposed rule, an application for employment authorization would be optional. A DACA recipient would need to apply for and be granted employment authorization in order to work lawfully.

Although DHS believes that the INA directly authorizes the Secretary to provide employment authorization to persons who receive deferred action under DACA, to the extent there is any ambiguity, humanitarian concerns, reliance interests, economic concerns, and other relevant policy concerns strongly weigh in favor of DHS continuing to make discretionary employment authorization available for individual DACA recipients who establish economic necessity. Existing DACA recipients have relied on deferred action and employment authorization for years, and planned their lives—and, in many cases, their families' lives—around them. Without work authorization, many DACA recipients would have no lawful way to support themselves and their families and contribute fully to society and the economy. At the same time, to make DACA recipients ineligible for work authorization would squander the important economic and social contributions that many DACA recipients are making as a result of their authorization to work (including by working in frontline jobs during the ongoing coronavirus emergency).[221] In addition, it would increase the likelihood that they no longer would be able to support their families, including U.S. citizen children, or perhaps that they might perceive no alternative but to work without authorization. This proposed rule therefore seeks to serve an assortment of important public policy goals by providing discretionary employment authorization to DACA recipients who demonstrate an economic necessity to work, and by allowing employers to lawfully hire DACA recipients. The ability to work lawfully provides numerous benefits to DACA recipients, their families, and their communities, and contributes to the collection of income tax and other payroll taxes at the Federal, State, and local levels, where applicable under law.[222]

E. Lawful Presence

Various Federal statutes draw distinctions between noncitizens who are ''lawfully present'' in the United States and those who are not. The INA does not contain a general definition of ''lawfully present'' or related statutory terms for purposes of Federal immigration law.[223] The statutory provisions that use ''lawfully present'' and related terms (*e.g.,* ''unlawfully present'') likewise leave those terms undefined, and they do not expressly address whether and in what sense individuals subject to a period of deferred action are to be considered ''lawfully present'' or ''unlawfully present'' in the United States during that period for purposes of various statutes.

Eligibility for certain Federal benefits depends in part on whether a noncitizen is ''lawfully present'' in the United States. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) [224] generally provides that noncitizens who are not ''qualified aliens'' are not eligible for ''federal public benefits.'' [225] However, PRWORA includes an exception to this ineligibility rule for retirement and disability benefits under title II of the Social Security Act for ''an alien who is lawfully present in the United States as determined by the Attorney General'' (now the Secretary).[226] The Balanced Budget Act of 1997 [227] amended PRWORA to add similar exceptions for Medicare and railroad retirement and disability benefits.[228]

PRWORA also limits the provision of ''state and local public benefits'' to noncitizens who are ''qualified'' noncitizens, nonimmigrants, or parolees, but it provides that States may affirmatively enact legislation making noncitizens ''who [are] not lawfully present in the United States'' eligible for such benefits.[229] Moreover, IIRIRA limits the availability of residency-based State post-secondary education benefits for individuals who are ''not lawfully present.'' [230]

In addition to making persons who are ''lawfully present'' potentially eligible for certain Federal public benefits for which they otherwise would be disqualified, and restricting eligibility for certain benefits under State law of persons who are ''not lawfully present,'' Congress has incorporated a formulation of the term ''lawful presence'' into the rules governing admissibility.[231] IIRIRA provides that a noncitizen who departs the United States after having been ''unlawfully present'' for specified periods is not eligible for admission for 3 or 10 years after the date of departure, depending on the duration of unlawful presence.[232] IIRIRA further provides that, with certain exceptions, an individual who has been ''unlawfully present'' for more than 1 year and who enters or attempts to re-enter the United States without being admitted is inadmissible.[233]

''For purposes of'' the 3-year and 10-year inadmissibility bars, IIRIRA provides that an individual is ''deemed to be unlawfully present'' if they are ''present in the United States after the expiration of the period of stay authorized by the Attorney General'' or are ''present in the United States without being admitted or paroled.'' [234] But apart from that provision, which is limited by its terms to that paragraph of the statute, Congress has not attempted to prescribe the circumstances in which persons are or should be deemed to be ''lawfully present'' or ''unlawfully

[219] *Texas II* July 16, 2021 memorandum and order at 38.

[220] *See id.* at 55–56.

[221] Svajlenka (2020).

[222] *See* Cong. Budget Office, ''Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security'' (Jan. 29, 2015) (estimating that blocking deferral of removal for certain noncitizens would cost the Federal Government $7.5 billion from 2015 to 2025), *https://www.cbo.gov/publication/49920;* Wong (2020).

[223] *See* 8 U.S.C. 1101.

[224] Public Law 104–193, 110 Stat. 2105.

[225] 8 U.S.C. 1611(a).

[226] 8 U.S.C. 1611(b)(2); *see also* 8 U.S.C. 1641(b) (defining ''qualified alien'').

[227] Public Law 105–33, 111 Stat. 251.

[228] 8 U.S.C. 1611(b)(3) and (4).

[229] 8 U.S.C. 1621(d).

[230] 8 U.S.C. 1623(a).

[231] *See generally* 8 U.S.C. 1182.

[232] 8 U.S.C. 1182(a)(9)(B)(i).

[233] 8 U.S.C. 1182(a)(9)(C).

[234] 8 U.S.C. 1182(a)(9)(B)(ii).

present.'' [235] Instead, Congress has left the definition of those terms under Federal laws to the executive branch. In some instances, it has done so explicitly, such as with respect to Social Security, Medicare, and railroad retirement benefits.[236] In others, it has done so implicitly, such as with respect to restrictions on State and local public benefits and residency-based State post-secondary education benefits, by using the terms without defining them or addressing their applicability to particular circumstances.[237]

The executive branch has not previously promulgated an overarching and unified definition of ''lawfully present'' and related terms for the various Federal laws that use those terms. On several occasions, however, the executive branch has addressed whether persons who are subject to a period of deferred action should be deemed to be ''lawfully present'' or ''unlawfully present'' not generally or in the abstract, but for the specific purposes of certain of those provisions. These phrases are terms of art, with specialized meanings for those purposes, as explained in more detail below.

Shortly after Congress enacted PRWORA in 1996, and prior to the enactment of IIRIRA and the Balanced Budget Act of 1997, the Attorney General exercised her express authority under 8 U.S.C. 1611(b)(2) to define ''lawfully present'' for purposes of eligibility for Social Security benefits. The Attorney General issued an interim regulation that defines the term to include, inter alia, ''[a]liens currently in deferred action status.'' [238] Following the Attorney General's administrative interpretation of the term ''lawfully present'' to include deferred action recipients for purposes of Social Security eligibility, Congress added the provisions in 8 U.S.C. 1611(b)(3) and (4) that permit the Attorney General to exercise the same authority with respect to eligibility for Medicare and railroad retirement benefits.

Subsequent administrative interpretations have taken a similar approach. The Government has interpreted ''lawfully present'' to include persons with a period of deferred action for purposes of other Federal programs.[239] In addition, the Government has interpreted the deeming provision in 8 U.S.C. 1182(a)(9)(B)(ii) to mean that persons should not be deemed ''unlawfully present'' during ''period[s] of stay authorized by the Attorney General,'' including periods of deferred action.[240]

Although the Federal Government has not adopted a comprehensive definition of ''lawfully present'' and related statutory terms, and although the implementation of those terms will depend on the specific statutory context in which they are used, the positions discussed above reflect certain more general views about the meaning of ''lawfully present.''

As a general matter, DHS understands the phrase ''lawfully present'' as a term of art—not in a broad sense, or to suggest that presence is in all respects ''lawful,'' but to encompass situations in which the executive branch tolerates an individual being present in the United States at a certain, limited time or for a particular, well-defined period. The term is reasonably understood to include someone who is (under the law as enacted by Congress) subject to removal, and whose immigration status affords no protection from removal (again, under the law as enacted by Congress), but whose temporary presence in the United States the Government has chosen to tolerate, including for reasons of resource allocation, administrability, humanitarian concern, agency convenience, and other factors.[241] In the case of persons with deferred action, because DHS has made a non-binding decision to forbear from taking enforcement action against them (for a limited period), those individuals' presence has been tolerated by the officials executing the immigration laws.

''Lawful presence'' is a ''distinct concept'' from the much broader concept of ''lawful status,'' which refers to an immigration status granted pursuant to a provision of the INA, such as lawful permanent residence, a nonimmigrant student status, or asylum.[242] Lawful status can be conferred only pursuant to statute because it provides a legally enforceable right to remain in the United States. Lawful presence, as understood and implemented by DHS, confers no such right. As noted by the court in *Texas II,* Congress has defined who is and is not entitled to lawful immigration status in the detailed provisions of the INA. DHS agrees that it is bound by those provisions and, except to the extent the INA itself includes a discretionary element in certain adjudications, does not have the ability to confer or deny lawful status beyond the terms laid out by Congress.[243] By contrast, according persons a period of deferred action and regarding them as ''lawfully present'' confers no substantive defense to removal or independent pathway to citizenship, and deferred action may be revoked at any time.

After careful consideration and with respect, DHS believes that the *Texas II* court erred in conflating the two concepts of ''lawful presence'' and ''lawful status.'' As the U.S. Court of Appeals for the Fifth Circuit put it, ''lawful status'' implies a ''right [to be in the United States] protected by law'' while lawful presence ''describes an exercise of discretion by a public official.'' [244] The statutory concept of lawful presence covers those individuals who may not have lawful status but whose presence the Federal Government has elected to tolerate. It is merely a recognition of the fact that DHS has decided to tolerate the presence of a noncitizen in the United States temporarily, under humanitarian or other particular circumstances, and that the individual is known to immigration officials and will not be removed for the time being.

The Napolitano Memorandum does not address lawful presence and does

[235] On this question DHS disagrees with the court in *Texas II,* which cited a number of statutory provisions in finding that ''the INA specifies several particular groups of aliens for whom lawful presence is available.'' *Texas II* July 16, 2021 memorandum and order at 53. However, these provisions confer lawful status, an entirely separate concept to lawful presence, and one that DHS agrees it does not have the authority to grant in this proposed rule.

[236] *See, e.g.,* 8 U.S.C. 1611(b)(2) through (4) (''lawfully present in the United States as determined by the Attorney General''); 42 U.S.C. 402(y) (same).

[237] *See, e.g.,* 8 U.S.C. 1621(d) and 1623(a).

[238] 61 FR 47039 (Sept. 6, 1996) (codified as transferred at 8 CFR 1.3(a)(4)(vi)); *see also* 76 FR 53778 (Aug. 29, 2011) (transferring the rule from 8 CFR 103.12 to 8 CFR 1.3).

[239] *See, e.g.,* 42 CFR 417.422(h) (eligibility for Medicare health maintenance organizations and competitive medical plans).

[240] *See* Memorandum to Field Leadership from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42 (May 6, 2009); Williams Memorandum; USCIS Adjudicator's Field Manual ch. 40.9.2(b)(3)(J).

[241] *See AADC,* 525 U.S. at 483–84.

[242] *Chaudhry* v. *Holder,* 705 F.3d 289, 292 (7th Cir. 2013); *see also* 8 CFR 245.1(d)(1) (defining ''lawful immigration status'' as any one of several types of immigration status granted pursuant to the INA). *See also Texas II* July 16, 2021 memorandum and order at 53.

[243] As noted above, however, the REAL ID Act of 2005 provides that deferred action serves as acceptable evidence of ''lawful status'' for purposes of eligibility for a REAL ID-compliant driver's license or identification card. *See* 49 U.S.C. 30301 note. In the regulations implementing the REAL ID Act, DHS clarified its view that this definition does not affect other definitions or requirements that may be contained in the INA or other laws. *See* 6 CFR 37.3.

[244] *See Dhuka* v. *Holder,* 716 F.3d 149, 156 (5th Cir. 2013).

not itself prescribe how DACA recipients are to be treated in the various arenas in which ''lawful presence'' is germane. However, DHS has treated persons who receive a period of deferred action under DACA like other deferred action recipients for these purposes. Thus, for example, DACA recipients are included in the Department's definition of ''lawfully present'' at 8 CFR 1.3(a)(4)(vi) for purposes of eligibility for Social Security benefits under 8 U.S.C. 1611(b)(2), and DHS has not regarded their time in deferred action as ''unlawful presence'' for purposes of inadmissibility determinations.[245]

As noted above, the executive branch has not previously proposed a singular definition of ''lawfully present'' that applies across the board to all statutes that include that and related terms. DHS recognizes that the statutory terms ''lawfully present'' and ''unlawfully present,'' and the distinction between ''lawful presence'' and ''lawful status,'' have caused significant confusion in debate about and litigation over the legality of the 2012 DACA policy and related DAPA policy. Questions have been raised about whether it is appropriate for persons with deferred action under DACA to be treated as ''lawfully present'' for purposes of statutes governing eligibility for Federal benefits.[246]

For the reasons discussed above, DHS believes that it is authorized to deem DACA recipients and other persons subject to deferred action to be ''lawfully present,'' as defined here, under these circumstances for the particular purposes in 8 U.S.C. 1611(b)(2) and 1182(a)(9). The proposed rule addresses two specific instances in which the term is used: eligibility for certain public benefits under 8 U.S.C. 1611(b)(2), and the accrual of ''unlawful presence'' for purposes of admissibility under 8 U.S.C. 1182(a)(9)(B). Section 1611(b)(2) expressly refers to the Secretary's determination of who is lawfully present for the specific purpose of that provision, and longstanding agency regulations and policies treat persons with deferred action as lawfully present for purposes of both provisions. In the intervening 25 years since the Attorney General issued her rule, Congress has not offered any indication to question or countermand that determination that the specified categories of noncitizens are eligible for Social Security benefits, and in fact, Congress only has enacted other similar provisions indicating that the Attorney General's determinations as to lawful presence for certain individuals make those individuals eligible for public benefits.[247]

The provisions of the proposed rule relating to lawful presence would not extend the benefits of lawful status to DACA recipients. From the beginning of the DACA policy (based on longstanding policies and regulations that far predate DACA), DHS has made clear that deferred action cannot and does not convey lawful status and, therefore, does not contradict the boundaries on lawful status that Congress has enacted via the INA. As then-Secretary Jeh Johnson said, ''[d]eferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.'' [248] Indeed, being treated as ''lawfully present'' or not ''unlawfully present'' for purposes of one or more of these statutes does not confer on noncitizens whose presence Congress has deemed unlawful the right to remain lawfully in the United States. They remain subject to removal proceedings at the Government's discretion, and they gain no defense to removal.

F. Fees

The INA authorizes DHS to establish and collect fees for adjudication and naturalization services to ''ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.'' [249] Through the collection of fees established under that authority, USCIS is funded primarily by immigration and naturalization fees charged to applicants, petitioners, and other requestors.[250] Fees collected from individuals and entities filing immigration requests are deposited into the Immigration Examinations Fee Account and used to fund the cost of providing immigration requests.[251] Consistent with that authority and USCIS' reliance on fees for its funding, and as discussed in greater detail below, this rule would amend DHS regulations to require a fee for Form I–821D, Consideration of Deferred Action for Childhood Arrivals.

G. Advance Parole

The INA authorizes the Attorney General, now the Secretary, ''in his discretion [to] parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien.'' [252] On a case-by-case basis, and under appropriate circumstances consistent with the statute, DHS exercises its discretion to authorize advance parole, so that a noncitizen may leave the United States and then be paroled back in. The access of DACA recipients to ''advance parole'' under 8 CFR 212.5(f) raises questions of both law and policy that were discussed by the *Texas II* district court in its July 16, 2021 memorandum and order. DHS emphasizes that the same statutory standard, ''for urgent humanitarian reasons or significant public benefit,'' applies to all noncitizens, including DACA recipients, and that this statutory standard does not depend on whether an individual is a DACA recipient. DHS reiterates that under the proposed rule, it would continue its adherence to that standard.

Likewise, the INA lays out a comprehensive scheme for eligibility for adjustment of status to that of a lawful permanent resident. There are several relevant statutory provisions and requirements, including those laid out

[245] *See Consideration of Deferred Action for Childhood Arrivals: Frequently Asked Questions,* Questions 1 and 5, *https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions* (hereinafter DACA FAQs).

[246] *Cf. Texas* v. *United States,* 809 F.3d 134, 184 (5th Cir. 2015) (*Texas I*) (holding that, for purposes of DAPA, ''the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits''), *aff'd by equally divided Court,* 136 S. Ct. 2271 (2016).

[247] *See* 8 U.S.C. 1611(b)(3) and (4).

[248] 2014 DAPA Memorandum.

[249] INA sec. 286(m), 8 U.S.C. 1356(m).

[250] *See* INA sec. 286(m) and (n), 8 U.S.C. 1356(m) and (n); 8 CFR 103.7(b)(1)(i) (Oct. 1, 2020) (current USCIS fees). On August 3, 2020, DHS published a final rule, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* (hereinafter 2020 Fee Schedule Final Rule), which was to be effective October 2, 2020. 85 FR 46788 (Aug. 3, 2020). The 2020 Fee Schedule Final Rule, among other things, established a new USCIS fee schedule and effectively transferred the USCIS fee schedule from 8 CFR 103.7(b) to the new 8 CFR part 106 at 8 CFR 106.2, Fees. However, before the 2020 Fee Schedule Final Rule took effect it was enjoined. *See Immigr. Legal Resource Ctr.* v. *Wolf,* 491 F. Supp. 3d 520 (N.D. Cal. Sept. 29, 2020); *Nw. Immigrant Rts. Proj.* v. *USCIS,* 496 F. Supp. 3d 21 (D.D.C. Oct. 8, 2020). At this time, DHS is complying with the terms of these orders and is not enforcing the regulatory changes set out in the 2020 Fee Schedule Final Rule, including the specific fees found in 8 CFR 106.2. 86 FR 7493 (Jan. 29, 2021). Nothing in this proposed rule proposes any change to that ongoing compliance.

[251] *See* 81 FR 73292, 73292 (Oct. 24, 2016).

[252] 8 U.S.C. 1182(d)(5)(A); *see also* 8 U.S.C. 1103(a), 8 CFR 212.5.

at 8 U.S.C. 1255(a), which requires, among other things, that applicants for adjustment of status be eligible for an immigrant visa and be admissible under 8 U.S.C. 1182,[253] and that applicants were ''inspected and admitted or paroled'' into the United States. The parole authority at 8 U.S.C. 1182(d)(5), when read together with the adjustment of status provisions at 8 U.S.C. 1255(a), creates a statutory pathway to adjustment of status for individuals who meet all the other adjustment criteria, including eligibility for an immigrant visa, but entered without inspection. Congress clearly intended that parole be available to a subset of noncitizens, and that such parole would affect eligibility for adjustment of status in these limited ways. These effects of parole are entirely separate from DACA, and do not depend on any executive actions not explicitly authorized by statute. So long as DHS acts within the limits on its parole authority in 8 U.S.C. 1182(d)(5), which as discussed above DHS believes the DACA-based advance parole guidance does, there is no conflict with Congress' expressed intent for eligibility for adjustment of status.

H. Further Analysis, Alternatives, and Call for Comments

As noted by the *Texas II* district court in its July 16, 2021 memorandum and order, the above features of the proposed rule—forbearance from enforcement action, employment authorization, and lawful presence—are amenable to further analysis. DHS takes seriously the district court's suggestion that it may enact a forbearance-only policy, and that features of the DACA policy may be modified through the rulemaking process. DHS anticipates that presenting the full DACA policy in the notice-and-comment process, and giving full consideration to public comments, will enable it to determine whether such an alternative (or other alternative policies) is warranted.

Further analysis of these features of the proposed rule, including an assessment of regulatory alternatives, also can be found in Section V. Specifically—

- Section V.A.4 contains estimates of wages earned and certain tax transfers by DACA recipients;
- Section V.A.4.d discusses the proposed rule's potential labor market impacts;
- Section V.A.4.f discusses a range of reliance interests and certain potential effects of the DACA policy identified by the *Texas II* district court (such as certain fiscal effects and effects on migration flows); and
- Section V.A.4.h discusses regulatory alternatives, including the alternatives of (1) implementing a policy of forbearance without employment authorization and lawful presence; and (2) implementing a policy of forbearance with employment authorization, but without lawful presence.

With respect to the alternatives relating to employment authorization and lawful presence in particular, DHS welcomes comments on whether there is any basis or reason for treating deferred action under DACA differently from other instances of deferred action in these respects, as well as any suggestions for alternatives. And with respect to lawful presence in particular, DHS invites comments on whether persons who receive deferred action pursuant to the proposed rule should be regarded as ''lawfully present'' or ''unlawfully present'' for purposes of eligibility for specified Federal public benefits under 8 U.S.C. 1611(b) and admissibility under 8 U.S.C. 1182(a)(9), respectively.

IV. Provisions of Proposed Rule

In this section, DHS describes the DACA policy contained in the proposed rule. DHS proposes to amend 8 CFR part 236 by adding new subpart C, Deferred Action for Childhood Arrivals. Proposed 8 CFR 236.21 through 236.23 establish the applicability, guidelines, and procedures for requests for DACA. Proposed 8 CFR 236.24 and 236.25 incorporate provisions on severability and no private rights. Nothing in this proposed rule diminishes DHS's authority to issue deferred action policies through subregulatory or other means, or otherwise exercise its authorities to administer and enforce the immigration laws of the United States.

DHS welcomes comments on all aspects of the proposed policy, including potential changes to maximize the rule's net benefits and provide necessary clarity to DHS officials and the public. For instance, DHS welcomes comment on whether specific provisions of the proposed rule should be changed; whether additional aspects of the existing DACA FAQs should be incorporated into the final rule; and whether any other aspect of the proposed rule could be improved materially.

A. Section 106.2—Fees

Under current practice, DACA requestors must file a Form I–765, Application for Employment Authorization, and the Form I–765WS, Employment Authorization Worksheet, with the filing of their Form I–821D, Consideration of Deferred Action for Childhood Arrivals. The current total fee for DACA requests is $495, which reflects the $410 fee for Form I–765 and the $85 biometrics services fee; the total fee is not waivable.[254] This proposed rule would modify existing practice for requesting DACA by making the request for employment authorization optional.[255] Although USCIS did not provide a policy rationale for its 2012 decision to require Form I–765 for all DACA requestors, DHS believes that, overall, this policy change will benefit DACA requestors. It recognizes that some DACA requestors may not need employment authorization or the accompanying EAD and should be given the option either to apply for DACA alone or to apply for both DACA and employment authorization. In addition, this change allows DACA requestors who so desire to learn first whether they are approved for DACA before they file the Form I–765 and pay the fee for employment authorization. While providing the choice to delay filing the Form I–765 means the EAD arrives later than the DACA approval notice, it potentially could provide some cost savings to those requestors who are found ineligible for DACA and previously would have been required to pay the filing fee for the Form I–765.

To cover some of the costs associated with reviewing DACA requests that USCIS will continue to incur in the absence of an I–765 filing, DHS proposes to charge a fee of $85 for Form I–821D and remove the discrete biometrics fee from the fees required to file Form I–765 under the (c)(33) eligibility category. This rule does not propose any changes to the fees for Form I–765; therefore, the DHS proposal of an $85 fee for the Form I–821D request for DACA means that the

[253] Parole also satisfies the admissibility requirement at 8 U.S.C. 1182(a)(6)(A)(i). Additionally, many of the inadmissibility provisions at 8 U.S.C. 1182 are waivable, including 8 U.S.C. 1182(a)(9)(B). *See* 8 U.S.C. 1182(a)(9)(B)(v).

[254] *See* USCIS, ''I–821D, Consideration of Deferred Action for Childhood Arrivals,'' *https://www.uscis.gov/i-821d*.

[255] *See* proposed 8 CFR 106.2(a)(38) and 236.23(a). This rule proposes to implement a fee for the Form I–821D, Consideration of Deferred Action for Childhood Arrivals. *See* proposed 8 CFR 106.2(a)(38). This proposed amendment will be made in a section of the regulation DHS is not currently implementing. As noted above, through this rulemaking process, DHS is proposing to codify a new fee where one did not exist before. *See* 8 CFR 106.2(a)(38). The fee for the Form I–821D is not germane to either lawsuit, it was not included in the enjoined 2020 Fee Schedule Final Rule, and the basis for the fee is explained in this proposed rule. If DHS ultimately codifies the new Form I–821D fee as part of this rulemaking, 8 CFR 106.2(a)(38) would provide the fee for the Form I–821D independent of other portions of 8 CFR part 106 that DHS is not enforcing at this time.

current total cost to DACA requestors who also file the optional Form I–765 remains at $495 ($85 for Form I–821D plus $410 for Form I–765) as of the time of this proposed rule.[256] Individuals who choose to request DACA by filing Form I–821D but do not file Form I–765 would pay $85, which is $410 less than under the current fee structure for DACA. Should the fee for Form I–765 for employment authorization change in a separate DHS fee rulemaking, then DACA requestors who choose to file that form would pay the same filing fee for the Form I–765 as all other applicants for employment authorization who are required to pay the fee. DHS proposes no changes to the existing DACA fee exemptions, which would continue to apply to both the proposed Form I–821D fee and the Form I–765 fee if the requestor also seeks employment authorization.[257]

Under this proposed model, a DACA requestor or recipient who believes they can demonstrate economic need on the Form I–765WS, Employment Authorization Worksheet, may apply to USCIS for employment authorization on the Form I–765, Application for Employment Authorization, with the required fee.[258] Under the current USCIS fee schedule, the fee for Form I–765 is $410. This rule proposes to modify the existing total fee for DACA with the following new fee structure:

- Required Form I–821D, Consideration of Deferred Action for Childhood Arrivals, $85 fee
- Optional Form I–765, Application for Employment Authorization, $410 fee (current fee as of date of publication)

Form	Required	Current Form Fee	Current Biometrics Fee	Proposed Form Fee in this Rule	Proposed Biometrics Fee	Fee Waiver Eligibility
I-821D	Yes	$0	$0	$85	$0	No
I-765	No	$410	$85	$410	$0	No

USCIS is funded primarily by immigration and naturalization benefit request fees charged to applicants and petitioners. DHS believes that the proposed I–821D fee of $85 balances the need to recover some of the costs of reviewing DACA requests filed without Form I–765, including the costs of biometric services, with the humanitarian needs of the DACA-eligible population. Many DACA recipients are young adults who are vulnerable because of their lack of immigration status and may have little to no means to pay the fee for the request for deferred action. DHS therefore proposes to hold the fee for Form I–821D, Consideration of Deferred Action for Childhood Arrivals, below the estimated full cost of adjudication. DHS estimates that the full cost of adjudicating Form I–821D, including the cost of providing biometric services and indirect activities that support adjudication, is approximately $332, based on initial budget and volume projections for FY 2022 and FY 2023.[259] [260] DHS proposes a fee of $85 for Form I–821D because it maintains the current total cost for DACA requestors who choose to file Form I–765, at its current fee level, to apply for employment authorization. Based on the estimated Form I–821D full cost of adjudication of approximately $332 and the proposed Form I–821D fee of $85, USCIS estimates that it would charge $247 ($332 minus $85) less than the full cost of adjudication for each Form I–821D filing. For budgetary purposes, at the time USCIS conducted its cost analysis for the proposed rule, the projected average number of Form I–821D filings was 379,500 for FY 2022 and FY 2023.[261] This implies that USCIS would charge, on average, approximately $93,736,500 [262] less than the estimated full cost of adjudication for Form I–821D annually in FY 2022 and FY 2023.

As the agency that administers this country's immigration system, USCIS has the expertise to assess on a case-by-case basis whether a DACA requestor has met the threshold criteria and warrants a favorable exercise of discretion in a uniform manner. Moreover, because USCIS operations are fee-funded, funds spent on DACA adjudications do not take any resources away from DHS's enforcement branches. Finally, DHS has an interest in encouraging eligible DACA requestors to come forward and apply for deferred action (aided by a low fee), because it allows DHS to proactively identify noncitizens who may be a low priority for removal should they be encountered by ICE or CBP in the field. For these reasons, DHS believes that USCIS' adjudication of DACA requests with the proposed $85 fee is reasonable.

We invite public comments on how DHS should structure fees for the required Form I–821D, Consideration of Deferred Action for Childhood Arrivals, and the optional Form I–765,

[256] The current fee for the Form I–765 is based upon the USCIS fee schedule that USCIS currently is following. 8 CFR 103.7(b)(1)(i)(II) (Oct. 1, 2020). Any future fees, including the fee for the Form I–821D or the Form I–765, may be affected by adjustments to the USCIS fee schedule.

[257] USCIS data suggest there is a negligible workload difference between adjudicating Form I–821D alone and the combined Forms I–821D/I–765 DACA adjudicative action. This is because the primary adjudicative decision is issued on Form I–821D. The adjudicative decision is conferred to the EAD, as the Form I–765 will be denied if the Form I–821D is denied, and approved if the Form I–821D is approved and the requestor demonstrates an economic need to work. Because current policy requires that these forms be filed together, the Form I–765 DACA action is adjudicated in tandem with Form I–821D. Workload data suggest that the difference equals the I–765 DACA decision and/or issuance of an EAD card upon benefit adjudication.

[258] *See* proposed 8 CFR 236.21(c)(2).

[259] Historically, USCIS excludes DACA volumes, costs, and revenues from its fee calculations. *See* 81 FR 73312. To estimate the projected full cost of adjudication for Form I–821D for the FY 2022/FY 2023 biennial period, USCIS included projected DACA volumes, costs, and revenues, as well as a completion rate activity-driver, in its activity-based costing model. At its January 2021 meetings, the USCIS Volume Projection Committee forecasted an average Form I–821D filing volume of 379,500 annually for FY 2022 and FY 2023. USCIS attributed the following activities to the adjudication of Form I–821D in its activity-based cost model: Intake; Inform the Public; Conduct TECS Check; Fraud Detection and Prevention; Perform Biometric Services; Make Determination; Management and Oversight; and Records Management. Based on the activity-based cost model, USCIS estimates that the full cost of adjudication for Form I–821D is approximately $332 for FY 2022 and FY 2023. Because the USCIS activity-based cost model relies on budget and volume projections, the estimated cost to adjudicate Form I–821D may change based on revisions to the budget or volume projections.

[260] OMB Circular A–25 defines ''full cost'' to mean the sum of direct and indirect costs that contribute to the output, including the costs of supporting services provided by other segments and entities. Available at *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf.*

[261] This projection is used for budgetary planning purposes and is determined by USCIS' Volume Projection Committee (VPC). The quantitative and qualitative methodologies used by the VPC differ from the methodologies used in projecting future application volumes as part of the RIA for this proposed rule, which makes different volume projections based on the methodologies described therein. As noted below, USCIS welcomes input on the methodologies employed to estimate the size and nature of the population likely to be affected by this rule.

[262] Calculation: (Estimated annual average I–821D filing volume of 379,500) * (Estimated gap between adjudication cost and fee of $247) = $93,736,500.

Application for Employment Authorization.

B. Section 236.21—Applicability

Paragraph (a) of proposed 8 CFR 236.21 makes clear that the proposed new subpart C would apply to requests for deferred action under the DACA policy only. Proposed subpart C would not apply to or govern any other request for or grant of deferred action or any other DHS deferred action policy. This provision is consistent with the exceptional circumstances giving rise to this rulemaking, as described above. This rulemaking is not intended to address issues that relate to deferred action more broadly and would not affect other deferred action policies and procedures.

Proposed paragraph (b) provides that the provisions that govern benefit requests within 8 CFR part 103 would not apply to requests for DACA except as specifically provided in this proposed rule. DHS proposes to include this provision because, as discussed, a request for deferred action is a temporary forbearance from removal and is not a ''benefit request'' as defined in 8 CFR 1.2. Benefit requests are subject to the provisions of 8 CFR part 103, which provides regulatory guidance on filings, evidence and processing, denials, appeals, precedent decisions, certifications, and motions to reopen and reconsider. Because deferred action is an exercise of prosecutorial discretion and not a benefit, these provisions do not apply to DACA requests.

Proposed paragraph (c) explains that the Secretary has broad authority to establish national immigration enforcement policies and priorities under 6 U.S.C. 202(5) and section 103 of the INA. Deferred action is a temporary, favorable exercise of immigration enforcement discretion that gives some cases lower priority for enforcement action in order to permit DHS to focus its limited enforcement resources on those cases that are higher priorities for removal.[263] As explained in the existing regulations, deferred action is ''an act of administrative convenience to the government which gives some cases lower priority.'' [264] In exercising its discretionary authority to forbear a noncitizen's removal, DHS is recognizing that the noncitizen is, for a temporary period, not an immigration enforcement priority. The temporary forbearance from removal does not confer any right or entitlement to remain in or re-enter the United States, nor does it prevent DHS or any other Federal agency from initiating any criminal or other enforcement action against the DACA requestor at any time if DHS determines in its sole and unreviewable discretion not to continue to exercise favorable enforcement discretion with respect to the individual.[265]

In the Napolitano Memorandum, the Secretary determined that certain children and young adults without lawful immigration status or parole who came to this country years ago as children were low-priority cases and warranted, for humanitarian and other reasons, a favorable exercise of enforcement discretion.[266] The memorandum explains that these vulnerable individuals ''know only this country as home'' and generally ''lacked the intent to violate the [immigration] law[s].'' [267]

During the period of forbearance from removal, a DACA recipient is considered ''lawfully present'' for purposes of 8 CFR 1.3(a)(4)(vi) and does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9). DACA recipients may apply for employment authorization based on economic necessity.[268] The provision of employment authorization and consideration of ''lawful presence'' for DACA recipients is pursuant to longstanding and independent DHS regulations and implementing guidance promulgated for all recipients of deferred action, as discussed elsewhere in this proposed rule.[269] Deferred action, however, is not a lawful immigration status and does not cure previous or subsequent periods of unlawful presence.

C. Section 236.22—Discretionary Determination

Section 236.22 contains the proposed provisions governing DHS's discretionary determination of requests for DACA. As explained, deferred action is a temporary, favorable exercise of immigration enforcement discretion that gives some cases lower priority for enforcement action. A pending request for deferred action does not authorize or confer any immigration benefits such as employment authorization or advance parole.[270] Deferred action requests submitted under this section would be determined on a case-by-case basis.[271]

The proposed rule lays out several threshold discretionary criteria that USCIS would assess on a case-by-case basis as part of a review of the totality of the circumstances. Even if all the threshold criteria are found to have been met, USCIS would examine the totality of the circumstances in the individual case to determine whether there are negative factors that make the grant of deferred action inappropriate or outweigh the positive factors presented by the threshold criteria or by any other evidence. Under the proposed rule, even if the adjudicator finds that an individual meets all the enumerated guidelines, the adjudicator has the discretion to deny deferred action after supervisory review and concurrence if, in the adjudicator's judgment, the case presents negative factors that make the grant of deferred action inappropriate or that outweigh the positive factors.

Although DHS could issue a policy from which individual adjudicators have no discretion to depart, and thus create something like a firm rule for adjudicators to apply,[272] DHS recognizes that (1) case-by-case assessment is a longstanding feature of deferred action policies; and (2) case-by-case assessments can yield important benefits in cases where the balance of the circumstances and relevant equities suggests a result that could not have been codified in an ex ante policy. Nonetheless, DHS recognizes that there could be costs associated with maintaining adjudicator discretion to deny a request notwithstanding

[263] Proposed 8 CFR 236.21(c)(1).

[264] 8 CFR 274a.12(c)(14).

[265] *See* Proposed 8 CFR 236.21(c)(1).

[266] *See* Napolitano Memorandum at 1.

[267] *Id.*

[268] *See* proposed 8 CFR 236.21(c) and 274a.12(c)(33).

[269] *See* 8 CFR 274a.12(c)(14); 8 CFR 1.3(a)(4)(vi).

[270] Proposed 8 CFR 236.22(a)(2).

[271] Proposed 8 CFR 236.22(c).

[272] *See, e.g., Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (observing that, '' 'even if a statutory scheme requires individualized determinations,' . . . 'the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority' '' and that such categorical applications or rules help to order the exercise of discretion, avoiding ''favoritism, disunity, and inconsistency'' (quoting *Am. Hosp. Ass'n* v. *NLRB,* 499 U.S. 606, 612 (1991))); *Fook Hong Mak* v. *INS,* 435 F.2d 728, 730 (2d Cir. 1970) (holding that there is no legal principle ''forbidding an [agency], vested with discretionary power, to determine,'' in a manner consistent with the APA, ''that he will or will not use it in favor of a particular class on a case-by-case basis'' and that the agency ''could select one characteristic as entitling a group to favorable treatment despite minor variables''); *see also Reno* v. *Flores,* 507 U.S. 292, 313 (1993) (observing that although the Attorney General's discretion in making immigration custody determinations required ''some level of individualized determination,'' the INS need not ''forswear use of reasonable presumptions and generic rules''); *id.* at 313–14 (''In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation,'' which established a ''blanket'' presumption against release to custodians other than parents, close relatives, and guardians, and ''[t]he particularization and individuation need go no further . . . .'').

satisfaction of the eligibility guidelines in the proposed rule. DHS believes that its proposed approach maintains the right mix of guidelines and discretion, but it welcomes comments on that approach.[273]

In this section of the proposed rule, as well as in 8 CFR 236.23 (which is discussed below), DHS has chosen generally to adhere to the threshold criteria for eligibility for DACA from the Napolitano Memorandum and as applied by DHS since 2012. DHS proposes to retain the threshold criteria of the DACA policy in part for reasons previously discussed and in part due to recognition of the significant reliance interests of individuals who have previously received DACA grants, as well as those similarly situated who have not yet requested DACA. This focus on reliance interests and preservation of the primary features of the policy is consistent with the President's direction to preserve and fortify DACA, as well as the Supreme Court's decision in *Regents,* as described above. This approach also is informed by DHS's assessment that the policy contained in the Napolitano Memorandum successfully advances DHS's important enforcement mission and reflects the practical realities of a defined class of undocumented noncitizens who are for strong policy reasons unlikely to be removed in the near future and who contribute meaningfully to their families, their communities, their employers, and the United States generally, as discussed elsewhere in this proposed rule. Moreover, the establishment and continued application of threshold discretionary criteria, while allowing for the residual exercise of discretion to account for other relevant considerations, serves to promote consistency and avoid arbitrariness in these determinations.

DHS believes that the proposed rule is drafted at an appropriate level of specificity, but it anticipates the need for further guidance, along the lines of the current DACA FAQs, to interpret the regulations and guide adjudicators in the exercise of their duties. DHS welcomes comment on whether other aspects of the DACA FAQs should be codified in the final rule.

1. Threshold Criteria and Burden of Proof

As proposed in this rule, and subject to the discretionary considerations described below, USCIS would consider requests for DACA from individuals who meet the following threshold criteria:

- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since June 15, 2007, to the time of filing of the request;
- Were physically present in the United States on June 15, 2012, and at the time of making their request for consideration of deferred action with USCIS;
- Had no lawful immigration status on June 15, 2012, as well as at the time of filing of the request for DACA;
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony, a misdemeanor described in the rule, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety; and
- Were born on or after June 16, 1981, and are at least 15 years of age at the time of filing their request, unless, at the time of filing their request, they are in removal proceedings, have a final order of removal, or have a voluntary departure order.

The burden would be on the DACA requestor to demonstrate that they meet the threshold criteria by a preponderance of the evidence.[274] Under the preponderance of the evidence standard, the sufficiency of each piece of evidence would be examined for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.[275]

Consistent with current practice, DHS would accept either primary or secondary evidence to determine whether the DACA requestor meets the threshold criteria. As used in the proposed rule, primary evidence would mean documentation, such as a birth certificate, that, on its face, proves a fact. Secondary evidence would mean other documentation that is more circumstantial and could lead the reviewer to conclude that it is more likely than not that the fact sought to be proven is true. Examples of secondary evidence include baptismal records issued by a church showing that the DACA requestor was born at a certain time or rental agreements in the name of the DACA requestor's parents to demonstrate periods of residence in the United States. Secondary evidence may require corroboration with other evidence submitted by the requestor.

DHS would evaluate the totality of all the evidence to determine if the other threshold criteria have been met. Consistent with practice under the Napolitano Memorandum, affidavits submitted in lieu of primary or secondary evidence would generally not be sufficient on their own to demonstrate that a requestor meets the DACA threshold criteria, except in certain circumstances as discussed in this proposed rule.

2. Arrival in the United States Under the Age of 16

Under proposed 8 CFR 236.22(b)(1), a noncitizen requesting DACA would be required to demonstrate that they arrived in the United States when they were under 16 years of age. This is a codification of the requirement in the Napolitano Memorandum that the noncitizen ''came to the United States under the age of sixteen.'' [276] 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.

3. Continuous Residence in the United States From June 15, 2007

A DACA requestor would be required to demonstrate that they have continuously resided in the United States since at least June 15, 2007.[277] This criterion is taken directly from the Napolitano Memorandum, such that the population of potentially eligible

[273] DHS notes that, historically, DACA requests have been approved at a relatively high rate. *See* USCIS, DACA Quarterly Report (FY 2021, Q1). DHS believes this is likely because DACA requestors generally have self-selected based on their belief that they qualify based on the Napolitano Memorandum criteria and public-facing guidance. *See Texas* v. *United States,* 809 F.3d 134, 174 (5th Cir. 2015) (*Texas I*). Accurate self-selection has advantages for requestors, who may wish to pay a fee only if they are relatively certain that they will obtain deferred action, and DHS believes it likely that a similar approval rate would continue under the proposed rule, although it is possible that the rate will decline if more noncitizens with borderline cases choose to apply for DACA once Form I–765 (and accompanying filing fee) is not also required. In either case, DHS does not believe that a relatively high approval rate raises legal or policy concerns, because the proposed rule would continue to provide clear guidance to potential requestors while maintaining DHS's ability to deny those requests that do not meet the enumerated criteria or that otherwise do not merit a favorable exercise of prosecutorial discretion.

[274] *See* proposed 8 CFR 236.22(a)(3).

[275] *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010).

[276] Napolitano Memorandum at 1.

[277] Proposed 8 CFR 236.22(b)(2).

noncitizens would remain substantially the same under the proposed rule. Applying this same continuous residence criterion in the codified DACA policy is in line with DHS's longstanding message that DACA is not available to individuals who have not continuously resided in the United States since at least June 15, 2007. Border security is a high priority for the Department, and we do not believe that codifying the DACA policy, with the continuous residence requirement included, would undermine DHS's enforcement messaging.

To provide further clarity on the meaning of this requirement, DHS proposes to define ''residence'' for the purpose of 8 CFR 236.22(b)(2) to mean ''the principal, actual dwelling place in fact, without regard to intent,'' which aligns with the INA definition of ''residence'' at section 101(a)(33), 8 U.S.C. 1101(a)(33). The proposed regulatory text also explains that the term ''residence'' is ''specifically [the] country of actual dwelling place.'' [278]

As has been longstanding DHS policy generally, any brief, casual, and innocent absences from the United States prior to August 15, 2012, would not result in a break of continuous residence for the purpose of this requirement.[279] Any travel outside of the United States on or after August 15, 2012, without prior DHS authorization, such as advance parole, would be considered an interruption in continuous residence.[280] Section 236.22 delineates the circumstances under which absences prior to August 15, 2012, would be considered brief, casual, and innocent. An absence would be considered brief, casual, and innocent if:

- The absence was short and reasonably calculated to accomplish the purpose for the absence;
- the absence was not because of a post-June 15, 2007 order of exclusion, deportation, or removal;
- the absence was not because of a post-June 15, 2007 order of voluntary departure, or an administrative grant of voluntary departure before the requestor was placed in exclusion, deportation, or removal proceedings; and
- the purpose of the trip, and the requestor's actions while outside the United States, were not contrary to law.[281]

This definition of continuous residence is rooted in case law and has been codified in other contexts, such as TPS and the Legal Immigration Family Equity Act legalization provisions.[282] As discussed, affidavits in lieu of primary or secondary evidence would generally not be sufficient on their own to demonstrate that a requestor meets the DACA threshold criteria. However, affidavits may be used to support evidence that the requestor meets the continuous residence requirement if there is a gap in documentation for the requisite periods and primary and secondary evidence is not available. DHS requests comments on whether affidavits should be considered acceptable evidence of the start of the continuous residence period for new initial requestors for DACA who may have been very young at the time of entry to the United States and may have difficulty obtaining primary or secondary evidence to establish this threshold requirement.

4. Physical Presence in the United States

For the same reasons described in the section on continuous presence immediately above, this proposed rule would codify the requirement from the Napolitano Memorandum and longstanding DACA policy that the requestor must demonstrate that they were physically present in the United States on June 15, 2012, which is the date of the issuance of the Napolitano Memorandum, as well as on the date of filing the DACA request.[283] As with the other guidelines, DHS would generally not accept affidavits alone as proof of satisfying the physical presence requirement.

5. Lack of Lawful Immigration Status

As discussed above, the proposed rule is intended to codify the DACA policy without significantly changing the potentially eligible population. It is longstanding DHS policy that to be considered for DACA, the requestor must demonstrate that they were not in a lawful immigration status on June 15, 2012.[284] This explicit guideline was not in the Napolitano Memorandum issued on June 15, 2012, but it is implicit in the memorandum's reference to children and young adults who are subject to removal because they lack lawful immigration status. This requirement is consistent with the underlying purpose of the policy, inasmuch as it limits the availability of the program to those individuals who were subject to removal at the time the memorandum was issued. Individuals also must be without lawful immigration status at the time of the request for DACA in order to be eligible for deferred action from removal.

DHS is proposing to codify this guideline by requiring that the requestor must not have been in a lawful immigration status on June 15, 2012, as well as at the time of filing of the request for deferred action under this section. If the requestor was in lawful immigration status at any time before June 15, 2012, or at any time after June 15, 2012, and before the date of the request, they would be required to submit evidence that that lawful status had expired prior to those dates.[285] For purposes of this proposed rule, the requirement regarding lack of lawful immigration status would mean either that the requestor never had a lawful immigration status, or that any lawful immigration status that they obtained prior to June 15, 2012, had expired before June 15, 2012, and likewise any lawful immigration status acquired after June 15, 2012, must have expired before the date of filing the request for DACA. If the requestor was admitted for duration of status, USCIS would not consider the requestor to be a person who is not in lawful immigration status for purposes of eligibility for DACA, unless the Department of Justice, Executive Office for Immigration Review (EOIR), terminated their status by issuing a final order of removal against them or their status is listed as ''terminated'' in the Student and Exchange Visitor Information System on or before June 15, 2012. Requestors who were admitted for duration of status as dependent nonimmigrants who aged out of their nonimmigrant status on or before June 15, 2012, could be considered for deferred action under the proposed rule.

6. Education

In accordance with longstanding DHS policy and the Napolitano Memorandum, DHS is proposing to codify the guideline that a DACA requestor must be currently enrolled in school, have graduated or received a certificate of completion from high school, have obtained a GED, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.[286] This guideline is reflective of DHS's recognition of the importance of education and military service, as well as of the significant contributions to this country of noncitizen youth who have been educated in and/or served in the Coast

[278] *See* proposed 8 CFR 236.22(b)(2).

[279] *See* DACA FAQs.

[280] Proposed 8 CFR 236.22(b)(2).

[281] Proposed 8 CFR 236.22(b)(2)(i) through (iv).

[282] *See* 8 CFR 244.9(a)(2) and 245a.16(b).

[283] Proposed 8 CFR 236.22(b)(3).

[284] DACA FAQs.

[285] Proposed 8 CFR 236.22(b)(4).

[286] Proposed 8 CFR 236.22(b)(5).

Guard or Armed Forces of the United States.

To be considered currently enrolled in school, under longstanding DHS policy, as of the date of the request, the DACA requestor must be enrolled in:

- A public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program that meets State requirements;
- an education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in postsecondary education, job training, or employment and where the requestor is working toward such placement; or
- an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under State law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other State-authorized exam (*e.g.,* HiSet or TASC) in the United States.[287]

Such education, literacy, or career training programs (including vocational training), or education programs assisting students in obtaining a regular high school diploma or its recognized equivalent under State law, or in passing a GED exam or other State-authorized exam in the United States, include programs funded, in whole or in part, by Federal, State, county, or municipal grants, or administered by non-profit organizations. Under longstanding policy, which DHS currently intends to maintain (but could revise to the extent consistent with law at a future date), programs funded by other sources would qualify if they are programs of demonstrated effectiveness.[288] DHS does not consider enrollment in a personal enrichment class (such as arts and crafts) or a recreational class (such as canoeing) to be an alternative educational program. Therefore, enrollment in such a program would not be considered to meet the ''currently enrolled in school'' guideline for purposes of this proposed rule.

As noted above, DHS proposes to codify the longstanding policy that a DACA requestor also can meet the educational guideline if they have graduated from high school or received a GED.[289] To meet this component of the educational guideline, consistent with longstanding policy, the DACA requestor would need to show that they have graduated or obtained a certificate of completion from a U.S. high school or have received a recognized equivalent of a high school diploma under State law; have passed a GED test or other equivalent State-authorized exam in the United States; or have graduated from a public or private college, university, or community college.[290]

As proposed, and consistent with longstanding policy, in lieu of being currently enrolled in school, having graduated from high school, or having received a GED, a DACA requestor may be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.[291] This may include reservists who were honorably discharged. Current or ongoing service in the Coast Guard or Armed Forces of the United States would not qualify under this component of the guideline.

7. Criminal History/Public Safety

Under the proposed rule, and consistent with longstanding policy, in order to be eligible for DACA, the requestor must not have been convicted of a felony, a misdemeanor described in § 236.22(b)(6) of the proposed rule,[292] or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety.[293] DHS currently uses the following definitions for each type of offense, and it would continue to rely on such definitions under the proposed rule as they have been effective at ensuring that those individuals who are a high priority for removal are not eligible for DACA while allowing for an individualized, case-by-case determination about whether to grant deferred action to each requestor:

- A ''felony'' is a Federal, State, or local criminal offense punishable by imprisonment for a term exceeding 1 year;
- a ''misdemeanor'' is a Federal, State, or local criminal offense for which the maximum term of imprisonment authorized is 1 year or less but greater than 5 days; and
- a misdemeanor described in § 236.22(b)(6) of this proposed rule refers to a misdemeanor that is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence; or is one for which the individual was sentenced to time to be served in custody of more than 90 days.

The time to be served in custody does not include any time served beyond the sentence for the criminal offense based on a State or local law enforcement agency honoring a detainer issued by ICE. Immigration-related offenses characterized as felonies or misdemeanors under State laws would not be treated as disqualifying crimes for the purpose of considering a request for consideration of deferred action pursuant to this process. Other offenses, such as foreign convictions and minor traffic offenses, would generally not be treated as a felony or misdemeanor, but they may be considered under a review of the totality of the circumstances. Under current policy, cases involving foreign convictions should be elevated for supervisory review. DHS does not currently anticipate changing this practice. DHS welcomes comments on whether a more detailed definition of these offenses, including ''minor traffic offenses,'' should be added to the rule (and if so, how the offenses should be defined) or whether the matter remains appropriate for subregulatory guidance.

If the evidence establishes that an individual has been convicted of a felony, a misdemeanor described in § 236.22(b)(6) of the proposed rule, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, USCIS would deny the request for deferred action. As discussed throughout this rule, the decision whether to defer action in a particular case is an individualized one, and thus would take into account the totality of the circumstances, including the nature and severity of the underlying criminal, national security, or public safety concerns. USCIS would retain the discretion to determine that an individual does not warrant deferred action on the basis of, for instance, a single criminal offense for which the individual was sentenced to time in custody of 90 days or less, or an arrest for an extremely serious crime where criminal proceedings are ongoing. Additionally, to the extent that the DACA guidelines may not align with other current or future DHS enforcement

[287] DACA FAQs.

[288] *Id.*

[289] Proposed 8 CFR 236.22(b)(5).

[290] USCIS considers graduation from a public or private college, university, or community college as sufficient proof of meeting the educational guideline because a college or university generally would require a high school diploma, GED certificate, or equivalent for enrollment.

[291] Proposed 8 CFR 236.22(b)(5).

[292] Under the Napolitano Memorandum, this concept is described as a ''significant misdemeanor.'' Because some stakeholders have expressed confusion regarding this term, DHS proposes to revise this terminology as part of the rulemaking. The substantive policy would remain the same.

[293] Proposed 8 CFR 236.22(b)(6); DACA FAQs.

discretion guidance, USCIS may consider that guidance when determining whether to deny or terminate DACA even where the DACA guidelines are met. Therefore, the absence or presence of a criminal history would not necessarily be determinative, but it would be a factor to be considered.

8. Age at Time of Request

To simplify the guideline from the Napolitano Memorandum and longstanding DHS policy that the requestor must have been under the age of 31 on June 15, 2012, DHS is clarifying that the requestor must have been born on or after June 16, 1981.[294] DHS also proposes to incorporate the longstanding guideline that a DACA requestor must be over the age of 15 at the time of filing the request, unless they are in removal proceedings, have a final removal order, or have a voluntary departure order.[295] As noted above, these proposed provisions are in line with the Department's goal of preserving and fortifying the DACA policy as it currently exists.

D. Section 236.23—Procedures for Request, Terminations, and Restrictions on Information Use

1. USCIS Jurisdiction

Consistent with longstanding policy, proposed § 236.23 would provide that USCIS has exclusive jurisdiction over requests for DACA for non-detained individuals.[296] Individuals who are in immigration detention may request DACA but may not be approved for DACA unless they are released from detention by ICE prior to USCIS' decision on the DACA request.[297] A noncitizen in removal proceedings would be allowed to apply for deferred action regardless of whether those proceedings have been administratively closed. And a voluntary departure order or a final order of exclusion, deportation, or removal would not bar a noncitizen from requesting DACA under this subpart.[298]

USCIS would notify the requestor, and if applicable, the requestor's attorney of record or accredited representative, of the decision to approve or deny the request for DACA in writing.[299] Continuing with current practice, this rule proposes that a grant of DACA generally will be provided for an initial period of 2 years.[300] Consistent with longstanding policy and given the nature of deferred action as an exercise of prosecutorial discretion and not a benefit, USCIS is not proposing any new requirements to issue a request for evidence or a notice of intent to deny if the requestor does not meet the eligibility guidelines or if USCIS denies the request as a matter of discretion.[301] Nor would USCIS be required to indicate the reasons for the denial, provide for the right to file an administrative appeal, or allow for the filing of a motion to reopen or motion to reconsider.[302] USCIS would be permitted to reopen or reconsider either an approval or a denial of such a request on its own initiative, however, and in addition a denied requestor would be allowed to submit another DACA request on the required form and with the requisite fees or apply for any form of relief or protection under the immigration laws.[303]

2. Issuance of a Notice To Appear or Referral to ICE

USCIS' policy for issuance of an NTA or RTI for denied DACA requests has remained unchanged since the inception of DACA in 2012, and DHS proposes to retain the essential elements of that policy in this rule.[304] USCIS would not issue an NTA or RTI for possible enforcement action against a DACA requestor as part of a denial unless the requestor meets DHS's criteria for enforcement action as proposed in this rule.[305] Current DHS policy for DACA as described under the DACA FAQs provides that if a requestor's case is denied, they will not be referred to ICE for purposes of removal proceedings unless their case involves a criminal offense, fraud, a threat to national security or public safety, or where DHS determines there are exceptional circumstances.[306] In this proposed rule, DHS intends to provide additional clarity for when an individual whose case has been denied would be referred to ICE or issued an NTA and has identified based on current practice the three general categories of cases that are prioritized as subject to immigration enforcement. Pursuant to these guidelines, USCIS would issue an NTA or RTI for possible enforcement action against a DACA requestor under this proposed rule if the case involves a denial for fraud, a threat to national security, or public safety concerns.[307] This approach to enforcement is consistent with interim DHS guidelines to ''implement civil immigration enforcement based on sensible priorities,'' which include ''protecting national security, border security, and public safety.'' [308] The appropriate charges on the Form I–862, Notice to Appear, will be determined on a case-by-case basis, and DHS may charge an individual who falls under any of these immigration enforcement priorities with grounds for removal that are unrelated to the underlying fraud, criminality, national security, or public safety factors.

3. Termination of Deferred Action

The decision on whether to grant a request for DACA is determined on a case-by-case basis as an exercise of the agency's prosecutorial discretion. Accordingly, DHS maintains its position that USCIS also may terminate a grant of DACA at any time if it determines that the recipient did not meet the threshold criteria; there are criminal, national security, or public safety issues; or there are other adverse factors resulting in a determination that continuing to exercise prosecutorial discretion is no longer warranted. Despite its broad prosecutorial discretion to terminate DACA, USCIS generally has provided a NOIT with an opportunity for the DACA recipient to respond before USCIS makes its final decision on termination. However, subject to the Federal district court's 2018 nationwide preliminary injunction in *Inland Empire,*[309] USCIS does exercise its discretion to terminate DACA immediately upon issuance of a Termination Notice in cases involving certain criminal, national security, or public safety concerns. For example, USCIS may issue a Termination Notice where there is a criminal charge based on an EPS offense described in the USCIS 2011 NTA policy memorandum.[310] In addition and except

[294] Proposed 8 CFR 236.22(b)(7).

[295] Proposed 8 CFR 236.22(b)(7).

[296] Proposed 8 CFR 236.23(a)(2).

[297] *Id.; see also* ICE, ''Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Lawful Permanent Residents (DAPA),'' *https://www.ice.gov/daca.*

[298] Proposed 8 CFR 236.23(a)(2).

[299] Proposed 8 CFR 236.23(c).

[300] Proposed 8 CFR 236.23(a)(4).

[301] *See* Proposed 8 CFR 236.23(a)(3).

[302] *See* Proposed 8 CFR 236.21(b).

[303] *See* Proposed 8 CFR 236.22(d) and 236.23(c).

[304] *See* DACA FAQs.

[305] *See* Proposed 8 CFR 236.23(c)(2).

[306] *See* DACA FAQs.

[307] Proposed 8 CFR 236.23(c)(2).

[308] *See* Pekoske Memorandum. Previous guidelines pertaining to enforcement and removal policies similarly have identified ''national security, public security, and border security'' as the Department's top priorities. *See* Memorandum from Secretary Jeh Charles Johnson to Acting Director of ICE, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).

[309] For a full description of the *Inland Empire* litigation, including the preliminary injunction, *see* discussion of litigation history at Section III.B of this preamble.

[310] Available at *https://www.uscis.gov/sites/default/files/document/memos/*

Continued

with regard to class members in *Inland Empire,* DACA terminates automatically upon the issuance of an NTA in immigration court to a DACA recipient, although USCIS sends the individual a notice of action (NOA) informing the recipient that automatic termination has occurred as of the date of the NTA issuance. DACA also automatically terminates and an NOA is issued when the recipient departs the United States without having obtained an advance parole document from USCIS.[311]

Although the *Inland Empire* injunction currently prohibits USCIS from terminating a class member's DACA without issuance of a NOIT, a reasoned explanation, or an opportunity to respond prior to termination, or terminating DACA at all based on an NTA that charges the individual solely as being present without inspection and admission or being an overstay, it is significant that the court granted the parties' agreement to carve out from class membership individuals who: (1) Have a criminal conviction that is disqualifying for DACA; (2) have a charge for a crime that falls within the EPS grounds referenced in the USCIS 2011 NTA policy memorandum; [312] (3) have a pending charge for certain terrorism and security crimes described in 8 U.S.C. 1182(a)(3)(B)(iii) and (iv) or 8 U.S.C. 1227(a)(4)(A)(i); (4) departed the United States without advance parole; (5) were physically removed from the United States pursuant to an order of removal, voluntary departure order, or voluntary return agreement; or (6) maintain a nonimmigrant or immigrant status. In excluding these individuals from the *Inland Empire* class, the court effectively recognized USCIS' prosecutorial discretion to terminate DACA, with or without notice, including the automatic termination of DACA when an NTA is issued to a non-class member or when any DACA recipient departs the United States without advance parole.

Although DHS disagrees with the *Inland Empire* court's preliminary injunction and DHS's appeal of the order remains pending, DHS will continue to comply fully with the court's order, as it has for more than 3 years, unless and until that order is no longer in effect. Subject to such continued compliance if necessary when this rule becomes final, DHS currently proposes to codify USCIS' prosecutorial discretion to terminate a grant of DACA at any time, with or without the issuance of a NOIT.[313] This provision would allow for terminations under this paragraph in circumstances where the DACA recipient does not meet the threshold criteria proposed in this rule, the recipient committed disqualifying criminal offenses or presents national security or public safety concerns, or other adverse factors result in a determination that continuing to exercise prosecutorial discretion is no longer warranted. Although the provision permits the termination of DACA without a NOIT, USCIS intends to maintain its longstanding practice of generally providing a NOIT where appropriate.

Non-automatic terminations of a grant of DACA, regardless of whether a NOIT is issued, would be made on a case-by-case basis pursuant to an assessment of the totality of the circumstances, including any documentary evidence. The proposed rule also would codify two bases for automatic termination: (1) Filing of an NTA for removal proceedings with EOIR, unless the NTA is issued by USCIS solely as part of an asylum referral to EOIR; or (2) departure of the DACA recipient from the United States without an advance parole document.[314] Although the proposed grounds for automatic termination are consistent with longstanding policy, DHS is proposing to modify when termination will occur based upon an NTA by shifting from the current policy of termination at the time of issuance of an NTA to termination at the time the NTA is filed with EOIR, marking the commencement of proceedings before an immigration judge.[315] DHS proposes this change to avoid termination in instances where NTAs are issued but later canceled prior to filing with EOIR. In addition, DHS is proposing to create a new exception to termination based upon an NTA where USCIS files an NTA with EOIR solely as part of an asylum referral. This exception would preserve DACA for those whose asylum cases are referred to the immigration court by the USCIS Asylum Division. Without such an exception, a DACA recipient either must lose DACA with the filing of the NTA referring the case to the immigration court, or keep DACA but forgo the opportunity to continue seeking asylum as a principal applicant or as a dependent on a parent or spouse's claim in immigration court (as allowed by existing DHS and DOJ regulations).[316] DHS has determined that, in the balancing of the equities and for humanitarian reasons, DACA will not terminate automatically for reasons based solely on the filing of an NTA for purposes of referring an asylum case to EOIR. However, DHS continues to reserve its prosecutorial discretion to terminate the individual's DACA, as appropriate, for other reasons permitted by the rule.

Under proposed 8 CFR 236.23(d)(3), termination of a grant of DACA also would result in the automatic termination of any employment authorization granted under proposed 8 CFR 274a.12(c)(33) and any related employment authorization documentation as of the date DACA is terminated, as it would not be reasonable for employment authorization based on a grant of DACA to continue where the DACA has been affirmatively terminated by DHS. The individual retains the ability to seek employment authorization under any other ground applicable to the individual's particular circumstances in 8 CFR 274a.12.

DHS also is considering other alternatives for this termination of DACA section of the proposed rule, on which DHS welcomes comment. One alternative would be to modify the provision regarding automatic termination of DACA solely based on the filing of an NTA so that such termination would be applicable only to certain categories of DACA recipients, such as individuals who are subject to an investigation regarding, have been arrested for, or have a conviction for an EPS offense, and certain individuals who fall within the terrorism or national security related provisions of the INA grounds for inadmissibility or deportability. A second alternative would be to strike the provision regarding automatic termination of DACA solely based on the filing of an NTA or to modify it to make termination automatic at a later point in the process for some or all DACA recipients (*e.g.,* upon issuance of an administratively final order of removal).

A third alternative, which could be implemented separately or in conjunction with the first or second, would be to specify the instances in which USCIS generally will issue a NOIT, with opportunity for the DACA recipient to respond before USCIS makes its final decision on DACA

NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf. As discussed in the litigation history section of this rule and below, individuals with pending EPS charges are not class members covered by the *Inland Empire* preliminary injunction.

[311] Unlike cases where USCIS makes an affirmative decision to terminate DACA, these two instances of automatic DACA termination currently occur upon issuance of the NTA or departure without advance parole and do not require any USCIS decision to terminate.

[312] *See supra* note 128.

[313] Proposed 8 CFR 236.23(d).

[314] Proposed 8 CFR 236.23(d)(2).

[315] *See* 8 CFR 1003.14(a).

[316] *See* 8 CFR 208.14(c); 8 CFR 1208.14(c).

termination. Under this alternative, USCIS would continue to retain the discretionary authority to terminate DACA without a NOIT in cases involving criminal offenses or concerns regarding national security or public safety. Depending upon whether other alternative proposals described here are adopted, this alternative also could allow for automatic DACA termination where the recipient leaves the United States without advance parole or an NTA is filed in a case, generally or only in cases involving certain EPS, national security, or other public safety concerns.

Finally, DHS is considering an alternative related to automatic termination upon the DACA recipient's departure from the United States without an advance parole document. DHS is considering an alternative under which departure from the United States in certain exigent circumstances and without an advance parole document would not automatically result in termination, such as where the DACA recipient left the country temporarily in an emergency and did not have sufficient time to obtain an advance parole document.

In short, although termination on the provided grounds, including automatic termination, is a longstanding feature of DACA and serves important policy interests, DHS recognizes that there may be potentially beneficial alternatives in this area. DHS welcomes comment on each of the above alternatives, and other alternatives that would address the same issues.

4. Information Use

In order to mitigate a potential disincentive for noncitizens with no current lawful immigration status to file a request for DACA and make their presence known to the Government, DHS implemented an information use policy for DACA requests in 2012, which has not changed in any way since it was first announced in 2012 (including through previous attempts to rescind DACA) and remains in effect in its original form to this day. Under this longstanding policy, information provided by DACA requestors is collected and considered for the primary purpose of adjudicating their DACA requests and is safeguarded from use for certain immigration enforcement-related purposes. DHS policy as described in the DACA FAQs provides that information about the DACA requestor and their family members and guardians is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria set forth in the 2011 USCIS NTA policy memorandum, but it notes that the information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.[317] Additionally, the policy assures that individuals whose cases are deferred pursuant to DACA will not be referred to ICE.[318] DHS policy regarding information provided in DACA requests has not changed since the initiation of DACA. However, DHS proposes in this rule under 8 CFR 236.23(e) to codify longstanding policy and practice, while clarifying that the policy is better understood as a restriction on the use of information provided in DACA requests than as a policy governing information sharing.

Since the inception of DHS and long before the DACA policy was initiated, the three immigration components of DHS (USCIS, ICE, and CBP) have had shared access to a variety of DHS electronic systems of records, as well as the paper Alien File or ''A-File,'' that contain information on noncitizens as they pass through the U.S. immigration process, so that each component can conduct its statutory functions properly within the overall DHS mission to administer and enforce U.S. immigration laws. For example, ICE and CBP officers with a ''need to know'' may query the systems on individual noncitizens they encounter to verify whether they are permitted to remain in or enter the United States and to ensure that the officers do not erroneously remove or take other enforcement action (*e.g.,* issuing an NTA for removal proceedings) against a person, such as a DACA recipient, who is so permitted.

Pursuant to the Privacy Act of 1974,[319] DHS regularly publishes System of Record Notices (SORNs) for immigration systems that provide the public with notice of each system's categories of individuals and categories of records, the purposes and legal authority for the collection of the information maintained in the system(s), and the potential use of the information described in ''routine uses'' for those systems that permit disclosure external to DHS. Information contained in DHS systems may be accessed by officers and employees of DHS ''who have a need for the record in the performance of their duties,'' either pursuant to the Privacy Act [320] or DHS privacy policy. The instructions for the Form I–821D, Consideration of Deferred Action for Childhood Arrivals, advise requestors that ''[t]he information you provide on this form may be shared with other Federal, state, local, and foreign government agencies and authorized organizations following approved routine uses described in the associated published [SORNs].'' In particular, the A-File/Central Index System SORN and the Benefits Information System SORN referenced therein describe what records are collected on and related to DACA requestors and recipients and how such records may be used by government officials in the immigration components of DHS as they perform their duties.[321] As such, ICE and CBP officers with a demonstrated ''need to know'' have always been able to access an individual's immigration-related information, including that contained in DACA requests, by querying DHS electronic systems on a case-by-case basis (for instance, by querying an individual's A-number or full name and date of birth).

Under the DACA information usage policy as set forth immediately below the description of ''Routine Uses'' in the instructions for Form I–821D, the ''[i]nformation provided in this request is protected from disclosure to ICE and [CBP] for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of [an NTA or RTI] under the criteria set forth in USCIS' 2011 [NTA] guidance (*www.uscis.gov/NTA*).'' In conjunction with the described routine uses, DHS upholds this policy by (1) prohibiting the affirmative provision of information provided by DACA requestors to ICE or CBP for the purpose of immigration enforcement, unless the listed exception applies; and (2) prohibiting ICE and CBP's use of information provided in a DACA

[317] *See* DACA FAQs; Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS Form I–821D at 13 (Apr. 24, 2019).

[318] *See* DACA FAQs.

[319] 5 U.S.C. 552a.

[320] *See* 5 U.S.C. 552a(b)(1).

[321] *See* DHS/USCIS/ICE/CBP–001—Alien File, Index, and National File Tracking System of Records, 82 FR 43556 (Sept. 18 2017); DHS/USCIS–007—Benefits Information System, 84 FR 54622 (Oct. 10, 2019); *see also* DHS/USCIS/PIA–003(a) Integrated Digitization Document Management Program (Sept. 24, 2013), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-iddmp-09242013.pdf;* DHS/USCIS/PIA–016(a)—Computer Linked Application Information Management System and Associated Systems (Mar. 25, 2016), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-claims3appendixupdated-september2019.pdf;* DHS/USCIS/PIA–056—USCIS Electronic Immigration System (May 17, 2016), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-elisappendixaupdate-may2018.pdf.*

request for the purpose of immigration enforcement, unless the listed exception applies. Additionally, DHS policy always has specified that if the information would be used for purposes other than removal, it could be shared with national security and law enforcement agencies, including ICE and CBP, and provided examples of such non-enforcement purposes, including for assistance in the consideration of a DACA request, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. But this policy does not limit (and has never limited) ICE or CBP's access to information indicating that an individual has DACA where ICE or CBP needs such information in order to ensure that it does not take inappropriate enforcement action against the individual.

DHS proposes to codify this policy that has governed the use of information provided by DACA requestors since the beginning of DACA.[322]

E. Section 236.24—Severability

Deferred action is at its core an act of forbearance from removal granted by DHS to noncitizens who are a low priority for enforcement action. According to statute, regulation, and longstanding practice, the Secretary also may, as an act of discretion, authorize employment for such individuals, enabling them to support themselves and their families while in the United States. During the period of deferred action, such individuals have no legal immigration status but are considered ''lawfully present'' for the specific purposes of 8 CFR 1.3(a)(4)(vi) and do not accrue ''unlawful presence'' for purposes of the inadmissibility grounds at INA sec. 212(a)(9). For the reasons described above, DHS believes that its authority to implement each of these three aspects or consequences of deferred action in the proposed regulation is well-supported in law and practice and should be upheld in any legal challenge. DHS also believes that its exercise of its authority reflects sound policy.

However, in the event that any portion of the proposed rule is declared invalid, DHS intends that the various aspects of lawful presence for DACA recipients be severable. For example, if a court were to find unlawful (1) the provision of employment authorization for DACA recipients, (2) the pause on accrual of unlawful presence for DACA recipients, or (3) the provision of lawful presence for these noncitizens under 8 CFR 1.3(a)(4)(iv), or some combination thereof, DHS still would intend the remaining features of the policy to stand. Likewise, DHS proposes that employment authorization for DACA recipients would be severable from lawful presence as well as forbearance from removal. DHS is including a provision in the proposed regulatory text to that effect.

DHS believes that a forbearance-only enforcement discretion policy is also viable, although not preferred for the reasons expressed above. While lawful presence and employment authorization are important to the DACA policy's overall success for DHS, as well as to DACA recipients and their communities, DHS believes that any DACA rule should not be struck down in its entirety so long as the forbearance policy is found lawful.[323] As the Supreme Court noted in *Regents,* forbearance is the DACA policy's ''defining feature,'' offering DACA recipients an important measure of assurance, one that is important in itself. Neither employment authorization nor lawful presence is categorically required for the forbearance portion of the proposed rule to serve a meaningful purpose.[324] Even without the proposed rule or a DACA policy, individuals who meet the DACA guidelines are unlikely to be high enforcement priorities, although as discussed elsewhere DHS believes that there are significant benefits to both the Department and DACA recipients to codifying the policy choices behind that low-priority status and accompanying forbearance and providing a process for such individuals to affirmatively come forward to provide the Government with necessary information to complete background checks and otherwise conduct necessary vetting.

DHS believes that it is in the interests of both DACA recipients and the nation as a whole for the noncitizens granted deferred action under the proposed rule to be able to work lawfully and be treated as lawfully present (in the narrow sense explained here) during the period of deferred action. Employment authorization in particular allows DACA recipients to contribute more fully to their communities while supporting themselves and their families, many of whom are U.S. citizens. But a forbearance-only rule still would have significant advantages and be worthwhile in itself, in that it would allow DACA recipients to have a measure of assurance that they are indeed low priorities for enforcement and are unlikely to be removed while enforcement action is deferred. This alone could justify the continued implementation of the policy. Likewise, so long as the forbearance aspect of the policy is in effect, employment authorization without lawful presence, or lawful presence without employment authorization, would be justified on both legal and policy grounds and could be implemented effectively by the Department.[325]

F. Section 236.25—No Private Rights

Consistent with the rule's purpose as an exercise of the Secretary's enforcement discretion, DHS proposes to include a section specifically providing that this rule is not intended to and does not supplant or limit otherwise lawful activities of DHS or the Secretary, and is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.[326] The proposed inclusion of a disclaimer is consistent with other DHS regulations governing immigration enforcement [327] and provides appropriate notice to the public of the intended effect of these regulations.

V. Statutory and Regulatory Requirements

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, to the extent permitted by law, to proceed only if the benefits justify the costs. They also direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In particular, E.O. 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and

[322] *See* proposed 8 CFR 236.23(e).

[323] *See Alaska Airlines, Inc.* v. *Brock,* 480 U.S. 678, 683 (1987) (''Unless (1) it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part [of a statute] may be dropped if (2) what is left is fully operative as a law.''); *K-Mart Corp.* v. *Cartier,* 486 U.S. 281 (1988) (applying similar test to regulatory severability provision).

[324] 140 S. Ct. at 1911.

[325] *See* Section IV.A above for a discussion of fees.

[326] Proposed 8 CFR 236.25.

[327] *See* 8 CFR 287.12.

human dignity. The latter values are highly and particularly relevant here.

This proposed rule is designated a ''significant regulatory action'' that is economically significant since it is estimated the proposed rule would have an annual effect on the economy of $100 million or more, under section 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this proposed regulation.* * *

1. Summary of Major Provisions of the Regulatory Action

This proposed rule would preserve and fortify DHS's DACA policy for the issuance of deferred action to certain young people who were brought to the United States many years earlier as children, who have no current lawful immigration status, and who are generally low enforcement priorities. The proposed rule would codify the following provisions of the DACA policy from the Napolitano Memorandum and longstanding USCIS practice:

- *Deferred Action.* The proposed rule would codify the definition of deferred action as a temporary forbearance from removal that does not confer any right or entitlement to remain in or re-enter the United States, and that does not prevent DHS from initiating any criminal or other enforcement action against the DACA requestor at any time.
- *Threshold Criteria.* The proposed rule would codify the following longstanding threshold criteria: That the requestor must have: (1) Come to the United States under the age of 16; (2) continuously resided in the United States from June 15, 2007, to the time of filing of the request; (3) been physically present in the United States on both June 15, 2012, and at the time of filing of the DACA request; (4) not been in a lawful immigration status on June 15, 2012, as well as at the time of request; (5) graduated or obtained a certificate of completion from high school, obtained a GED certificate, currently be enrolled in school, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (6) not been convicted of a felony, a misdemeanor described in § 236.22(b)(6) of the proposed rule, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety; and (7) been born on or after June 16, 1981, and be at least 15 years of age at the time of filing, unless the requestor is in removal proceedings, has a final order of removal, or a voluntary departure order. The proposed rule also would codify that deferred action under DACA may be granted only if USCIS determines in its discretion that the requestor meets the threshold criteria and merits a favorable exercise of discretion.
- *Procedures for Request, Terminations, and Restrictions on Information Use.* The proposed rule would codify the procedures for denial of a request for DACA or termination of a grant of DACA, the circumstances that would result in the issuance of an NTA or RTI, and the restrictions on use of information contained in a DACA request for the purpose of initiating immigration enforcement proceedings.

In addition to proposing the retention of longstanding DACA policy and procedure, the proposed rule includes the following changes:

- *Filing Requirements.* The proposed rule would modify the existing filing process and fees for DACA by making the request for employment authorization on Form I–765, Application for Employment Authorization, optional and charging a fee of $85 for Form I–821D, Consideration of Deferred Action for Childhood Arrivals. DHS would maintain the current total cost to DACA requestors who also file Form I–765 of $495 ($85 for Form I–821D plus $410 for Form I–765).
- *Employment Authorization.* The proposed rule would codify DACA-related employment authorization for deferred action recipients in a new paragraph designated at 8 CFR 274a.12(c)(33). The new paragraph would not constitute any substantive change in current policy: It would continue to specify that the noncitizen must have been granted deferred action and must establish economic need to be eligible for employment authorization.
- *Automatic Termination of Employment Authorization.* The proposed rule would automatically terminate employment authorization granted under 8 CFR 274.12(c)(33) upon termination of a grant of DACA.
- ''*Lawful Presence.*'' Additionally, the proposed rule reiterates USCIS' longstanding codification in 8 CFR 1.3(a)(4)(vi) of agency policy that a noncitizen who has been granted deferred action is considered ''lawfully present''—a term that does not confer authority to remain in the United States—for the discrete purpose of authorizing the receipt of certain benefits under that regulation. The proposed rule also would reiterate longstanding policy that a noncitizen who has been granted deferred action does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9).

2. Summary of Costs and Benefits of the Proposed Rule

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of DACA, DHS considers the potential impacts of this proposed rule relative to two baselines. The No Action Baseline represents a state of the world under the DACA program; that is, the program initiated by the guidance in the Napolitano Memorandum in 2012 and prior to the July 16, 2021 district court decision. For reasons explained in Section V.A.4.a.(1) below, this baseline does not directly account for the July 16, 2021 district court decision. The second baseline is the Pre-Guidance Baseline, which represents a state of the world before the issuance of the Napolitano Memorandum (*i.e.,* a state of the world where the DACA program does not exist and has never existed). If the goal is to understand the consequences of the DACA program, the Pre-Guidance Baseline is the more useful point of reference.

Table 3 provides a detailed summary of the proposed provisions and their potential impacts relative to the No Action Baseline. Additionally, Table 4 provides a detailed summary of the proposed provisions and their potential impacts relative to the Pre-Guidance Baseline.

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Table 3. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2021—FY 2031 (Relative to the No Action Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will change from $0 to $85.	**Quantitative:** Cost Savings Part of the DACA requestor population might choose only to request deferred action through Form I-821D, thus forgoing the cost of applying for an EAD through Form I-765: • Annual undiscounted cost savings for no longer filing the Form I-765 for employment authorization could range from $0 to $43.9 million, depending on how many individuals choose this option. • Total cost savings over a 11-year period could range from: ○ $0 to $483.6 million for undiscounted cost savings; ○ $0 to $422.2 million at a 3-percent discount rate; and ○ $0 to $359.0 million at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing
Amending 8 CFR 236.21(c)(2). Applicability.	DACA recipients who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33).	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include a request for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	
Adding 8 CFR 236.24(b). Severability.	The provisions in § 236.21(c)(2) through (4) are intended to be severable from each other. The period of forbearance, employment authorization, and lawful presence are all severable under this provision.	

		fee cost for both Forms I-821D and I-765: • Annual undiscounted transfers could range from $0 to $34.9 million. • Total transfers over a 11-year period could range from: o $0 to $384.1 million undiscounted; o $0 to $335.4 million at a 3-percent discount rate; and o $0 to $285.2 million at a 7-percent discount rate. **Qualitative:** Benefits • Having the option to file Form I-765 could incentivize requests by reducing some of the financial barriers to entry for some requestors who do not need employment authorization but who will still file Form I-821D for deferred action. • The proposed rule allows the active DACA-approved population to continue enjoying the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future, including by virtue of mitigating the risk of litigation resulting in termination of the DACA program.

Source: USCIS analysis.

Note: The No Action Baseline refers to a state of the world under the current DACA program in effect under the guidance of the Napolitano Memorandum.

Table 4. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2012–FY 2031 (Relative to the Pre-Guidance Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will be $85.	**Quantitative:** Benefits Income earnings of the employed DACA recipients due to obtaining an approved EAD: • Annual undiscounted benefits could be $22.8 billion dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy. • Total benefits over a 20-year period could be: o $455.5 billion for undiscounted benefits; o $424.8 billion at a 3-percent discount rate; and o $403.6 billion at a 7-percent discount rate. Costs Costs to requestors associated with a DACA request, including filing Form I-821D, Form I-765, and Form I-765WS: • Annual undiscounted costs could range from $385.6 million to $476.1 million. • Total costs over a 20-year period could range from: o $7.7 billion to $9.5 billion for undiscounted costs; o $7.3 billion to $9.1 billion at a 3-percent discount rate; and o $7.2 billion to $8.8 billion at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS
Amending 8 CFR 236.21(c). Applicability, regarding forbearance, employment authorization, and lawful presence.	DACA recipients receive a time-limited forbearance from removal. Those who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33) and are considered lawfully present and not unlawfully present for certain purposes.	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include a request for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	

		to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765: • Annual undiscounted transfers over a 20-year period could range from $0 to $30.9 million. • Total transfers over a 20-year period could range from: ○ $0 to $619.8 million undiscounted; ○ $0 to $589.9 million at a 3-percent discount rate; and ○ $0 to $574.9 million at a 7-percent discount rate. Employment taxes from the employed DACA recipients and their employers to the Federal Government dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy: • Annual undiscounted transfers could be $3.8 billion. • Total transfers over a 20-year period could be: ○ $75.5 billion undiscounted; ○ $70.4 billion at a 3-percent discount rate; and ○ $66.9 billion at a 7-percent discount rate. **Qualitative:** Cost Savings DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients. Benefits • The proposed rule results in more streamlined enforcement encounters and decision making, as well as avoided

		costs associated with enforcement action against low-priority noncitizens. • The proposed rule allows the DACA-approved population to enjoy the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future.
Source: USCIS analysis. Note: The Pre-Guidance Baseline refers to a state of the world as it was before the guidance of the Napolitano Memorandum.		

In addition to the impacts summarized above, and as required by OMB Circular A–4, Table 5 and Table 6 present the prepared accounting statements showing the costs, benefits, and transfers associated with this proposed regulation relative to the No Action Baseline and the Pre-Guidance Baseline, respectively.[328] The primary estimate of annualized cost savings of the proposed rule relative to the No Action baseline is approximately $51.4 million, discounted at 3 percent, or $51.9 million, discounted at 7 percent. The primary estimate represents an average of the minimum estimate of cost savings, $0, and the high estimate, $102.7 million, discounted at 3 percent, or $103.7 million, discounted at 7 percent.

[328] *See* OMB Circular A–4, *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

Table 5. OMB A-4 Accounting Statement – No Action Baseline ($ in millions, 2020; period of analysis: FY 2021–FY 2031)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source/ Citations**
Benefits				
Annualized monetized benefits (3%)	$0	$0	$0	RIA
Annualized monetized benefits (7%)	$0	$0	$0	RIA
Unquantified benefits	The proposed optional Form I-765 could increase DACA Form I-821D requests by reducing some financial barriers for those requestors who do not need employment authorization but who would file for deferred action. Additionally, the proposed rule allows the active DACA-approved population to continue enjoying the advantages of the policy and have the option to request renewal in the future. For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future, including by virtue of mitigating the risk of litigation resulting in termination of the DACA program.			RIA
Cost Savings				
Annualized monetized cost savings (3%)	$22.2	$0	$44.3	RIA
Annualized monetized cost savings (7%)	$22.4	$0	$44.7	RIA
Transfers				
From whom to whom?	Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765.			RIA

Annualized monetized transfers (3%)	$17.6	$0	$35.2	
Annualized monetized transfers (7%)	$17.8	$0	$35.5	
Unquantified transfers	None.			
Miscellaneous Categories	**Effects**			
Effects on State, local, and/or Tribal governments	No direct effects.			RIA
Effects on small businesses	The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.			RFA
Effects on wages	None	None	None	RIA
Effects on growth	None	None	None	RIA
Source: USCIS analysis.				

Table 6. OMB A-4 Accounting Statement – Pre-Guidance Baseline ($ in millions, 2020; period of analysis: FY 2012–FY 2031)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source/ Citations**
Benefits				
Annualized monetized benefits (3%)	$2,188.3	N/A	N/A	RIA
Annualized monetized benefits (7%)	$2,072.3	N/A	N/A	RIA
Unquantified benefits	The proposed optional Form I-765 could increase DACA Form I-821D requests by reducing some of the financial barriers for those requestors who do not need employment authorization but who would file for deferred action. Additionally, the proposed rule allows the DACA-approved population to enjoy the advantages of the policy and have the option to request renewal in the future. For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future.			RIA
Costs				
Annualized monetized costs (3%)	$422.5	$378.1	$466.8	RIA
Annualized monetized costs (7%)	$410.4	$367.3	$453.5	RIA
Unquantified Cost Savings	DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients.			
Transfers				
From whom to whom?	Transfer payments in the form of employment taxes from the employed DACA recipients and their employers to the Federal Government dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy.			RIA

Annualized monetized transfers (3%)	$3,625.5	N/A	N/A	
Annualized monetized transfers (7%)	$3,433.2	N/A	N/A	
From whom to whom?	Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765.			RIA
Annualized monetized transfers (3%)	$15.2	$0	$30.4	
Annualized monetized transfers (7%)	$14.8	$0	$29.5	
Miscellaneous Categories	**Effects**			
Effects on State, local, and/or Tribal governments	Indirect effects, such as tax revenues and provision of certain government services, depending on (among other factors) policy choices made by the State, local, and/or Tribal governments.			RIA
Effects on small businesses	The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.			RFA
Effects on wages	None	None	None	RIA
Effects on growth	None	None	None	RIA
Source: USCIS analysis.				

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3. Background and Purpose of the Rule

The INA [329] generally charges the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[330] The INA further authorizes the Secretary to ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of'' the INA.[331] In the Homeland Security Act of 2002, Congress also provided that the Secretary ''shall be responsible for . . . [e]stablishing national immigration

[329] Public Law 82–414, 66 Stat. 163 (as amended).

[330] INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also vests certain authorities in the President, Attorney General, and Secretary of State, among others. *See id.*

[331] INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

enforcement policies and priorities.'' [332] The Homeland Security Act also provides that the Secretary, in carrying out their authorities, must ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.'' [333]

The Secretary proposes in this rule to establish specified guidelines for considering requests for deferred action submitted by certain individuals who came to the United States many years ago as children, consistent with the Napolitano Memorandum described above. As with the 2012 DACA policy, this proposed rule would serve the significant humanitarian and economic interests animating and engendered by the DACA policy, with respect to the population covered by that policy. In addition, the proposed rule would preserve not only DACA recipients' substantial reliance interests, but also those of their families, schools, employers, faith groups, and communities.[334] The proposed rule also would help appropriately focus the Department's limited immigration enforcement resources on threats to national security, public safety, and border security where they are most needed.

4. Cost-Benefit Analysis

DHS estimates the potential impacts of this proposed rule relative to two baselines. The first baseline is a No Action Baseline that represents a state of the world in which the DACA program would be expected to continue under the Napolitano Memorandum guidance. For reasons explained in Section V.A.4.a.(1), this baseline does not directly account for the July 16, 2021 district court decision. The second baseline is a Pre-Guidance Baseline, which represents a state of the world before the guidance in the Napolitano Memorandum, where the DACA program does not exist and has never existed. The Pre-Guidance Baseline is included in this analysis in accordance with OMB Circular A–4, which directs agencies to include a pre-statutory baseline in an analysis if substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action.[335] In this case, the DACA program was implemented through DHS and USCIS guidance. DHS has not performed a regulatory analysis on the regulatory costs and benefits of that guidance previously and, therefore, includes a Pre-Guidance Baseline in this analysis for purposes of clarity and completeness. In other words, notwithstanding that the program does in fact exist, we present the Pre-Guidance Baseline to provide a more informed picture on the overall impacts of the program since its inception, while at the same time recognizing that many of these impacts have been realized already. DHS notes that the Pre-Guidance Baseline analysis also can be used to better understand the state of the world under the July 16, 2021 district court decision, should the stay of that decision ultimately be lifted.

The rest of this cost-benefit analysis section is organized to present the impacts of this proposed rule relative to the No Action Baseline first and then relative to the Pre-Guidance Baseline second. In each baseline section of the analysis, we begin by laying out the assumptions and estimates used in calculating any costs, benefits, and transfers of this proposed rule.

a. No Action Baseline

(1) Population Estimates and Other Assumptions

The proposed rule would affect certain individuals who came to the United States many years ago as children, who have no current lawful immigration status, and who are generally low enforcement priorities. DHS currently allows eligible individuals to request an exercise of discretion, called ''deferred action,'' on a case-by-case basis according to certain criteria outlined in the Napolitano Memorandum. Individuals may request deferred action under this policy, known as DACA. The proposed rule would affect individuals seeking deferred action under the DACA policy.

DHS recognizes a growing literature on the impacts of DACA that identifies potentially DACA-eligible noncitizens based on age and length of time in the United States. This approach to estimating the population affected by this proposed rule estimates the total number of people who are potentially eligible for DACA and then predicts the proportion of those people who actually will request DACA in the future. Given that no widely available, national microdata survey exists that reports on the immigration status of the foreign-born population, the subpopulation potentially eligible for DACA must be estimated by other means. In general, analysts typically estimate the size of the DACA-eligible population using the so-called residual method, in which the total foreign-born population is estimated based on the U.S. Census Bureau's American Community Survey (ACS), Current Population Survey, American Time Use Survey, Survey of Income and Program Participation, or some other sample, and the lawfully present foreign-born population is estimated based on DHS administrative records or a mix of DHS administrative records and logical rules based on foreign-born demographic characteristics, with the difference between these estimates (*i.e.,* the residual) being the unauthorized population.[336] With this approach, the demographic characteristics of the underlying survey data may further be used to identify the portion of the unauthorized population that would be potentially eligible for DACA, although some factors, such as education, criminal history, and discretionary determinations may not be accounted for in such estimates.

The Migration Policy Institute (MPI) estimates an eligible DACA population of 1.7 million, including the currently active population.[337] Historical DHS administrative data between FY 2012 and FY 2021 show a total of around 1 million initial DACA program requests.[338] Thus, MPI's estimate implies a remaining DACA-eligible population of around 700,000 people.

DHS has two concerns with adopting this approach to estimate the number of future DACA applicants. First, as analysts who use the residual method observe, the approach is complex and highly sensitive to specific modeling assumptions. In a DHS Office of

[332] Public Law 107–296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)).

[333] 6 U.S.C. 111(b)(1)(F).

[334] *See DHS* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1914 (2020) (*Regents*) (''DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission, respondents emphasize, would 'radiate outward' to DACA recipients' families, including their 200,000 U.S. citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.'' (internal citations omitted)).

[335] *See* OMB Circular A–4.

[336] *See, e.g.,* OIS Report (''DHS estimates that 11.4 million unauthorized immigrants were living in the United States on January 1, 2018, roughly unchanged from 11.4 million on January 1, 2015''); Capps (2020) (''As of 2018 . . . there were 11 million unauthorized immigrants in the country, down slightly from 12.3 million in 2007.'').

[337] Migration Policy Institute, *Back on the Table: U.S. Legalization and the Unauthorized Immigrant Groups that Could Factor in the Debate* (Feb. 2021), *https://www.migrationpolicy.org/research/us-legalization-unauthorized-immigrant-groups.*

[338] Source: DHS/USCIS/OPQ July 2021.

Immigration Statistics (OIS) report, ''Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018,'' OIS stated that ''estimates of the unauthorized population are subject to sampling error in the ACS and considerable non-sampling error because of uncertainty in some of the assumptions required for estimation [of the unauthorized population].'' [339] In the chapter on weighting and estimation in the latest ACS design and methodology report,[340] the U.S. Census Bureau details the many complex adjustments applied to produce estimates of the population by sex, age, race, Hispanic origin, and number of household units, clarifying that ''[t]he ACS estimates are based on a probability sample, and will vary from their true population values due to sampling and non-sampling error.'' [341] A rigorous analysis by sociologists and statisticians of the external validity of available methods used to impute unauthorized status in Census survey data concluded that

> it is not possible to spin straw into gold. All approaches that we tested produced biased estimates. Some methods failed in all circumstances, and others failed only when the join observation condition was not met, meaning that the imputation method was not informed by the association of unauthorized status with the dependent variable.[342]

In light of these modeling challenges, it is possible that a new estimate of the DACA-eligible population based on the residual method would systematically under- or overestimate the authorized immigrant population, which would in turn lead to systematic but unknown under- or overestimation of the residual subpopulation.[343]

A second concern about using the residual method to estimate the number of future DACA applicants is that, even if DHS accurately estimates the total DACA-eligible population, the Department does not have a ready methodology to predict how many potentially DACA-eligible individuals will actually request DACA in the future. Given the nature of the DACA program, its population, political factors, the challenging legal history, and characteristics of the active DACA and DACA-eligible populations, including varying personal circumstances and expectations, it is uncertain and would be complex to predict how many potentially eligible noncitizens may request DACA even if a census of the remaining DACA-eligible population existed.

Therefore, in the context of this proposed rule, DHS relies instead on the limited administrative data USCIS collects from individuals who have requested DACA over the past several years, as described later in this analysis. The Department nonetheless acknowledges potential limitations to the population estimate methodologies that USCIS uses in this analysis, and it emphasizes that USCIS remains open to modifying its approach or using alternative approaches at a later stage in the rulemaking. DHS particularly welcomes public comment and data from demographers, statisticians, researchers, and the public on available data sources and the validity, risks, and advantages to incorporating these methods in a final rule.

To provide a framework for our baseline population estimates, we start by first presenting historical USCIS data on the active DACA population and then presenting historical data on DACA program request receipts. These data provide a sense of historical participation in the program and insights into any trends. They also allow us to make certain assumptions in estimating a potential future active DACA population who would enjoy the benefits of this policy and contribute potential transfers to other populations as well as in estimating potential future DACA program request receipts (*i.e.,* the population who would incur the costs associated with applying to the program). We therefore proceed by presenting first the historical active DACA population and our estimates of a potential future active DACA population, and then the historical volume of DACA program request receipts and our estimates of this potential future population.

Before presenting the historical and projected populations associated with this proposed rule, we first identify certain historical time periods of interest to this analysis. Historically, the 2012 and then 2017 DACA-related memoranda have shaped the level of participation in the DACA program. The 2012 Napolitano Memorandum initiated the program, and the 2017 Duke Memorandum halted new requests.[344] As such, DHS identifies three periods of interest: A surge period, FY 2012–FY 2014, where initial requests were high compared to later years; a stable period, FY 2015–FY 2017, where initial requests were slowing, renewal requests were leveling off, and the overall active DACA-approved population was stabilizing; and a cool-off period, FY 2018–FY 2020, where initial requests dramatically decreased, the active DACA-approved population started to decline, and most requests were for renewals.[345]

Table 7 presents historical data on the volume of DACA recipients who were active as of September 30th of each year. For clarity, ''active'' is defined as those requestors who have an approved Form

[339] *See* OIS Report at 10.

[340] *See* U.S. Census Bureau, *American Community Survey Design and Methodology (January 2014), Chapter 11: Weighting and Estimation, https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_ch11_2014.pdf.*

[341] *Id.* at 16.

[342] *See* Jennifer Van Hook, et al., *Can We Spin Straw into Gold? An Evaluation of Immigrant Legal Status Imputation Approaches,* Demography 52(1): 329–54, at 330.

[343] In Pope (2016), *see* section 5, ''Empirical method.'' *See also* George J. Borjas and Hugh Cassidy, *The wage penalty to undocumented immigration,* Lab. Econ. 61, art. 101757 (2019), *https://scholar.harvard.edu/files/gborjas/files/labourecon2020.pdf* (hereinafter Borjas and Cassidy (2019)). In section 2, ''Imputing undocumented status in microdata files,'' the authors state that, ''[i]n the absence of administrative data on the characteristics of the undocumented population, it is not possible to quantify the direction and magnitude of any potential bias,'' and in footnote 2 they describe DHS's assumed correction for sample bias. *See also* Catalina Amuedo-Dorantes and Francisca Antman, *Schooling and Labor Market Effects of Temporary Authorization: Evidence from DACA,* J. of Population Econ. 30(1): 339–73, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5497855/pdf/nihms866067.pdf.* In section III.B, ''Capturing Undocumented Immigrants and DACA Applicants,'' the authors describe a potential effect of a limitation in the data relied upon as follows: ''As such, some may be concerned that the control group may be made up of individuals who immigrated with the purpose of getting an educational degree in the United States, as is the case with F1 and J1 visa holders.''

[344] As discussed above, the Duke Memorandum rescinded the DACA policy, allowing for a brief wind-down period in which a limited number of renewal requests would be adjudicated, but all initial requests would be rejected. Duke Memorandum at 4–5. In the litigation that followed, the Duke Memorandum was enjoined in part, such that DHS was required to adjudicate renewal requests as well as ''initial'' requests from individuals who had been granted DACA previously but did not qualify for the renewal process. *See Regents* v. *DHS; Batalla Vidal* v. *Nielsen,* 279 F. Supp. 3d 401 (E.D.N.Y. 2018). The effect of the Duke Memorandum, along with these court orders and the Wolf Memorandum also discussed above, was that individuals who were granted DACA at some point before September 5, 2017, remained able to request DACA, while those who had never before received DACA were not able to do so until the Wolf Memorandum was vacated in December 2020. *See Batalla Vidal* v. *Wolf,* No. 16–cv–4756, 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020).

[345] DHS believes it is likely that the initial surge in DACA requests reflects a rush of interest in the new program, and that the slowdown in 2014–2017 simply reflects the fact that many of the eligible and interested noncitizens requested DACA shortly after it became available. It is also possible that there was a decline in interest due to the uncertainty caused by the *Texas I* litigation described above, which began in 2014. The limits on requests described above, *supra* note 344, along with changes in the national environment, likely account for much of the ''cooling off'' after 2017.

I–821D and I–765 in the relevant USCIS database. The approval can be either an initial or a renewed approval. Additionally, we do not need specificity or further breakdown of these data into initials and renewals to project this active DACA population and calculate associated monetized benefits and transfers based on the methodology employed in this RIA. Whether initial participants in the program or renewal participants, both categories of participants will have been issued an EAD that could be used to participate in the labor market.[346] Therefore, the annual cumulative totals of the active DACA population will suffice for estimating the quantified and monetized benefits and transfers of this proposed rule that stem from the potential labor market earnings of the DACA population with an EAD.

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Table 7. Historical Active DACA Program Population, FY 2012–FY 2020 (as of September 30th of each fiscal year)

FY	Total Active DACA Recipients
2012	2,019
2013	472,880
2014	608,037
2015	652,530
2016	679,830
2017	700,572
2018	704,095
2019	660,552
2020	647,278
Annual Growth Rate	
FY 2015–FY 2016	4.1837%
FY 2016–FY 2017	3.0511%
Average	**3.6174%**

Source: DHS/USCIS/OPQ ELIS, CLAIMS 3, and CIS2 (queried June 2021).

Notes: DHS considers FY 2015–FY 2017 to be a stable period in the DACA program history—after the surge in DACA initial requests prompted by the Napolitano Memorandum, FY 2012–FY 2014, and before the cool-off prompted by the Duke Memorandum, FY 2018–FY 2020. As noted below, the average annual growth rate of FY 2015–FY 2017 will be used to project the potential future active DACA population for FY 2021–FY 2031.

On July 16, 2021, the U.S. District Court for the Southern District of Texas issued a decision enjoining USCIS from approving new DACA requests.[347] At this time, it remains uncertain what impact this injunction will have on total projected initial requests for FY 2021. Projecting if and when USCIS might begin to approve initial requests again absent this rulemaking presents added difficulty. Consequently, the No Action baseline used for this RIA employs the assumption that the historical trends in the active DACA population outlined remain a reasonable and useful indication of the trend in the future over the period of analysis. Table 8 presents DHS's estimates for the active DACA population for FY 2021–FY 2031. Given the motivation and scope of this proposed rule, DHS assumes that upon the implementation of a final rule the DACA program will be characterized by relatively more stability, meaning the yearly active DACA population will not continue to decrease as it did in FY 2018–FY 2020. Therefore, in our projections of the active DACA population, DHS used the average annual growth rate of the stable period, FY 2015–FY 2017, which was 3.6174%, and multiplied it by the current year cumulative totals to obtain the next year's estimated active DACA population. In other words, the values in Table 8 grow at an annual rate of

[346] Please see the *Labor Market Impacts* section of this RIA for discussion and analysis of labor force participation as well as discussion of the possibility that some DACA recipients might choose not to work despite having employment authorization, or that some DACA recipients might opt out of requesting an EAD given the choice as this rulemaking is proposing.

[347] As of July 20, 2021, USCIS ELIS and CLAIMS 3 data show 89,605 initial requests have been accepted at a lockbox in FY 2021.

3.6174%. These estimates will be used later when calculating the monetized benefits and transfers of this proposed rule.

DHS notes that although this methodology for projecting a future active DACA population has important advantages (including transparency, reproducibility, and a clear nexus to historical program data), it also has some potential limitations. For instance, the methodology assumes that the active DACA population again will grow at the same rate that it did in FY 2015–FY 2017, just a few years after the Napolitano Memorandum was first issued. The methodology does not account, for instance, for the fact that when the Duke Memorandum was issued, the growth rate had been declining, or for the fact that potential DACA requestors will stop ''aging in'' to the policy in June 2022, when the youngest possible requestor reaches 15 years of age. DHS does not believe there necessarily will be a precipitous decline in the growth rate of DACA requestors after new requestors stop ''aging in'' in 2022. A substantial portion of initial DACA requests have come from individuals who applied long after they were eligible. And some individuals may become newly eligible after June 2022, upon satisfying the educational or military service requirement for the first time. DHS has included data in the rulemaking docket regarding DACA requestors' age at time of filing. DHS welcomes comments regarding whether and how DHS might incorporate these data into the population estimate methodology for the final rule.

Similarly, the active DACA population projections do not directly capture the possibility that there will be a surge of request receipts following publication of a final rule (or in the wake of the vacatur of the Wolf Memorandum, which already has occurred), followed by a slower growth rate in later years. However, USCIS notes that projecting a surge in application receipts does not necessarily imply a surge in the active DACA population. The levels of approvals, renewals, and noncitizens remaining in or exiting the program can vary. For example, there could be delays in processing requests caused by the surge of new applications (assuming that USCIS maintains current staff levels) or by other events, noncitizens could exit the program at higher rates than before, and approval rates could change relative to historical trends. As mentioned previously, a continuation of the injunction of approvals of new DACA requests would curtail initial requests. As noted above, DHS welcomes comments on its methodology for projecting the active DACA population, as well as all other aspects of this RIA.

Table 8. Projected Active DACA Program Population (FY 2021–FY 2031)

FY	Active DACA Recipients
2020	647,278
2021	670,693
2022	694,954
2023	720,093
2024	746,142
2025	773,133
2026	801,100
2027	830,079
2028	860,106
2029	891,219
2030	923,458
2031	956,863

Source: USCIS analysis.

Notes: FY 2020 is included as a reference. Active DACA recipients equals previous year total plus the average annual growth rate (3.6174%) of the stable historical period FY 2015–FY 2017. The active DACA population is used to calculate the monetized benefits and transfers of this proposed rule.

Next, we present the population that will be used when calculating the monetized costs of this proposed rule. Table 9 presents historical data on the numbers of DACA program receipts. This population incurred the cost of requesting DACA. The population is made up of initial and renewal requestors, both of whom face similar costs, such as application fees,[348] time burdens, and opportunity costs. For clarity, this table represents intake and processing data and does not say anything about how many requests were approved. DHS does not need that level

[348] The proposed fee does not differentiate between initial and renewal receipt costs. The estimated full cost reflects a weighted average of April 2020 to March 2021 initial and renewal workload receipt data.

of detail to estimate the monetized costs of this proposed rule. We only need total receipts to estimate the monetized costs of this proposed rule.

Table 9. Historical DACA Program Receipts

FY	Initials	Renewals	Total
2012	157,826		157,826
2013	443,967		443,967
2014	141,538	122,249	263,787
2015	92,470	391,878	484,348
2016	74,498	198,520	273,018
2017	45,637	470,668	516,305
2018	2,062	287,709	289,771
2019	1,574	406,588	408,162
2020	4,301	339,632	343,933

Source: DHS/USCIS/OPQ ELIS and CLAIMS 3 Consolidated (queried Dec. 2020).

Note: The paragraphs surrounding this table explain how this historical information is used to project the future population over FY 2021–FY 2031.

To project total DACA program receipts, DHS makes use of the historical information from Table 9 as follows. In doing so, the intention is to capture a possible surge effect in initial requests, a stabilization effect through the renewals, and then a steady decline in initial requests as the newly DACA-eligible population might dwindle over time because individuals stop ''aging in'' after June 2022. We first calculate the percentage of initials in the previously defined surge years FY 2012–FY 2014 out of the total over period FY 2012–FY 2017, to account for a similar possibility in our projections, which we call a surge rate.[349] This rate is 77.76%. Second, DHS calculates the average initial requests over the stable period of FY 2015–FY 2017, which is 70,868. Third, we calculate the average annual rate of growth in initial requests over FY 2015–FY 2017, which is −29.08%. Fourth, DHS calculates the average number of renewal requests over FY 2015–FY 2020, which is 349,166. We chose FY 2015–FY 2020 for this calculation due to the relatively stable nature of historical renewal requests. The intention is to capture a possible surge effect in initial requests, a stabilization effect through the renewals, and then a steady decline in initial requests as the DACA-eligible population might dwindle over time.

Table 10 presents the projected volume of DACA program request receipts. DHS estimates a surge component in initials over FY 2021–FY 2022. As stated, these projections make no adjustment for the uncertain impacts of the July 16, 2021 injunction on initial requests. To do so, we first calculate the total number of historic initials over the stable period FY 2015–FY 2017, which is 212,605. We then multiply this number by the surge rate of 77.76% to estimate a potential surge in our projections of 165,321 initial requests in the first two projected years, FY 2021–FY 2022. DHS then divides this number in two to estimate a surge in initial requests for FY 2021 and FY 2022, which is 82,660. Adding to this number the average number of historic initial requests of 70,868 yields a total (surge) number of 153,529 initial requests for FY 2021 and FY 2022. Starting with FY 2024, DHS applies the historic FY 2015–FY 2017 growth rate of −29.08% to initial requests for the rest of the projected years.[350]

The renewals in FY 2023–FY 2024 capture this surge as the historical average number of renewals of 349,166 plus 153,529. Recall, DACA approved participants can renew their deferred action every 2 years. Adding total initials and renewals for every fiscal year then yields a total number of requests that will be used in estimating the monetized costs of this proposed rule.

As with DHS's projection methodology for the active DACA population, DHS acknowledges potential limitations associated with the methodology used to project requests. For instance, although the methodology is transparent, reproducible, and has a clear nexus to historical program data, the methodology assumes that the ''surge rate'' for DACA requests following publication of this proposed rule would mirror the surge rate that followed issuance of the Napolitano Memorandum. There are reasons to support such an assumption, including a potential backlog of demand following the Duke Memorandum and subsequent guidance and ongoing litigation. But there are also reasons to question it, such as the potential that demand was exhausted in the years prior to the Duke Memorandum's issuance such that any ''surge'' in applications would consist primarily of applications from individuals who turned 15 after the issuance of the Duke Memorandum.

[349] Calculation: FY 2012–FY 2014 initials total = 743,331; FY 2012–FY 2017 initials total = 955,936; initials surge rate = (743,331/955,936) * 100 = 77.76%.

[350] For example: FY 2024 = FY 2023 * (1 − 29.08%), which yields 70,868 * (1 − 0.2908) = 50,254.

Table 10. Projected DACA Program Receipts (FY 2021–FY 2031)

FY	Initials	Renewals	Total
2021	153,529	349,166	**502,694**
2022	153,529	349,166	**502,694**
2023	70,868	502,695	**573,563**
2024	50,254	502,695	**552,949**
2025	35,636	420,034	**455,670**
2026	25,270	420,034	**445,304**
2027	17,920	420,034	**437,954**
2028	12,707	420,034	**432,741**
2029	9,011	420,034	**429,045**
2030	6,390	420,034	**426,424**
2031	4,531	420,034	**424,565**

Source: USCIS analysis.

Notes: For FY 2023, 70,868 represents initials averaged over FY 2015–FY 2017. For the rest of the projection period this population declines at the average annual rate of 29.08%. For FY 2021–FY 2022, 349,166 represents renewals averaged over FY 2015–FY 2020. For FY 2025–FY 2031, 420,034 represents historical average initials (349,166) plus historical average renewals (70,868). The surges in initials in FY 2021–FY 2022 and renewals in FY 2023–FY 2024 are explained in the surrounding text. Total receipts are used in calculating the monetized cost (to the requestors) of this proposed rule.

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As of July 2021, DHS administrative data for quarters 2 and 3 of FY 2021 show that there were 89,701 initial DACA requests and 302,985 renewal DACA requests pending.[351] These data include requests filed during periods in which DHS did not accept most initial DACA requests due to ongoing litigation and subsequent policy changes.[352] In this RIA's projections, it is assumed that initial DACA requests would be accepted without interruptions from any legal rulings on the program in FY 2021 and all other subsequent projected fiscal years. In the absence of these restrictions on initial requests, DHS's projection for FY 2021 tracks with the observed trend in the most recent FY 2021 administrative data.

In sum, while population estimates in this NPRM are consistent with the overall MPI population estimate, this RIA relies on historical application data to estimate future DACA applications rather than estimating the overall DACA-eligible population and then further estimating the share of the population likely to apply for DACA in the future. While both approaches face methodological challenges, the Department has no reason to believe the residual-based methodology would yield a more accurate estimate. At the same time, the current approach based on historical application data offers an especially transparent and easily reproducible estimation methodology. The Department invites public comment on the ability to improve accuracy and validity of unbiased estimates of the active population projections using other methodologies in the final rule.

(2) Forms and Fees

Individuals seeking deferred action under the DACA program must file Form I–821D in order to be considered for approval. Currently, all individuals filing Form I–821D to request deferred action under DACA, whether for the initial consideration for or a renewal of DACA, also must file Form I–765 and Form I–765WS (Form I–765 Worksheet) and submit biometrics. Submission of Forms I–821D, I–765, and I–765WS and biometrics together is considered to comprise a complete DACA request. Additionally, certain DACA requestors choose to have a representative, such as a lawyer, prepare and file their DACA request.[353] If that is the case, a Form G–28 must accompany a complete DACA request.[354]

Currently, the fees associated with a DACA request are as follows: For Form I–821D, $0; for Form I–765, $410; for Form I–765WS, $0; for Form G–28, $0; and for biometrics collection, $85. This yields a total current fee of $495, with or without the submission of a Form G–28. DHS believes this is a reasonable proxy for the Government's costs of processing and vetting these forms

[351] Source: DHS/USCIS/OPQ July 2021.

[352] *See* Section III.B above for litigation history, including *Regents,* 140 S. Ct. 1891 (2020), and *Texas II,* No. 1:18–cv–00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021).

[353] An internal OPQ data request reveals that 44 percent of requestors chose to have a preparer. We use this percentage breakdown in subsequent cost calculations.

[354] Individuals retained to help a requestor prepare and file their DACA request must submit a Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, to provide information about their eligibility to act on behalf of the requestor (*see* 8 CFR 292.4(a)).

when filed together.[355] However, DHS expects there would be little savings in the Government's costs of processing and vetting for applicants who choose not to apply for an EAD. Therefore, fees for these applicants are not anticipated to cover the Government's costs for these applicants since they would be paying only $85.

(3) Wage Assumptions

The estimated wage rate of DACA requestors and the total compensation rate of those hired to prepare and file DACA requests are used as proxies for the opportunity cost of time in the calculation of costs. The estimated wage rate of the requestors also is used to estimate the benefits of income that accrue to those requestors who participate in the labor market through the grant of employment authorization. In the following paragraphs, DHS explains how it estimates the preparers' and requestors' compensation rates. All compensation estimates are in 2020 dollars.

A DACA request can be prepared on behalf of the applicant. In this proposed rule, we assume that a preparer has similar knowledge and skills necessary for filing a DACA request as an average lawyer would for the same task. Based on Bureau of Labor Statistics (BLS) data, DHS estimates an average loaded wage, or compensation, for a preparer of $103.81.[356]

To estimate the DACA requestor population's hourly opportunity cost of time, DHS uses data from the U.S. Census Bureau and USCIS. We assume, for the purposes of this analysis, that the profile of the DACA-approved requestors matches that of the population at large; that is, the average DACA-approved requestor values education and employment in a similar way as the average person in the population at large and in that age group. This allows DHS to use other government agencies' official data, such as the Census Bureau's, to estimate DACA-approved requestor compensation rates and other economic characteristics given the absence of DHS-specific DACA-approved population economic data, but DHS welcomes comments about other methods for estimating compensation rates and economic characteristics.

USCIS data on the active DACA population[357] lend themselves to delineation by age group: 15 to 25, 26 to 35, and 36 to 39.[358] In an effort to provide a more focused estimate of wages, DHS takes this information into account. We estimate these age groups to represent 43 percent, 51 percent, and 6 percent, respectively, out of this total population. Next, DHS seeks to estimate an average compensation rate that accounts for income variations across these age groups. We first obtain annual average Consumer Price Index information for years 2012 through 2020.[359] We set 2020 as the base year and then calculate historical average annual incomes (in 2020 dollars) based on U.S. Census Bureau historical income data.[360] To do this, DHS converts the annual mean incomes in the Census data (2019 dollars) into 2020 dollars and then averages the period 2012–2019 to obtain average full-time salary information for the population at large for these age groups as $18,389, $45,529, and $60,767, respectively.[361] DHS recognizes that not all DACA recipients work full time or have jobs that offer additional benefits beyond the offered wage. The employment and school attendance status of DACA recipients is varied and includes being in school only, working full or part time, or being unemployed. Moreover, some DACA recipients have additional compensation benefits such as health insurance whereas others do not. Additionally, DACA recipients could hold entry-level jobs as well as more senior positions in companies. Some are employed in industries that generally pay higher wages and some are employed in industries where wages are relatively lower. To account for this wide range of possibilities, DHS takes a weighted average of the salaries presented above using the distribution of the age groups as weights, divided by 26 pay periods and 80 hours per pay period (the typical biweekly pay schedule), loading the wage to account for benefits, to arrive at an average hourly DACA requestor compensation of $24.20.[362]

(4) Time Burdens

Calculating any potential costs associated with this proposed rule involves accounting for the time that it takes to fill out the required forms, submit biometrics collection, and travel to and from the biometrics collection site. The Paperwork Reduction Act (PRA) section of the instructions for Form I–821D estimates a response time of 3 hours for reviewing instructions and completing and submitting the form: For Form I–765, 4.75 hours; for Form I–765WS, 0.5 hours; and for Form G–28, 0.83 hours.

In addition to the biometrics services fee, the requestor will incur the costs to comply with the biometrics submission requirement as well as the opportunity cost of time for traveling to an USCIS Application Support Center (ASC), the mileage cost of traveling to an ASC, and the opportunity cost of time for submitting his or her biometrics. While travel times and distances vary, DHS estimates that a requestor's average roundtrip distance to an ASC is 50 miles and takes 2.5 hours on average to complete the trip.[363] Furthermore, DHS estimates that a requestor waits an average of 70 minutes or 1.17 (rounded, 70 divide by 60 minutes) hours for service and to have his or her biometrics collected at an ASC according to the PRA section of the instructions for Form I–765, adding up to a total biometrics-related time burden of 3.67 hours. In addition to the opportunity cost of time for providing biometrics and traveling to an ASC, requestors will incur travel costs related to biometrics collection. The per-requestor cost of travel related to biometrics collection is about $28.00

[355] USCIS Office of the Chief Financial Officer (OCFO) analysis.

[356] DHS assumes the preparers with similar knowledge and skills necessary for filing DACA requests have average wage rates equal to the average lawyer wage of $71.59 per hour. Source: BLS, Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2020, 23–1011 Lawyers, *https://www.bls.gov/oes/2020/may/oes231011.htm#nat.*

The benefits-to-wage multiplier is calculated as follows: (total employee compensation per hour)/(wages and salaries per hour) = $38.60/$26.53 = 1.4549 = 1.45 (rounded). *See* BLS, Economic News Release (Mar. 2021), *Employer Cost for Employee Compensation—December 2020,* Table 1. Employer Costs for Employee Compensation by ownership, *https://www.bls.gov/news.release/archives/ecec_03182021.htm.* Total compensation rate calculation: (wage rate) * (benefits multiplier) = $71.59 * 1.45 = $103.81.

[357] Source: Count of Active DACA Recipients by Month of Current DACA Expiration as of Dec. 31, 2020. DHS/USCIS/OPQ ELIS and CLAIMS 3 Consolidated (queried Jan. 2021).

[358] We assume this distribution remains constant throughout the periods of analysis for both baselines as new DACA recipients enter and previous DACA recipients exit the program. The current (age) requirements of the DACA program does not prohibit us from making this assumption.

[359] Source: BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, index averages, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf.*

[360] Source: U.S. Census Bureau, *Historical Income Tables: People,* Table P–10. Age—People (Both Sexes Combined) by Median and Mean, *https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html.*

[361] The Census data delineate age groups as 15 to 24, 25 to 34, and 35 to 44. DHS assumes the age groups identified in the USCIS data follow the same pattern on average as the age groups in the Census data (*e.g.,* the Census income information by age group also represents the income information in the age groups identified in the USCIS data).

[362] Calculation: $24.20 = (($18,389 * 43%) + ($45,529 * 51%) + ($60,767 * 6%))/26)/80 * 1.45.

[363] *See* Final Rule, *Employment Authorization for Certain H–4 Dependent Spouses,* 80 FR 10284 (Feb. 25, 2015), and Final Rule, *Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,* 78 FR 536, 572 (Jan. 3, 2013).

per trip, based on the 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of $0.56 per mile.[364] DHS assumes that each requestor travels independently to an ASC to submit his or her biometrics.

(5) Costs of the Proposed Regulatory Action

The provisions of this proposed rule would not impose any new costs on the potential DACA requestor population if requesting both deferred action through Form I–821D and applying for an EAD using Form I–765 and Form I–765WS (though this rule would change the composition of these fees). The proposed rule would not implement any new forms to file, nor would it change the estimated time burden for completing and filing any of the required forms to request deferred action, and thus the total DACA request cost would not change from the current amount if requestors continued to file all Forms I–821D, I–765, and I–765WS. With this proposed rule, DHS seeks to (1) make it optional to file Form I–765 to apply for employment authorization; (2) eliminate the $85 biometrics fee when filing Form I–765; and (3) implement a new $85 fee to file Form I–821D. Requestors still would be required to submit biometrics information, but that process would be included as part of the requirements for filing Form I–821D. Requestors who both request DACA and apply for employment authorization would incur the same total costs as they currently incur.

Nevertheless, the provisions of the proposed rule would make requesting an EAD optional when filing for DACA. DHS recognizes the possibility that some requestors might forgo applying for employment authorization using Form I–765 and opt only to request deferred action by filing Form I–821D. For example, this category could include DACA requestors who are currently enrolled in school, who perhaps have scholarships or other types of aid, and who may not need additional financial support (*e.g.,* young DACA requestors, including high school students, who are supported by their parents or guardians). Therefore, such individuals may choose not to participate in the labor market. DHS acknowledges that such requestors might choose to save the $410 fee to file Form I–765. As a result, requestors who forgo seeking employment authorization would incur fewer costs when requesting DACA. These requestors would be required to submit Form I–821D and pay the proposed $85 form fee only. Therefore, DHS conducts a sensitivity analysis to account for the possibility that some DACA requestors likely would not seek employment authorization.

In order to identify the proportion of the DACA requestor population who might forgo applying for employment authorization, DHS uses data from BLS on labor force participation rates.[365] BLS data show historical and projected labor force participation rates (as a percent of total working-age population) by age group. Assuming the DACA requestors' population profiles (such as education and employment status) match those of the U.S. population at large, DHS combines the BLS data on labor force participation by age group with previously presented USCIS data on the distribution of ages for the approved DACA requestor population (*see Wage Assumptions* section) to calculate an age-group-adjusted weighted average. Based on this methodology, DHS estimates that the rate of the potential DACA requestor population who may opt in and apply for employment authorization is 70 percent and the rate of those who may opt out and not apply for employment authorization is 30 percent.[366] Under this sensitivity analysis using a 70/30 percent population split, the entire population would file Form I–821D to request deferred action and would pay an $85 fee, while only 70 percent of the population of those who file Form I–821D to request deferred action would file Form I–765 and Form I–765WS to request an EAD. DHS recognizes that the 70-percent estimate does not directly account for the potential additional benefits of an EAD, which may result in a greater percentage of DACA requestors also requesting an EAD. DHS describes these potential additional benefits in the analysis below, at Section V.A.4.b.(6), regarding the benefits of the proposed rule relative to the Pre-Guidance Baseline.

If 100 percent of the estimated population applies for an EAD, the costs of the proposed rule relative to the No Action Baseline are zero since currently all DACA requestors filing Form I–821D must file Forms I–765 and I–765WS and request employment authorization. Using the estimated requestors' wage rate ($24.20 per hour), the preparers' total compensation rate ($103.81 per hour), and the percentage of requestors who use a preparer (44%), we find that applicants would face the same total numbers of fees, the same forms time burdens, and the same biometric travel costs. The quantified and monetized costs of the proposed rule relative to the No Action Baseline would be zero.

By contrast, if 70 percent of DACA requestors apply for an EAD based on the provision of this proposed rule that makes such application optional, there would be cost savings. In particular, there would be cost savings to DACA requestors in terms of opportunity costs of time in no longer having to fill out forms to apply for an EAD. For example, some requestors, including renewal requestors, do not need an EAD. Such requestors would have the option to save the costs associated with submitting Form I–765 and Form I–765WS to apply for employment authorization relative to the No Action Baseline where they are required to submit these forms as part of the application. They now have the option not to do so.

The potential cost savings are calculated as the difference between the total costs associated with 100 percent of the population applying for an EAD and the total costs associated with 70 percent of the population applying for an EAD, less the $410 fee for Form I–765 multiplied by 30% of the DACA requestor population estimates. In Table 11, DHS then subtracts the $410 fee from the cost savings estimate, because in this analysis we account for the distributional effect of a lower fee as a transfer rather than a cost saving. (We acknowledge that in this scenario the requestor and USCIS avoid the costs of filing and processing the Form I–765, respectively. For this proposed rule, this fee will not be considered a cost saving as there are no estimated government resources saved. The time it takes to

[364] See the U.S. General Services Administration website for privately owned vehicle mileage reimbursement rates, *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-povmileage-reimbursement-rates.*

[365] Source: BLS, Employment Projections (Sept. 2020), *Civilian labor force participation rate by age, sex, race, and ethnicity,* Table 3.3. Civilian labor force participation rates by age, sex, race, and ethnicity, 1999, 2009, 2019, and projected 2029, *https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm.*

[366] BLS labor force calculated averages by age group, United States: 16-to-24-year-old average is 53.6 percent (average of FY 2019 [55.9%] and FY 2029 [51.3%]); 25-to-34-year-old average is 82.4 percent (average of FY 2019 [82.9%] and FY 2029 [81.9%]); and 34-to-44-year-old average is 82.15 percent (average of FY 2019 [82.1%] and FY 2029 [82.2%]). USCIS age group distribution of the active DACA-approved population: 16 to 24 years old is 43 percent; 25 to 34 years old is 51 percent; and 35 to 44 years old is 6 percent. Calculations: Age group adjusted weighted average is (53.6% * 43%) + (82.4% * 51%) + (82.15% * 6%) = 70.001% = 70% (rounded) of the DACA applicant population who potentially will opt in to apply for employment authorization. Thus, it follows, (1–70.001%) = 29.999% = 30% (rounded) of the DACA requesting population who potentially will opt out of applying for employment authorization.

adjudicate Form I–765 with Form I–821D is negligible compared to adjudicating only Form I–821D.[367])

Table 11 presents the estimates used in calculating any potential cost savings.

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Table 11. Total Cost Savings, FY 2021–FY 2031, Relative to the No Action Baseline (2020 dollars) (if 100% EAD requests, cost savings = 0)

	Costs			
FY	**If 100% Apply for an EAD (A)**	**If 70% Apply for an EAD (B)**	**Less $410 I-765 Fee (C)**	**Cost Savings D = A - B - C**
2021	$572,247,113	$463,521,979	$61,831,418	$46,893,716
2022	$572,247,113	$463,521,979	$61,831,418	$46,893,716
2023	$652,920,958	$528,868,050	$70,548,243	$53,504,665
2024	$629,454,553	$509,860,187	$68,012,693	$51,581,673
2025	$518,716,551	$420,162,054	$56,047,430	$42,507,068
2026	$506,916,464	$410,603,945	$54,772,428	$41,540,090
2027	$498,548,793	$403,826,106	$53,868,299	$40,854,388
2028	$492,615,116	$399,019,808	$53,227,164	$40,368,143
2029	$488,407,430	$395,611,570	$52,772,523	$40,023,338
2030	$485,423,679	$393,194,722	$52,450,128	$39,778,829
2031	$483,307,844	$391,480,888	$52,221,511	$39,605,444
Undiscounted Total	$5,900,805,614	$4,779,671,287	$637,583,255	**$483,551,071**

Source: USCIS analysis.

Note: Assuming 30% of the I-821D population estimates in Table 10, FY 2021: 502,694 * 0.30 = 150,808.336 * $410 I-765 fee = $61,831,418 (rounded).

(6) Benefits of the Proposed Regulatory Action

There are quantified and monetized benefits as well as unquantified and qualitative benefits associated with the DACA program under the Napolitano Memorandum and this proposed rule. The quantified and monetized benefits stem from the income earned by DACA recipients who have been granted an EAD and participate in the labor market. DHS calculates the quantified and monetized benefits associated with this proposed rule by taking the sum of the approved initial and renewal populations (*i.e.,* those who have been granted an EAD) and multiplying it by an estimated yearly compensation total of $50,341, which is the previously estimated compensation rate of $24.20, multiplied by 80 hours in a pay period, times 26 pay periods per year. As previously discussed, DHS assumes only 70 percent of DACA recipients will choose to work, so the total population projections presented previously will be adjusted to reflect this (population * 70 percent). Given the previously delineated provisions of this proposed rule and the stated assumptions, there are no new quantified and monetized benefits relative to the No Action Baseline. In the No Action Baseline, 70 percent of DACA recipients will work, which is the same percentage of people who would work under this proposed rule.

The unquantified and qualitative benefits stem from the forbearance component of an approved DACA request, and they are discussed in significantly greater detail in the analysis below, at Section V.A.4.b.(6), regarding the benefits of the proposed rule relative to the Pre-Guidance Baseline. These benefits are generally the same under this proposed rule and under the No Action Baseline.

(7) Transfers of the Proposed Regulatory Changes

The provisions of this proposed rule could produce transfers relative to the No Action Baseline. The proposed rule would change the fee for Form I–821D from $0 to $85 and the fee for biometrics from $85 to $0. These changes move in opposite directions, cancelling each other out. However, the full cost of adjudication to USCIS for Form I–821D, including biometrics adjudication costs, is estimated at $332.[368] Table 12 presents the pre- and post-rulemaking fees to applicants with and without filing Form I–765, along with the estimated pre- and post-rulemaking costs to the Government for processing and vetting each application.

[367] USCIS OCFO analysis.

[368] USCIS OCFO analysis.

Table 12. Pre- and Post-Rulemaking Per-Applicant Fees to Applicants and Processing Costs to DHS				
Pre-Rulemaking				
	Form I-821D	Form I-765	Biometrics	**Total**
Fees to Applicants	$0	$410	$85	$495
Processing and Vetting Costs to DHS	$280	$0	$52	$332
Post-Rulemaking with EAD				
	Form I-821D	Form I-765	Biometrics	**Total**
Fees to Applicants	$85	$410	$0	$495
Processing and Vetting Costs to DHS	$280	$0	$52	$332
Post-Rulemaking without EAD				
	Form I-821D	Form I-765	Biometrics	**Total**
Fees to Applicants	$85	N/A	$0	$85
Processing and Vetting Costs to DHS	$280	N/A	$52	$332
Source: USCIS OCFO analysis.				
Note: Form I-765 incurs negligible processing and vetting costs because Form I-821D already captures the information requested on Form I-765.				

For the 30% of the projected population who are assumed to file Form I–821D without filing and paying the fee for Form I–765, DHS subtracts the new fee of $85 from the full cost of $332 for an estimated $247 transfer payment from USCIS to each DACA requestor who chooses to request only deferred action by filing Form I–821D without Form I–765. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I–821D would now pay less in filing fees than the current filing fee cost for both Forms I–821D and I–765. Table 13 presents the estimates of these potential transfers.

Table 13. Total Transfers, FY 2021–FY 2031, If 30% of DACA Requestors Forgo EAD Applications (from USCIS to certain DACA requestors) (2020 dollars)

FY	Transfers
2021	$37,249,659
2022	$37,249,659
2023	$42,501,015
2024	$40,973,501
2025	$33,765,159
2026	$32,997,048
2027	$32,452,366
2028	$32,066,121
2029	$31,792,227
2030	$31,598,004
2031	$31,460,276
Undiscounted Total	**$384,105,034**

Source: USCIS analysis.

b. Pre-Guidance Baseline

As noted above, the period of analysis for this baseline also includes the time period FY 2012–FY 2020, which includes the time period during which DHS has operated under the Napolitano Memorandum, to provide a more informed picture of the total impact of the DACA program. We proceed by taking into account the DACA population from this time period (given by the historical data of Table 7 and Table 9), but applying all the assumptions (for example, on wages and age distributions) as presented before. In essence, in this baseline, we assume the DACA program never existed but instead of starting the analysis in FY 2021 we start the analysis from FY 2012 spanning to FY 2031, analyzing the potential effects of the proposed rule's provisions starting in FY 2012. As a result, the Pre-Guidance baseline condition is similar to the state of the world under the July 16, 2021 district court decision, should the stay of that decision ultimately be lifted.

(1) Population Estimates and Other Assumptions

For the Pre-Guidance Baseline, the total population estimates include all the projected populations described earlier in this analysis for FY 2021–FY 2031, in Table 8 and Table 10, while also adding the historical population numbers presented in Table 7 and Table 9 for FY 2012–FY 2020. To conserve space and time, we will not repeat those numbers here.

(2) Forms and Fees

All the forms and fees remain the same in the Pre-Guidance Baseline, except that Form I–821D has a fee of $85 and there is no fee charged for biometrics collection.

(3) Wage Assumptions

For the Pre-Guidance Baseline, the wage assumptions remain as presented previously with an overall average compensation for the DACA requestors of $24.20 and a total compensation rate for preparers of $103.81.

(4) Time Burdens

For the Pre-Guidance Baseline, all the time burdens remain as presented previously.

(5) Costs of the Proposed Regulatory Changes

The Pre-Guidance Baseline represents a world without DACA; that is, all baseline impacts are $0. DHS calculates the proposed rule's impacts relative to this baseline of $0 costs, benefits, and transfers. As presented previously, we maintain the assumption that only 70 percent of requestors will apply for an EAD given that this proposed rule allows this option. This will serve as a lower bound estimate of costs. Given the population estimates, form fees, time burdens, wage assumptions, biometrics fee, travel costs, and biometrics time burden information, DHS presents next the application costs for time period FY 2012–FY 2031. The cost per requestor in a scenario where all DACA requestors (100%) apply for an EAD is $1,138.36. The cost per requestor in a scenario where only 70 percent of DACA requestors apply for an EAD is $922.07. Multiplying these per-requestor costs with the population estimates yields total costs. The following tables present our quantified and monetized cost estimates.

Table 14. Total Costs Relative to the Pre-Guidance Baseline, FY 2012–FY 2031 (2020 dollars)

FY	Costs if 100% Apply for an EAD	Costs if 70% Apply for an EAD
2012	$179,662,760	$145,527,406
2013	$505,394,146	$409,370,864
2014	$300,284,493	$243,231,393
2015	$551,362,250	$446,605,173
2016	$310,792,692	$251,743,067
2017	$587,740,811	$476,071,924
2018	$329,863,632	$267,190,590
2019	$464,635,177	$376,355,969
2020	$391,519,471	$317,132,015
2021	$572,247,113	$463,521,979
2022	$572,247,113	$463,521,979
2023	$652,920,958	$528,868,050
2024	$629,454,553	$509,860,187
2025	$518,716,551	$420,162,054
2026	$506,916,464	$410,603,945
2027	$498,548,793	$403,826,106
2028	$492,615,116	$399,019,808
2029	$488,407,430	$395,611,570
2030	$485,423,679	$393,194,722
2031	$483,307,844	$391,480,888
Undiscounted Total	**$9,522,061,046**	**$7,712,899,688**

Source: USCIS analysis.

The DACA program also creates cost savings for DHS that are not simple to quantify and monetize. For instance, the DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients. Cost savings vary considerably depending on the circumstances of the encounter; the type of enforcement officer involved; relevant national security, border security, and public safety considerations; and any intervening developments in the noncitizen's situation and equities. In addition, some cost savings that historically have been considered as part of deferred action decision making are inherently difficult to quantify, such as costs associated with taking enforcement action without first considering ''the likelihood of ultimately removing the alien, the presence of sympathetic factors that could adversely affect future cases or generate bad publicity . . . , and whether the alien had violated a provision that had been given high enforcement priority.'' [369]

(6) Benefits of the Proposed Regulatory Changes

There are quantified and monetized benefits and unquantified and qualitative benefits associated with this proposed rule. The quantified and monetized benefits stem from the income earned by DACA recipients who have received an EAD and choose to participate in the labor market. By participating in the labor market, DACA recipients are increasing the production of the economy and earning wages, which in turn leads to additional consumption. DHS acknowledges the possibility that certain DACA recipients might have participated in the informal labor market and earned wages prior to being granted lawful presence and work authorization under the DACA program. For this segment of the DACA-recipient population, DHS could be overestimating the quantified benefits in the form of earned income directly attributable to receiving work authorization. Adjusting the quantified benefits to show only income attributable to work authorization under DACA would entail estimating the difference between the compensation these individuals might expect to earn in the informal labor market and the compensation estimates presented in

[369] *See AADC,* 525 U.S. at 484 n.8 (citing 16 C. Gordon, S. Mailman, and S. Yale-Loehr, *Immigration Law and Procedure* § 242.1 (1998)).

this analysis, multiplied by the estimate of this population.[370]

For example, Borjas and Cassidy (2019) examine the wage differential between informal and formal work for immigrant populations. They apply their analysis of a wage differential, or ''wage penalty,'' to an estimated proxy of the DACA-eligible population, suggesting that the wage earned as a documented noncitizen would be, on average, 4.5% to 6.8% higher than the wage of an individual working as an undocumented noncitizen. This phenomenon also is discussed in a recently published piece on the economic benefits of unauthorized immigrants gaining permanent legal status, which points out that there exist per-hour income differentials when comparing unauthorized immigrant workers to native-born and legal immigrant workers.[371] In contrast, in a survey of 1,157 DACA recipients fielded by Wong (2020), respondents age 25 and older (n = 882) reported wage increases of 129% ($27.17/$11.89 = 2.285) since receiving DACA.[372] If done properly, such an adjustment would yield a more accurate estimate of the quantified benefits attributable to the receipt of work authorization under DACA.[373] DHS welcomes public comment regarding wage differentials and wage penalties of unauthorized and authorized workers, including differences in wages among those immigrant workers participating in formal or informal employment.

Other empirical and conceptual issues are also challenging here. In addition to the difficulty of identifying the correct adjustment to the quantified benefits due to wages presented in this analysis, the Department recognizes that the lack of work authorization under DACA could push immigrants to seek informal work with greater hazards and vulnerabilities to exploitation. Seeking and engaging in that informal work would involve welfare losses (hedonic as well as economic).

In addition, DHS is considering whether to make an additional modification to the estimated benefits in order to help ensure DHS is not overestimating the quantified benefits directly attributable to receiving DACA. For those who entered the labor market after receiving work authorization and began to receive paid compensation from an employer, counting the entire amount received by the employer as a benefit likely results in an overestimate. Even without working for wages, the time spent by an individual has value. For example, if someone performs childcare, housework, or other activities without paid compensation, that time still has value. Consequently, a more accurate estimate of the net benefits of receiving work authorization under the proposed rule would take into account the value of time of the individual before receiving work authorization. For example, the individual and the economy would gain the benefit of the DACA recipients entering the workforce and receiving paid compensation but would lose the value of their time spent performing non-paid activities. Due to the wide variety of non-paid activities an individual could pursue without DACA work authorization, it is difficult to estimate the value of that time. DHS is requesting public comment on how to best value the non-paid time of those who were not part of the authorized workforce without DACA. One possible method is to use 50% of wages as a proxy of the value for this non-paid time. DHS requests public comment on ways to best estimate the value of this non-paid time.

DHS welcomes public comment and/or data on all these issues, including, for example, data regarding wages earned by the DACA-eligible or DACA-approved populations both with and without work authorization, which DHS may be able to use in order to adjust the benefit estimates presented in Table 14 in a final rule.

For benefit calculations, DHS makes use of the previously estimated average annual compensation of DACA EAD recipients of $50,341 multiplied by 70 percent of each the population data in Table 7 and the population estimates in Table 8. Recall, DHS estimated that 70 percent of DACA recipients will choose to participate in the labor market, potentially earning income. This earned income is presented here as the quantified and monetized benefit of this proposed rule because of recipients having an EAD and working. The benefit (from income earnings) per applicant is $35,238.77 ($50,341 * 70%), assuming that these jobs were added to the economy and that DACA workers were not substituted for other workers. Multiplying this per-applicant benefit by the population projections presented earlier in Table 7 and Table 8 and subtracting the portion of income that is a transfer from the DACA population to the Federal Government yields the results in Table 15.[374]

[370] *See* Borjas and Cassidy (2019).

[371] *See* White House Council of Economic Advisors, *The Economic Benefits of Extending Permanent Legal Status to Unauthorized Immigrants* (Sept. 17, 2021), *https://www.whitehouse.gov/cea/blog/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants.*

[372] *See* Wong (2020). DHS notes that the intervening years of experience could explain some of this growth rate.

[373] Borjas and Cassidy (2019) and Wong (2020) suggest that the additional earnings from wages presented in this proposed rule, for this segment of the DACA population, would have to be adjusted by this formula: NPRM estimated DACA wage—(NPRM DACA estimated wage/(1 + wage differential %)). This adjustment multiplied by this population yields a more accurate estimate of the quantified and monetized benefits of this proposed rule.

[374] The portion of total potential income earned that is a payroll tax transfer from the DACA working population to the Federal Government is 7.65%. Multiplying the benefits numbers in Table 15 by [1/(1 − 0.0765)] yields the pre-tax overall total potential income earned. Section V.A.4.b.(7) discusses more details on the calculations and transfer estimates.

Table 15. Total Benefits Relative to the Pre-Guidance Baseline, FY 2012–FY 2031 (2020 dollars)

FY	Benefits
2012	$65,704,318
2013	$15,388,934,012
2014	$19,787,348,312
2015	$21,235,284,027
2016	$22,123,707,937
2017	$22,798,714,851
2018	$22,913,363,841
2019	$21,496,343,976
2020	$21,064,368,190
2021	$21,826,347,756
2022	$22,615,891,066
2023	$23,433,995,208
2024	$24,281,693,337
2025	$25,160,055,982
2026	$26,070,192,397
2027	$27,013,251,962
2028	$27,990,425,634
2029	$29,002,947,452
2030	$30,052,096,096
2031	$31,139,145,259
Undiscounted Total	**$455,459,811,615**

Source: USCIS analysis.

DHS notes that to whatever extent a DACA recipient's wages otherwise would be earned by another worker, the benefits in Table 15 could be overstated (*see* Section V.A.4.d for additional analysis).

The unquantified and qualitative benefits stem in part from the forbearance component of an approved DACA request. The DACA requestors who receive deferred action under this proposed rule would enjoy additional benefits relative to the Pre-Guidance Baseline. We will describe these next along with any other qualitative impacts this proposed rule creates relative to the Pre-Guidance Baseline.

Some of the benefits associated with the DACA program accrue to DHS (as discussed above), whereas others accrue to the noncitizens who are granted deferred action and employment authorization, and still others accrue to family members, employers, universities, and others. Quantification and monetization of many of these benefits is unusually challenging. E.O. 13563 states that

> each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.[375]

It is essential to emphasize that the goals of this regulation include protection of equity, human dignity, and fairness, and that DHS is keenly alert to distributive impacts. DHS also recognizes that while some of those qualitative benefits are difficult or impossible to measure, it is essential that they be considered. Under the proposed regulation, deferred action may be available to people who came to the United States many years ago as children—often as young children. As discussed above, in DHS's view, scarce resources are not best expended with respect to people who meet the relevant criteria. In addition, DHS believes forbearance of removal for such individuals furthers values of equity, human dignity, and fairness.

It is not simple to quantify and monetize the benefits of forbearance for those who obtain deferred action and their family members. These challenging-to-quantify benefits include (1) a reduction of fear and anxiety for DACA recipients and their families,[376] (2) an increased sense of acceptance and

[375] 76 FR 3821 (Jan. 21, 2011).

[376] Osea Giuntella, et al., *Immigration policy and immigrants' sleep. Evidence from DACA,* 182 J. of Econ. Behav. & Org. 1 (Feb. 2021).

belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future. Some of these benefits are connected with equity and fairness, mentioned in E.O. 13563; others are plausibly connected with human dignity, also mentioned in that E.O. Again, these benefits are difficult to quantify.[377] It might be tempting to try to compare the benefits of the reduced risk of deportation to other benefits from risk reduction, such as the reduction of mortality and morbidity risks. But any such comparison would be highly speculative, and DHS does not believe that it can monetize the total value of these specific benefits to DACA recipients. A possible (and very conservative) lower bound estimate could be the cost of requesting DACA; that is, it would be reasonable to assume that the DACA-approved population values these benefits at least as much as the cost of requesting DACA. DHS does not speculate on an upper bound but concludes that it could well be a substantially large sum, much larger than the lower bound; the benefits of items (1), (2), (3), and (4) above are likely to be high. DHS invites comments on the challenges of quantification here and on how they might be met.

DHS notes as well that DACA recipients could qualify for discretionary advance parole, which would allow them to travel outside of the United States during the duration of their deferred action and be allowed to return to the United States.[378] In addition to the benefits of travel itself, DHS recognizes that some DACA recipients who were not previously lawfully admitted or paroled into the United States and are otherwise eligible to adjust status to that of a lawful permanent resident (such as through employment or family relationships) may satisfy the ''inspected and admitted or paroled'' requirement of the adjustment of status statute at 8 U.S.C. 1255(a) upon their return to the United States through advance parole. However, DHS may grant advance parole to any individual who meets the statutory criteria with or without lawful status or deferred action, and a grant of advance parole alone does not create a pathway to lawful status or citizenship. Regardless, DHS is also unable to quantify the value of advance parole to the DACA population. DHS welcomes public comments on these specific benefits and, in particular, on whether and how quantitative estimates might be operationalized.

Employment authorization and receipt of an EAD grants additional benefits to the DACA-approved population and their families. An EAD can serve as official personal identification, in addition to serving as proof that an individual is authorized to work in the United States for a specific time period. In certain States, depending on policy choices made by the State, an EAD also could be used to obtain a driver's license or other government-issued identification. Similar to the benefits that are derived from being granted deferred action, DHS is unable to estimate the total value of benefits from having official personal identification or a driver's license for individuals in the DACA population. DHS invites public comments on whether and how quantitative estimates might be used for benefits derived from being granted employment authorization and receiving an EAD, such as serving as official personal identification, or as a conduit to receiving additional tangential benefits like a driver's license.

The fee structure in the proposed rule may result in some additional qualitative benefits relative to the No Action Baseline, and may result in increased benefits relative to the Pre-Guidance Baseline, as compared to the existing fee structure. Providing the option to forgo requesting employment authorization when requesting deferred action using Form I–821D, and thus pay only the accompanying $85 fee, could incentivize noncitizens to request DACA by reducing some of the financial barriers to entry for individuals who potentially qualify for deferred action, but do not need (or yet need) employment authorization, and desire the benefits associated with deferred action. Such individuals otherwise may be discouraged from requesting DACA due to the current $495 cost to file. For example, it is possible that some persons who are in school, receive scholarships, or have other types of school or non-school aid, and who value the benefits from deferred action, might find the lower cost of the program ($85 without employment authorization) more attractive than the current cost to request DACA ($495) and be encouraged to do so. Additionally, the proposed rule allows the current DACA-approved population to continue enjoying the advantages of the policy and have the option to request renewal of DACA in the future without also requesting a renewal of employment authorization.

Finally, as discussed above, the proposed rule reiterates USCIS' longstanding codification in 8 CFR 1.3(a)(4)(vi) of agency policy that a noncitizen who has been granted deferred action is considered ''lawfully present''—a specialized term of art that does not confer lawful status or the right to remain in the United States—for the discrete purpose of authorizing the receipt of certain Social Security benefits consistent with 8 U.S.C. 1611(b)(2). The proposed rule also reiterates longstanding policy that a noncitizen who has been granted deferred action does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9) (imposing certain admissibility limitations for noncitizens who departed the United States after having accrued certain periods of unlawful presence). These benefits as well are difficult to quantify in part due to the time-limited nature of the benefit, the age of the relevant population, and the various ways in which accrual of unlawful presence might ultimately affect an individual based on their immigration history. DHS welcomes comments on ways to evaluate these benefits.

(7) Transfers of the Proposed Regulatory Changes

Relative to the Pre-Guidance Baseline, the proposed rule would result in tax transfers to different levels of government, assuming that DACA recipients who have employment perform work that is new to the economy rather than substituting their labor for the labor of workers already employed in the economy. It is difficult to quantify tax transfers because individual tax situations vary widely (as do taxation rules imposed by different levels of government), but DHS estimates the potential increase in transfer payments to Federal employment tax programs, namely Medicare and Social Security, which have a combined payroll tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[379] With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated increase in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent. This analysis relies on this total tax rate to calculate these transfers relative to the Pre-Guidance Baseline. DHS takes this rate and multiplies it by the total (pre-

[377] On some of the conceptual and empirical issues, *see* Matthew Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety,* 79 Chicago-Kent L. Rev. 977 (2004).

[378] *See* 8 U.S.C. 1182(d)(5), 8 CFR 212.5, authorizing parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

[379] Internal Revenue Service, ''Topic No. 751 Social Security and Medicare Withholding Rates,'' *https://www.irs.gov/taxtopics/tc751* (last updated Mar. 10, 2021).

tax income earnings) benefits,[380] which yields our transfer estimates for this section. Table 16 presents these estimates.

Table 16. Total Employment Federal Tax Transfers, FY 2012–FY 2031 (from DACA employees and employers to the Federal Government) (2020 dollars)

FY	Transfers
2012	$10,885,501
2013	$2,549,547,270
2014	$3,278,250,451
2015	$3,518,135,849
2016	$3,665,324,650
2017	$3,777,155,790
2018	$3,796,150,155
2019	$3,561,386,712
2020	$3,489,819,527
2021	$3,616,059,780
2022	$3,746,866,630
2023	$3,882,405,270
2024	$4,022,846,866
2025	$4,168,368,777
2026	$4,319,154,777
2027	$4,475,395,290
2028	$4,637,287,625
2029	$4,805,036,232
2030	$4,978,852,954
2031	$5,159,059,778
Undiscounted Total	**$75,457,989,883**

Source: USCIS analysis.

Part of the DACA requestor population may choose only to request deferred action through Form I–821D. If this were to happen, this would result in a transfer from USCIS to those DACA requestors as requestors filing only the Form I–821D (proposed fee: $85) would now pay less in filing fees than the current filing fee cost for both Forms I–821D and I–765. As previously discussed, the cost to USCIS of adjudicating Form I–821D is $332. The difference of $247 multiplied by 30% of the DACA requestor population yields the potential transfers if 30% of DACA requestors apply for deferred action only. Table 17 presents the estimates of these potential transfers.

[380] The benefit (from pre-tax income earnings) per applicant is $35,238.77 ($50,341 * 70%). Multiplying this benefit per applicant by the population projections presented earlier in Table 7 and Table 8 yields total pre-tax earnings. Multiplying the 15.3% payroll tax rate to this pre-tax total yields the Table 16 estimates.

Table 17. Total Transfers, FY 2012–FY 2031, If 30% of DACA Requestors Forgo EAD Applications (from USCIS to certain DACA requestors) (2020 dollars)

FY	Transfers
2012	$11,694,907
2013	$32,897,955
2014	$19,546,617
2015	$35,890,187
2016	$20,230,634
2017	$38,258,201
2018	$21,472,031
2019	$30,244,804
2020	$25,485,435
2021	$37,249,659
2022	$37,249,659
2023	$42,501,015
2024	$40,973,501
2025	$33,765,159
2026	$32,997,048
2027	$32,452,366
2028	$32,066,121
2029	$31,792,227
2030	$31,598,004
2031	$31,460,276
Undiscounted Total	**$619,825,804**

Source: USCIS analysis.

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c. Costs to the Federal Government

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing immigration adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.[381] Generally, DHS establishes USCIS fees according to the estimated cost of adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs, such as clerical, officer, and managerial salaries and benefits, plus an amount to recover unassigned overhead (*e.g.,* facility rent, information technology equipment and systems) and immigration benefits provided without a fee charge. DHS established the current fee for Form I–765, Application for Employment Authorization, in its FY 2016/FY 2017 USCIS Fee Rule at a level below the estimated full cost of adjudication but raised other fees to provide for full cost recovery to USCIS overall. DHS proposes no change to the $410 fee for Form I–765 in this NPRM and will review the fee in the context of an overall adjustment to the USCIS fee schedule. However, in instances where DHS determines it to be in the public interest, DHS establishes fees that are below the estimated full cost and charges other benefit requestors more to provide for the recovery of USCIS' costs. As previously discussed, DHS has determined that it is in the public interest to hold the fee for Form I–821D, Consideration of Deferred Action for Childhood Arrivals, below the estimated full cost of adjudication. Consequently, if the primary fee proposal is finalized, the rule may result in the transfer of a portion of these estimated full costs of adjudication to the fee-paying population. Moreover, another form affected by this proposed rule that currently does not charge a filing fee is Form I–765WS, I–765 Worksheet, which DACA requestors must file with Form I–765. DHS notes the time necessary for USCIS to review the information submitted with each of these forms includes the time to adjudicate the underlying benefit request. DHS notes that the proposed rule may increase USCIS' costs associated with adjudicating immigration benefit

[381] *See* INA sec. 286(m), 8 U.S.C. 1356(m).

requests. Future adjustments to the fee schedule may be necessary to recover these additional operating costs and will be determined at USCIS' next comprehensive biennial fee review. DHS invites public comments on the potential impacts of these additional operating costs.

d. Labor Market Impacts

The projected active DACA population of the proposed rule in the *No Action Baseline* section of the analysis suggests that about 16,391 new participants [382] could enter the U.S. labor force in the first year of implementation of the proposed rule as compared to the number of DACA recipients in the labor market in FY 2020 (based on the 70% labor force participation rate presented earlier). This number increases annually at a growth rate of 3.6174%, reaching up to 23,384 new participants in the last year of analysis, FY 2031. As of 2020, there were an estimated 160,742,000 people in the U.S. civilian labor force.[383] The aforementioned estimate of 16,391 new participants in the U.S. labor force in FY 2021 would represent approximately 0.0102% of the 2020 overall U.S. civilian labor force.[384] Of course, as noted above, these figures likely represent an overestimate, insofar as some individuals otherwise would be engaged in informal employment.

The top four States where current DACA recipients reside represent about 55 percent of the total DACA-approved population: California (29%), Texas (16%), Illinois (5%), and New York (4%).[385] These States may have a slightly larger share of potentially additional DACA workers compared with the rest of the United States. Assuming the estimate for first year impacts could be distributed following the same patterns, DHS estimates the following potential impacts. California could receive approximately 4,753 (*i.e.,* 29% * 16,391) additional workers in the first year of implementation; Texas 2,623 additional workers; Illinois 820 additional workers; and New York 656 additional workers. To provide additional context, in April of 2021, California had a population of 18,895,158 in the civilian labor force in February 2021, Texas had 14,034,972, Illinois had 6,146,496, and New York had 9,502,491.[386] As an example, the additional 4,753 workers who could be added to the Californian labor force in the first year after promulgation of this proposed rule would represent about 0.0252% of the overall California labor force.[387] The potential impacts to the other States would be lower (*e.g.,* for Texas, the impact would be about 0.0187%).

As noted above, the analysis of the proposed rule relative to the Pre-Guidance Baseline entails consideration of effects going back to FY 2012, when the program was introduced and the surge of new requestors occurred. Because the Napolitano Memorandum was released in June of 2012, the FY 2012 September 30th count of 2,019 active DACA participants does not cover a full fiscal year; therefore, we add FY 2012 and FY 2013 together, adjusting by the 70% labor market participation rate, for a count of new active DACA entrants in the U.S. labor market equal to 332,429. Applying this number to the U.S. labor market statistics, as in the No Action Baseline labor market analysis above, we estimate that this number of new entrants would represent about 0.2139% of the 2013 overall US. civilian labor force of 155,389,000.[388] As discussed in the preceding paragraph, for California, the new active DACA entrant population in FY 2012 and FY 2013 would represent about 0.5102% of California's April 2021 labor force, 0.3790% of Texas's, 0.2704% of Illinois's, and 0.1399% of New York's. Again, these figures likely represent an overestimate, insofar as some individuals otherwise would be engaged in informal employment.

As noted above, the relative proportion of DACA recipients in any given labor market would depend on the number of active DACA recipients who choose to work and the size of the labor market at that time. In future years within the period of analysis, the number of DACA recipients in the labor force would be expected to increase because, as indicated in Table 8, the RIA projects an increase in the active DACA population in future years. Even in FY 2031, however—when the projected active DACA population would be at its peak of 956,863—the number estimated to participate in the labor force would be 669,804, or 0.4167 percent of the 2020 U.S. civilian labor force.[389]

Although the estimated annual increases in the active DACA population in this proposed rule are small relative to the total U.S. and individual State labor forces, DHS recognizes that, in general, any increase in worker supply may affect wages and, in turn, the welfare of other workers and employers. However, the effects are not obvious as changes in wages depend on many factors and various market forces, such as the type of occupation and industry, geographic market locations, and overall economic conditions. For example, there are industries where labor demand might outpace labor supply, such as in healthcare, food services, and software development sectors. BLS projects that home health and personal care aides occupations will grow by about 34 percent over the next 10 years, cooks in restaurants by about 23 percent, and software development occupations by about 22 percent.[390] In industries or sectors such as these, holding everything else constant, increases in the labor supply might not be enough to satisfy labor demand. As a result, wages might rise to attract qualified workers, thereby improving welfare for all workers in these sectors. The opposite could happen for industries or sectors where labor supply outpaces labor demand. DHS cannot predict the degree to which DACA recipients are substituted for other workers in the U.S. economy since this depends on factors such as industry characteristics as described above as well as on the hiring practices and preferences of employers, which depend on many factors, such as worker skill levels, experience levels, education levels, training needs, and labor market regulations, among others.[391]

Isolating immigration's effect on labor markets has been an ongoing task in the research. A 2017 National Academies of Sciences, Engineering, and Medicine

[382] Calculation: (FY 2021 projected active DACA population − FY 2020 projected active DACA population) * 0.70 = (670,693 − 647,278) = 23,415 * 0.70 = 16,391.

[383] Source: BLS, *Labor Force Statistics from the Current Population Survey,* Household Data Annual Averages: Table 3. Employment status of the civilian noninstitutional population by age, sex, and race, *https://www.bls.gov/cps/cpsaat03.htm.*

[384] Calculation: (16,391/160,742,000) * 100 = 0.0102%.

[385] Source: Count of Active DACA Recipients by Month of Current DACA Expiration as of Dec. 31, 2020. DHS/USCIS/OPQ ELIS and CLAIMS 3 Consolidated (queried Jan. 2021).

[386] Source: BLS, News Release, *State Employment and Unemployment—May 2021,* Labor Force Data Seasonally Adjusted: Table 1. Civilian labor force and unemployment by state and selected area, seasonally adjusted, *https://www.bls.gov/news.release/pdf/laus.pdf.*

[387] Calculation: (4,753/18,895,158) × 100 = 0.0252%.

[388] Source: BLS, *Labor Force Statistics from the Current Population Survey,* Household Data Annual Averages: Table 1. Employment status of the civilian noninstitutional population, 1950 to date, *https://www.bls.gov/cps/cpsaat01.pdf.*

Calculation: (332,429/155,389,000) * 100 = 0.2139%.

[389] Calculation: (669,804/160,742,000) * 100 = 0.4167%.

[390] Source: BLS, Employment Projections (Sept. 2020), *Occupations with the most job growth,* Table 1.4. Occupations with the most job growth, 2019 and projected 2029, *https://www.bls.gov/emp/tables/occupations-most-job-growth.htm.*

[391] DHS also discusses the possibility of informal employment elsewhere in this analysis.

(NAS) publication synthesizes the current peer-reviewed literature on the effects of immigration and empirical findings from various publications.[392] Notably, the 2017 NAS Report addresses a different subject than this proposed rule, which relates to a policy of enforcement discretion with respect to those who arrived in the United States as children and have lived here continuously for well over a decade. Nonetheless, the analysis presented in that report may be instructive.

The 2017 NAS Report cautions that

> economic theory alone is not capable of producing definitive answers about the net impacts of immigration on labor markets over specific periods or episodes. Empirical investigation is needed. But wage and employment impacts created by flows of foreign-born workers into labor markets are difficult to measure. The effects of immigration have to be isolated from many other influences that shape local and national economies and the relative wages of different groups of workers.[393]

Whether immigrants are low-skilled or high-skilled workers can matter with respect to effects on wages and the labor market generally.[394] According to the 2017 NAS Report, some studies have found high-skilled immigrant workers positively impact wages and employment of both college-educated and non-college-educated native workers, consistent with the hypothesis that high-skilled immigrants often complement native-born high-skilled workers, and some studies looking at ''narrowly defined fields'' involving high-skilled workers have found adverse wage or productivity effects on native-born workers.[395] In addition,

> some studies have found sizable negative short-run wage impacts for high school dropouts, the native-born workers who in many cases are the group most likely to be in direct competition for jobs with immigrants. Even for this group, however, there are studies finding small to zero effects, likely indicating that outcomes are highly dependent on prevailing conditions in the specific labor market into which immigrants flow or the methods and assumptions researchers use to examine the impact of immigration. The literature continues to find less favorable effects for certain disadvantaged workers and for prior immigrants than for natives overall.[396]

With respect to wages, in particular, the 2017 NAS Report described recent research showing that,

> when measured over a period of more than 10 years, the impact of immigration on the wages of natives overall is very small. However, estimates for subgroups [of noncitizens] span a comparatively wider range, indicating a revised and somewhat more detailed understanding of the wage impact of immigration since the 1990s. To the extent that negative wage effects are found, prior immigrants—who are often the closest substitutes for new immigrants—are most likely to experience them, followed by native-born high school dropouts, who share job qualifications similar to the large share of low-skilled workers among immigrants to the United States.[397]

With respect to employment, the report described research finding

> little evidence that immigration significantly affects the overall employment levels of native-born workers. However, recent research finds that immigration reduces the number of hours worked by native teens (but not their employment rate). Moreover, as with wage impacts, there is some evidence that recent immigrants reduce the employment rate of prior immigrants—again suggesting a higher degree of substitutability between new and prior immigrants than between new immigrants and natives.[398]

Further, the characteristics of local economies matter with respect to wage and employment effects. For instance, the impacts to local labor markets can vary based on whether such market economies are experiencing growth, stagnation, or decline. On average, immigrants tend to locate in areas with relatively high labor demand or low unemployment levels where worker competition for available jobs is low.[399]

Overall, as noted, the 2017 NAS Report observed that when measured over a period of 10 years, the impact of immigration on the wage of the native-born population overall was ''very small.'' [400] Although the current and eligible DACA population is a subset of the overall immigrant population, it still shares similar characteristics with the overall immigrant population, including varying education and skill levels. Therefore, one could expect the DACA population to have similar economic impacts as the overall immigrant population, relative to the Pre-Guidance Baseline.

The 2017 NAS Report also discusses the economic impacts of immigration and considers effects beyond labor market impacts. Similar to the native-born population, immigrants also pay taxes; stimulate the economy by consuming goods, services, and entertainment; engage in the real estate market; and take part in domestic tourism. Such activities contribute to further growth of the economy and create additional jobs and opportunities for both native-born and noncitizen populations.[401]

DHS welcomes public comments and information that can further inform any labor market or wage impact analysis.

e. Fiscal Effects on State and Local Governments

In this section, in consideration of the *Texas II* court's discussion of fiscal effects (as described in the next section of this RIA), DHS briefly addresses the proposed rule's potential fiscal effects on State and local governments. It would be extremely challenging to measure the overall fiscal effects of this proposed rule in particular, especially due to those governments' budgetary control. The 2017 NAS Report discussed above canvassed studies of the fiscal impacts of immigration as a whole, and it described such analysis as extremely challenging and dependent on a range of assumptions. Although the 2017 NAS Report addresses a different subject than this proposed rule (which relates to a policy of enforcement discretion with respect to those who arrived in the United States as children and have lived here continuously for well over a decade), DHS discusses the 2017 NAS Report to offer general context for this topic. DHS then offers a discussion of the potential effects of this proposed rule in particular.

With respect to its topic of study, the NAS wrote that

> estimating the fiscal impacts of immigration is a complex calculation that depends to a significant degree on what the questions of interest are, how they are framed, and what assumptions are built into the accounting exercise. The first-order net fiscal impact of immigration is the difference between the various tax contributions immigrants make to public finances and the government expenditures on public benefits and services they receive. The foreign-born are a diverse population, and the way in which they affect government finances is sensitive to their demographic and skill characteristics, their role in labor and other markets, and the rules regulating accessibility and use of government-financed programs.[402]

In addition, second-order effects also clearly occur; analysis of such effects also presents methodological and empirical challenges.[403]

For example, as with the native-born population, the age structure of immigrants plays a major role in assessing any fiscal impacts. Children and young adults contribute less to

[392] NAS, *The Economic and Fiscal Consequences of Immigration* (2017), *https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration* (hereinafter 2017 NAS Report).

[393] *Id.* at p. 4.

[394] *Id.* at p. 4.

[395] *Id.* at 6.

[396] *Id.* at 267.

[397] *Id.* at 5.

[398] *Id.* at 5–6.

[399] *Id.* at 5.

[400] *Id.* at 5.

[401] *Id.* at 6–7.

[402] *Id.* at 28.

[403] *Id.* at 342.

society in terms of taxes and draw more in benefits by using public education, for example. On average, as people age and start participating in the labor market they become net contributors to public finances, paying more in taxes than they draw from public benefit programs. Moreover, people in post-retirement again could become net users of public benefit programs. Compared to the native-born population, immigrants also can differ in their characteristics in terms of skills, education levels, income levels, number of dependents in the family, the places they choose to live, etc., and any combination of these factors could have varying fiscal impacts.

Local and State economic conditions and laws that govern public finances and availability of public benefits also vary and can influence the fiscal impacts of immigration. The 2017 NAS Report explained that fiscal impacts of immigration

> vary strongly by level of governments. States and localities bear the burden of funding educational benefits enjoyed by immigrant and native children. The federal government transfers relatively little to individuals at young and working ages but collects much tax revenue from working-age immigrant and native-born workers. Inequality between levels of government in the fiscal gains or losses associated with immigration appears to have widened since 1994.[404]

The extent of such gaps among Federal, State, and local impacts necessarily varies by jurisdiction and due to a range of surrounding circumstances.[405]

Based on the information presented in the 2017 NAS Report, DHS approaches the question of State and local fiscal impacts as follows. First, it is clear that the fiscal impacts of the proposed rule to State and local governments would vary based on a range of factors, such as the characteristics of the DACA-recipient population within a particular jurisdiction at a particular time (or over a particular period of time), including recipients' age, educational attainment, income, and level of work-related skill as well as the number of dependents in their families. In addition, fiscal effects would vary significantly depending on local economic conditions and the local rules governing eligibility for public benefits.[406] For example, some States may allow DACA recipients to apply for subsidized driver's licenses or allow DACA recipients to qualify for instate tuition at public universities, which may not be available to similarly situated individuals without deferred action. These costs to the State will be highly location specific and are, therefore, difficult to quantify.

Second, as compared to the Pre-Guidance Baseline, multiple aspects of this proposed rule suggest that the burden on State and local fiscal resources imposed by the proposed rule is unlikely to be significant, and it may well have a positive net effect. Recall that under the Pre-Guidance Baseline, most noncitizens who otherwise would be DACA recipients likely would remain in the country, but without the additional measure of security, employment authorization, and lawful presence that this proposed rule would provide. Under the Pre-Guidance Baseline, these noncitizens would continue to use and rely, as necessary, on those safety net and other public resources for which they are eligible. As noted above, DACA recipients may be eligible for more benefits under current State and local law than they otherwise would be eligible for without DACA, but they still do not fall under the ''qualified alien'' category, and are, therefore, generally ineligible for public benefits at the Federal, State, and local levels.[407] Under the proposed rule, these noncitizens can work and build human capital and, depending on the choices made by a State, may be able to secure driver's licenses and other identification, obtain professional licenses, or otherwise realize benefits from the policy. In short, the proposed rule likely would result in increases in tax revenues, as well as decreases in reliance on safety net programs, although effects on specific programs may vary based on a range of factors.

Third, DHS notes the relatively small size of the DACA population in any particular region relative to any given jurisdiction's overall population. The overall long-term fiscal health of State and local jurisdictions where DACA recipients choose to work and live will depend on many other factors not within DHS's control. In the long term, DHS expects State and local governments to continue to choose how to finance public goods, set tax structures and rates, allocate public resources, and set eligibilities for various public benefit programs, and to adjust these approaches based on the evolving conditions of their respective populations.

In short, DHS acknowledges that though the proposed rule likely would result in some indirect fiscal effects on State and local governments (both positive and negative), such effects would be extremely challenging to quantify fully and would vary based on a range of factors, including policy choices made by such governments. DHS welcomes comment on such fiscal effects and how, if at all, DHS should weigh those fiscal effects in the context of the full range of policy considerations relevant to this rulemaking.

DHS invites public comments on State and local fiscal effects that could be incorporated in the analysis.

f. Reliance Interests and Other Regulatory Effects

In the *Texas II* district court's decision, the court identified a range of considerations potentially relevant to ''arbitrary and capricious'' review of any actions that DHS might take on remand,[408] although the court noted that many of these considerations were matters raised by parties and amici in the course of *Texas I* and *Texas II,* and the court did not appear to suggest that DHS was required to analyze each of these considerations. The court further cautioned that it did not mean to suggest ''this is an exhaustive list, and no doubt many more issues may arise throughout the notice and comment period. Further, the Court takes no position on how DHS (or Congress, should it decide to take up the issue) should resolve these considerations, as long as that resolution complies with the law.'' DHS has assessed the considerations presented by the district court, and it presents its preliminary views in this section.[409]

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[404] *Id.* at 407.

[405] *See, e.g., id.* at 518, 545 (tables displaying State and local revenues per independent person unit and State and local expenditures per independent person unit, by immigrant generation by State, but without adjusting for eligibility rules specific to noncitizens).

[406] DHS notes that DACA recipients are not considered ''qualified aliens.'' *See* 8 U.S.C. 1641(b). As noted elsewhere in this preamble, PRWORA also limits the provision of ''state and local public benefits'' to noncitizens who are ''qualified aliens,'' with limited exceptions, but provides that States may affirmatively enact legislation making noncitizens ''who [are] not lawfully present in the United States'' eligible for such benefits. *See* 8 U.S.C. 1621(d).

[407] *See* 8 U.S.C. 1641(b), 1611 (general ineligibility for Federal public benefits), and 1621 (general ineligibility for State public benefits).

[408] In the same section of the court's opinion, the court also suggested that DHS consider a forbearance-only alternative to DACA. The court wrote that ''the underlying DACA record points out in multiple places that while forbearance fell within the realm of prosecutorial discretion, the award of status and benefits did not. Despite this distinction, neither the DACA Memorandum nor the underlying record reflects that any consideration was given to adopting a policy of forbearance without the award of benefits.'' DHS has addressed this issue in the *Regulatory Alternatives* section below.

[409] DHS has opted to address these considerations out of deference to the district court's memorandum and order, and in an abundance of caution. This decision should not be viewed as a concession that DHS must or should consider the various considerations raised by the district court, with respect to this proposed rule or any other proposed rule.

First, the court raised potential reliance interests of States and their residents, writing that

> for decades the states and their residents have relied upon DHS (and its predecessors) to protect their employees by enforcing the law as Congress had written it. Once again, neither the DACA Memorandum nor its underlying record gives any consideration to these reliance interests. Thus, if one applies the Supreme Court's rescission analysis from *Regents* to DACA's creation, it faces similar deficiencies and would likely be found to be arbitrary and capricious.

In developing this proposed rule, DHS has considered a wide range of potential reliance interests. As noted throughout this preamble, reliance interests can take multiple forms, and may be entitled to greater or lesser weight depending on the nature of the Department action or statement on which they are based. Such interests can include not only the reliance interests of DACA recipients, but also those indirectly affected by DHS's actions, including DACA recipients' family members, employers, schools, and neighbors, as well as the various States and their other residents. Some States have relied on the existence of DACA in setting policies regarding eligibility for driver's licenses, instate tuition, State-funded health care benefits, and professional licenses.[410] Other States may have relied on certain aspects of DACA—such as employment authorization or lawful presence—in making other policy choices.[411]

In addition, prior to 2012, some States may have relied on the pre-DACA status quo in various ways, although the relevance of such reliance interests may be attenuated by the fact that DACA has been in existence since 2012, and by the fact that the executive branch has long exercised, even prior to 2012, various forms of enforcement discretion with features similar to DACA (*see* Section III.A for examples). DHS is aware of such interests and has taken them into account; it does not believe they are sufficient to outweigh the many considerations, outlined above, that support the proposed rule. DHS seeks comments on potential reliance interests of all kinds, including any reliance interests established prior to the issuance of the Napolitano Memorandum, and how DHS should accommodate such asserted reliance interests in a final rule.

Second, the court wrote that ''the parties and amici curiae have raised various other issues that might be considered in a reformulation of DACA,'' as follows (in the court's terms):

1. The benefits bestowed by the DACA recipients on this country and the communities where they reside;
2. the effects of DACA or similar programs on legal and illegal immigration;
3. the effects of DACA on the unemployed or underemployed legal residents of the States;
4. whether DACA amounts to an abandonment of the executive branch's duty to enforce the law as written (as the plaintiff States have long claimed);
5. whether any purported new formulation violates the equal protection guarantees of the Constitution (as Justice Sotomayor was concerned that DACA's rescission would); and
6. the costs DACA imposes on the States and their respective communities.

The court also identified ''more attenuated considerations,'' as follows:

7. The secondary costs imposed on States and local communities by any alleged increase in the number of undocumented immigrants due to DACA; and
8. what effect illegal immigration may have on the lucrative human smuggling and human trafficking activities of the drug cartels that operate on our Southern border.

Throughout the preamble generally and in this RIA specifically, DHS has addressed several of these issues relative to both baselines, and we seek comment on all of them. DHS addresses each question briefly below, with the expectation of additional engagement by the public during the comment period for this proposed rule.

With respect to item (1), the benefits bestowed by DACA recipients on this country and the communities where they reside are numerous. DHS directs the reader to Section II.A, as well as the discussions of benefits and transfers in this RIA. DACA recipients have made substantial contributions, including as members of families and communities, and have offered substantial productivity and tax revenue through their work in a wide range of occupations.

With respect to item (2), as noted above, DHS does not perceive DACA as having a substantial effect on volumes of lawful and unlawful immigration into the United States.[412] DHS is not aware of any evidence, and does not believe that, DACA acts as a significant material ''pull factor'' (in light of the wide range of factors that contribute to both lawful and unlawful immigration into the United States).[413] DHS policy and messaging have been and continue to be clear that DACA is not available to individuals who have not continuously resided in the United States since at least June 15, 2007, and that border security remains a high priority for the Department.[414] DHS does not propose to open up the DACA policy to new groups of noncitizens and does not believe that codifying the DACA policy would undermine DHS's enforcement messaging.[415] For the same reasons, DHS does not believe it necessary to address items (7) and (8) above, although DHS welcomes comments to inform DHS's analysis further.

With respect to item (3), DHS details its consideration of potential harm to unemployed and underemployed individuals in the *Labor Market Impacts* section. That section discusses findings from the 2017 NAS Report, which

[410] *See, e.g.,* National Conference of State Legislators, ''Deferred Action for Childhood Arrivals | Federal Policy and Examples of State Actions,'' *https://www.ncsl.org/research/immigration/deferred-action.aspx* (last updated Apr. 16, 2020) (describing State actions, in the years following the Napolitano Memorandum, with respect to unauthorized noncitizens generally, DACA recipients in particular, and other classes of noncitizens).

[411] *See, e.g.,* National Conference of State Legislators, ''States Offering Driver's Licenses to Immigrants,'' *https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx* (last updated Aug. 9, 2021) (describing multiple State decisions to offer driver's licenses to noncitizens with lawful presence).

[412] As discussed elsewhere in this rule, DHS believes that the proposed rule will not necessarily affect the number of noncitizens it removes each year, but rather helps ensure that finite removal resources are focused on the highest priority cases.

[413] *See, e.g.,* Catalina Amuedo-Dorantes and Thitima Puttitanun, *DACA and the Surge in Unaccompanied Minors at the US-Mexico Border,* 54(4) Int'l Migration 102, 112 (2016) (''DACA does not appear to have a significant impact on the observed increase in unaccompanied alien children in 2012 and 2013.'').

[414] For example, DHS continues to invest in new CBP personnel, including hiring more than 100 additional Border Patrol Processing Coordinators in FY 2021, with plans to hire hundreds more. CBP also is investing in technology that enhances its border security mission. Over the last few years, CBP has increased its use of relocatable Autonomous Surveillance Towers (ASTs) along the border, which enable enhanced visual detection, identification, and classification of subjects or vehicles at a great distance via autonomous detection capabilities. ASTs can be moved to areas of interest or high traffic, as circumstances on the ground dictate. To increase situational awareness, CBP also recently integrated the Team Awareness Kit, which provides near real-time situational awareness for USBP agents and the locations of suspected illegal border activities. Advanced technology returns agents to the field and increases the probability of successful interdiction and enforcement.

[415] *See* DACA FAQs; Pekoske Memorandum; *see also* Acting ICE Director Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). As noted above, on September 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially stayed a preliminary injunction issued by the U.S. District Court for the Southern District of Texas with respect to the two 2021 policies. *See State of Texas* v. *United States,* No. 21–40618 (5th Cir. Sept. 15, 2021).

summarizes the work of numerous social scientists who have studied the costs and benefits of immigration for decades.

This RIA does not contain a section that discusses the costs of a regulatory alternative in which DACA EADs are terminated or phased out relative to a No Action baseline, although it does contain estimates of costs, benefits, and transfers relative to the Pre-Guidance Baseline, which may be instructive for understanding some of these effects. In such a scenario, as discussed in USCIS' Asylum Application, Interview, and Employment Authorization for Applicants Final Rule (85 FR 38532, June 26, 2020), the lost compensation from DACA recipients could serve as a proxy for the cost of lost productivity to U.S. employers that are unable to find replacement workers in the U.S. labor force. There also could be additional employer costs related to searching for new job applicants.

With respect to item (4), DHS continues to enforce the law as written. As noted in Sections II.A, III.A, and III.C, the use of prioritization and discretion is a necessary element of fulfilling the DHS mission, and the use of deferred action for this purpose is consistent with the longstanding practice of DHS and the former INS.

With respect to item (5), DHS does not believe that the DACA policy or this proposed rule would violate the equal protection component of the Fifth Amendment's Due Process Clause. DHS nonetheless invites comment on whether equal protection principles bear on or would preclude DACA.[416]

With respect to item (6), DHS addresses the issue in Section V.A.4.e above. In short, although such an analysis is challenging for a variety of reasons, multiple aspects of this proposed rule suggest that the proposed rule is unlikely to impose a significant burden on State and local fiscal resources, and it may well have a positive effect.

With respect to items (7) and (8), which relate to the costs of unlawful immigration and human smuggling, DHS disagrees with the premise, as noted in DHS's discussion of item (2) above. As with each of these items, however, DHS welcomes the submission of evidence pertinent to the empirical question, as well as information and views as to how to evaluate and use such evidence.

Finally, the court also stated that ''if DHS elects to justify DACA by asserting that it will conserve resources, it should support this conclusion with evidence and data. No such evidence is to be found in the administrative record or the DACA Memorandum. DHS should consider the costs imposed on or saved by all governmental units.'' DHS agrees on the importance of evidence and data and has addressed the resource implications of DACA throughout the proposed rule, including at Sections III.C and V.A.4.b.(5).

[416] Although the Equal Protection Clause of the Fourteenth Amendment does not apply to the Federal Government, the Supreme Court in *Bolling* v. *Sharpe,* 347 U.S. 497, 500 (1954), held that while '''equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' . . . discrimination may be so unjustifiable as to be violative of due process.''

g. Discounted Direct Costs, Cost Savings, Transfers, and Benefits of the Proposed Regulatory Changes

To compare costs over time, DHS applied a 3-percent and a 7-percent discount rate to the total estimated costs, cost savings, transfers, and benefits associated with the proposed rule. Table 18 presents a summary of the proposed rule's quantified cost savings relative to the No Action Baseline at 3-percent and 7-percent discount rates.

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Table 18. Total Estimated Potential Cost Savings of the Proposed Rule Discounted at 3 Percent and 7 Percent (relative to the No Action Baseline) (FY 2021–FY 2031)

Form	Source of Cost Savings	Total Estimated Annual Cost Savings (Undiscounted)	Total Estimated Cost Savings Over 11-Year Period (Undiscounted)
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $0 and $43,959,188	Could range between $0 and $483,551,071
Form I-765	• $410 fee to file form; • Optional form; • No biometrics collection (less total time burden)		
Form I-765WS	No changes		
Total Undiscounted Cost Savings		**Could range between $0 and $43,959,188**	**Could range between $0 and $483,551,071**
Total Cost Savings at 3-Percent Discount Rate		**Could range between $0 and $44,306,430**	**Could range between $0 and $422,249,263**
Total Cost Savings at 7-Percent Discount Rate		**Could range between $0 and $44,747,009**	**Could range between $0 and $359,031,274**

Source: USCIS analysis.

Notes: The larger numbers represent the higher bound cost savings estimates presented earlier based on the 70/30 percent population split assumption. The $0 represents when the entire DACA population requests deferred action and EAD.

Table 19 presents a summary of the proposed rule's potential transfers relative to the No Action Baseline at 3-percent and 7-percent discount rates.

Table 19. Proposed Rule Potential Transfers from USCIS to Certain DACA Requestors Discounted at 3 Percent and 7 Percent (relative to the No Action Baseline) (FY 2021–FY 2031)

Form	Source of Transfers	Total Estimated Annual Transfer (Undiscounted)	Total Estimated Transfers Over 11-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $0 and $34,918,639	Could range between $0 and $384,105,034
Form I-765	Optional form (optional EAD)		
Total Undiscounted Transfers		**Could range between $0 and $34,918,639**	**Could range between $0 and $384,105,034**
Total Transfers at 3-Percent Discount Rate		**Could range between $0 and $35,194,468**	**Could range between $0 and $335,410,419**
Total Transfers at 7-Percent Discount Rate		**Could range between $0 and $35,544,439**	**Could range between $0 and $285,193,701**

Source: USCIS analysis.

Table 20 presents a summary of the potential costs relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 20. Total Estimated Potential Costs of the Proposed Rule Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Costs	Total Estimated Annual Costs (Undiscounted)	Total Estimated Costs Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $385,644,984 and $476,103,052	Could range between $7,712,899,688 and $9,522,061,046
Form I-765	Optional form (optional EAD)		
Total Undiscounted Costs		**Could range between $385,644,984 and $476,103,052**	**Could range between $7,712,899,688 and $9,522,061,046**
Total Costs at 3-Percent Discount Rate		**Could range between $378,119,675 and $466,812,583**	**Could range between $7,339,957,122 and $9,061,639,930**
Total Costs at 7-Percent Discount Rate		**Could range between $367,333,528 and 453,496,405**	**Could range between $7,154,431,373 and $8,832,596,693**

Source: USCIS analysis.

Note: The Pre-Guidance Baseline applies reverse-discounts to the costs associated with 100 percent of the FY 2012–FY 2021 population applying for EAD. The lower numbers represent the lower bound cost estimates for FY 2022–FY 2031, presented earlier based on the 70/30 percent population split assumption. The larger numbers represent the costs if the entire projected DACA population requests deferred action/EAD.

Table 21 presents a summary of the potential benefits relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 21. Total Estimated Potential Benefits of the Proposed Rule Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Benefits	Total Estimated Annual Benefits (Undiscounted)	Total Estimated Benefits Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could be $22,772,990,581	Could be $455,459,811,615
Form I-765	Optional form (optional EAD)		
Total Undiscounted Benefits		**Could be $22,772,990,581**	**Could be $455,459,811,615**
Total Benefits at 3-Percent Discount Rate		**Could be $21,883,257,823**	**Could be $424,791,897,651**
Total Benefits at 7-Percent Discount Rate		**Could be $20,722,598,193**	**Could be $403,607,063,268**

Source: USCIS analysis.

Table 22 presents a summary of the potential tax transfers relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 22. Proposed Rule Employment Federal Tax Transfers from DACA Employees and Employers to the Federal Government Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Tax Transfers	Total Estimated Annual Tax Transfer (Undiscounted)	Total Estimated Tax Transfers Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could be $3,772,899,494	Could be $75,457,989,883
Form I-765	Optional form (optional EAD)		
Total Undiscounted Tax Transfers		**Could be $3,772,899,494**	**Could be $75,457,989,883**
Total Tax Transfers at 3-Percent Discount Rate		**Could be $3,625,492,432**	**Could be $70,377,081,077**
Total Tax Transfers at 7-Percent Discount Rate		**Could be $3,433,199,809**	**Could be $66,867,275,980**
Source: USCIS analysis.			

Table 23 presents a summary of the potential transfers relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 23. Proposed Rule Potential Transfers from USCIS to Certain DACA Requestors Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Transfers	Total Estimated Annual Transfer (Undiscounted)	Total Estimated Transfers Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $0 and $30,991,290	Could range between $0 and $619,825,804
Form I-765	Optional form (optional EAD)		
Total Undiscounted Transfers		**Could range between $0 and $30,991,290**	**Could range between $0 and $619,825,804**
Total Transfers at 3-Percent Discount Rate		**Could range between $0 and $30,386,540**	**Could range between $0 and $589,855,308**
Total Transfers at 7-Percent Discount Rate		**Could range between $0 and $29,519,741**	**Could range between $0 and $574,946,046**
Source: USCIS analysis.			

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h. Regulatory Alternatives

Consistent with the Supreme Court's general analysis in *Regents,* and the more recent analysis of the district court in *Texas II,* DHS is keenly alert to the importance of exploring all relevant alternatives. This focus is also consistent with E.O. 12866 and E.O. 13563. As stated in E.O. 12866,

[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Consistent with these requirements, DHS has considered a range of regulatory alternatives to the proposed rule, including alternatives related to a policy of forbearance without employment authorization or the benefits associated with so-called lawful presence. As discussed in detail in Sections III.A through III.C above, the authority to forbear is an undisputed feature of DHS's enforcement discretion, whereas the district court in *Texas II* held that DHS lacked authority to provide employment authorization and benefits such as Social Security benefits to DACA recipients.[417]

The analysis of this forbearance-only alternative is in a sense relatively straightforward. Like the proposed rule, as compared to the Pre-Guidance Baseline, such an approach would confer a range of benefits to DHS, while also conferring benefits to DACA recipients and their families, in the form of increased security, reduced fear and anxiety, and associated values (which we have not been able to quantify). Unlike the proposed rule, however, such an approach would not confer upon DACA recipients, their families, and their communities the benefits of their work authorization and employment, or impose the corresponding costs (both quantified here, to the extent feasible). To that

[417] As the court stated in *Texas II* in objecting to work authorization and lawful presence, ''the individualized notion of deferred action'' is an approach ''that courts have found permissible in other contexts.''

extent, a forbearance-only alternative would have substantially lower net benefits, consistent with the numbers discussed above.

For instance, as discussed in Section III.D. above, a policy of forbearance without work authorization also would disrupt the reliance interests of hundreds of thousands of people, as well as the families, employers, and communities that rely on them. It would result in substantial economic losses. It would produce a great deal of human suffering, including harms to dignitary interests, associated with lost income and ability to self-support. It potentially would result in hundreds of thousands of prime-working-age people remaining in the United States while lacking authorization to work to support either themselves or their families. Importantly, it also would deprive American employers and the American public at large of the ability to benefit from valuable work of hundreds of thousands of skilled and educated individuals and disappoint their own, independent reliance interests as well. For the Federal Government, as well as for State and local governments, it likely would have adverse fiscal implications, due to reduced tax revenues. In addition, unlike the proposed rule, such an approach would produce reduced transfers to Medicare and Social Security funds, as well as any other transfers associated with the DACA policy under the No Action Baseline.

A possible alternative to the policy in the proposed rule would include (1) forbearance and (2) work authorization, but exclude (3) ''lawful presence'' and the resulting elimination of one ground of ineligibility for the associated benefits. DHS has considered this alternative and seeks comment on the issues of law and policy associated with it, including data as to the potential effects of such an approach. As noted above, ''lawful presence'' is a term of art; it could not and does not mean ''lawful status.'' But DHS believes that this alternative approach also may be inferior to the proposal, for at least two reasons. First, that approach would 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. Second, DHS is aware that some States have keyed benefits eligibility to lawful presence and may experience unintended indirect impacts if DHS, a decade after issuance of the Napolitano Memorandum, revises that aspect of the policy.[418] For these reasons, DHS does not at this time believe that it would be preferable to limit the proposal to forbearance and work authorization, but it welcomes comments on that alternative, and on all reasonable alternatives.

Finally, consistent with the *Texas II* district court's equitable decision to stay its vacatur and injunction as it relates to existing DACA recipients, DHS considered the alternative of applying this proposed rule only to existing DACA recipients. Existing DACA recipients have clearer reliance interests in the continuation of DACA than do prospective applicants who have yet to apply. On the other hand, the benefits of the program are equally applicable to those who have yet to apply, and some who might have benefited under the Napolitano Memorandum but have yet to ''age in'' to eligibility to request DACA. Although DHS believes that restricting eligibility to existing DACA recipients would not be desirable or maximize net benefits, DHS welcomes comment on the matter.

DHS invites the public to provide input regarding the current regulatory alternatives presented, suggest any other possible regulatory alternatives, or both.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA),[419] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[420] requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[421]

The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. It does not mandate any actions or requirements for small entities in the process of a DACA requestor seeking DACA or employment authorization. Rather, this proposed rule regulates individuals, and individuals are not defined as ''small entities'' by the RFA.[422] Based on the evidence presented in this analysis and throughout this preamble, DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. DHS nonetheless welcomes comments regarding potential economic impacts on small entities, which DHS may consider as appropriate in a final rule. For example, DHS seeks data and information on the number of DACA recipients who have started small businesses or work at small businesses.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[423] The inflation-adjusted value of $100 million in 1995 is approximately $169.8 million in 2020 based on the CPI–U.[424] The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate.[425] The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[426] The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the

[418] *See supra* note 411.

[419] 5 U.S.C. ch. 6.

[420] Public Law 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note).

[421] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act (15 U.S.C. 632).

[422] 5 U.S.C. 601(6).

[423] *See* 2 U.S.C. 1532(a).

[424] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf.*

Steps in calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the most recent current year available (2020); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100.

Calculation of inflation: [(Average monthly CPI–U for 2020—Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(258.811 − 152.383)/152.383] * 100 = (106.428/152.383) * 100 = 0.6984 * 100 = 69.84 percent = 69.8 percent (rounded).

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.698 = $169.8 million in 2020 dollars.

[425] *See* 2 U.S.C. 1502(1), 658(6).

[426] 2 U.S.C. 658(5).

private sector except (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[427]

This proposed rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices and would not be a consequence of an enforceable duty. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.[428] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the RIA above. DHS welcomes comments on this analysis.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule, if finalized, would be a major rule as defined by section 804 of SBREFA.[429] This proposed rule likely would result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets. Accordingly, absent exceptional circumstances, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132: Federalism

This proposed rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988: Civil Justice Reform

This proposed rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was reviewed carefully to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

G. Paperwork Reduction Act—Collection of Information

Under the PRA,[430] all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a rule. DHS and USCIS are revising two information collections in association with this rulemaking action:

USCIS Form I–821D

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0124 and the agency name. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Consideration of Deferred Action for Childhood Arrivals.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–821D; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The information collected on this form is used by USCIS to determine eligibility of certain noncitizens who entered the United States as minors and meet the guidelines to be considered for DACA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the I–821D initial requests information collection is 112,254 annually, and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the I–821D renewal requests information collection is 276,459, and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the biometrics collection is 388,713 annually, and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,620,933 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $42,758,430.

USCIS Form I–765

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 and the agency name. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the

[427] 2 U.S.C. 658(7).

[428] *See* 2 U.S.C. 1502(1), 658(6).

[429] *See* 5 U.S.C. 804(2).

[430] Public Law 104–13, 109 Stat. 163.

agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–765 and I–765WS; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses Form I–765 to collect information needed to determine if a noncitizen is eligible for an initial EAD, a new replacement EAD, or a subsequent EAD upon the expiration of a previous EAD under the same eligibility category. Noncitizens in many immigration statuses are required to possess an EAD as evidence of employment authorization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the I–765 information collection is 2,062,880 annually, and the estimated hour burden per response is 4.5 hours; the estimated total number of respondents for the Form I–765 (e-file) information collection is 106,506 annually, and the estimated hour burden per response is 4 hours; the estimated total number of respondents for the I–765WS information collection is 185,386 annually, and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the biometrics collection is 302,535 annually, and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the passport photos collection is 2,169,386 annually, and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 11,240,336 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $379,642,550.

H. Family Assessment

DHS has reviewed this proposed rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,[431] enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[432] DHS has systematically reviewed the criteria specified in section 654(c)(1) of that act, by evaluating whether this proposed regulatory action: (1) Impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines the proposed regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

DHS has determined that the implementation of this proposed rule would not negatively affect family well-being, but rather would strengthen it. This regulation would create a positive effect on the family by allowing families to remain together in the United States and enabling access to greater financial stability. More than 250,000 children have been born in the United States with at least one parent who is a DACA recipient.[433] DACA would provide recipients with U.S. citizen children a greater sense of security, which is important for families' overall well-being and success. It would also 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.[434]

I. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule has been reviewed in accordance with the requirements of E.O. 13175, Consultation and Coordination with Indian Tribal Governments. E.O. 13175 requires Federal agencies to consult and coordinate with Tribes on a Government-to-Government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. DHS has assessed the impact of this rule on Indian Tribes and determined that this proposed rule does not have Tribal implications that require Tribal consultation under E.O. 13175.

J. National Environmental Policy Act

DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the policies and procedures DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that experience has shown do not have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement.[435] The Instruction Manual establishes categorical exclusions that DHS has found to have no such effect.[436] Under DHS implementing procedures for NEPA, for a proposed action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no

[431] *See* 5 U.S.C. 601 note.

[432] Public Law 105–277, 112 Stat. 2681 (1998).

[433] Svajlenka and Wolgin (2020).

[434] Gonzales (2019); Wong (2020).

[435] 40 CFR 1507.3(e)(2)(ii) and 1501.4.

[436] *See* Instruction Manual, Appendix A, Table 1.

extraordinary circumstances exist that create the potential for a significant environmental effect.[437]

This proposed rule codifies the enforcement discretion policy stated in the Napolitano Memorandum into DHS regulations. It defines the criteria under which DHS will consider requests for DACA, the procedures by which one may request DACA, and what an affirmative grant of DACA will confer upon the requestor.

To whatever extent this rule might have effects on the human environment, if any, DHS believes that analysis of such effects would require predicting a myriad of independent decisions by a range of actors (including current and prospective DACA recipients, employers, law enforcement officers, and courts) at indeterminate times in the future. Such predictions are unduly speculative and not amenable to NEPA analysis.

Nevertheless, if NEPA did apply to this action, the proposed action would clearly fit within categorical exclusion number A3(c), which includes rules that ''implement, without substantive change, procedures, manuals, and other guidance documents'' as set forth in the Instruction Manual,[438] as the proposed rule codifies the existing DACA policy and is not expected to alter the population who qualify for DACA.

This proposed rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

K. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

This proposed rule would not cause a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. Therefore, a takings implication assessment is not required.

L. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

E.O. 13045 requires agencies to consider the impacts of environmental health risk or safety risk that may disproportionately affect children. DHS has reviewed this rule and determined that this rule is not a covered regulatory action under E.O. 13045. Although the rule is economically significant, it would not create an environmental risk to health or risk to safety that may disproportionately affect children. Therefore, DHS has not prepared a statement under this E.O.

VI. List of Subjects and Regulatory Amendments

List of Subjects

8 CFR 106

Fees, Immigration.

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

Accordingly, DHS proposes to amend parts 106, 236, and 274a of chapter I of title 8 of the Code of Federal Regulations as follows:

PART 106—USCIS FEE SCHEDULE

■ 1. The authority citation for 8 CFR part 106 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b, 1304, 1356; Pub. L. 107–609; Pub. L. 115–218.

■ 2. Amend § 106.2 by revising paragraph (a)(38) to read as follows:

§ 106.2 Fees.

(a) * * *

(38) *Application for Deferred Action for Childhood Arrivals, Form I–821D:* $85.

* * * * *

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

■ 3. The authority citation for part 236 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 6 U.S.C. 112(a)(2), 112(a)(3), 112(b)(1), 112(e), 202, 251, 279, 291; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1232, 1324a, 1357, 1362, 1611; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

■ 4. Add subpart C, consisting of §§ 236.21 through 236.25, to read as follows:

Subpart C—Deferred Action for Childhood Arrivals

Sec.

§ 236.21 Applicability.

(a) This subpart applies to requests for deferred action under the enforcement discretion policy set forth in this subpart, which will be described as Deferred Action for Childhood Arrivals (DACA). This section does not apply to or govern any other request for or grant of deferred action or any other DHS deferred action policy.

(b) Except as specifically provided in this subpart, the provisions of 8 CFR part 103 do not apply to requests filed under this subpart.

(c)(1) Deferred action is an exercise of the Secretary's broad authority to establish national immigration enforcement policies and priorities under 6 U.S.C. 202(5) and section 103 of the Act. It is a form of enforcement discretion not to pursue the removal of certain aliens for a limited period in the interest of ordering enforcement priorities in light of limitations on available resources, taking into account humanitarian considerations and administrative convenience. It furthers the administrability of the complex immigration system by permitting the Secretary to focus enforcement on higher priority targets. This temporary forbearance from removal does not confer any right or entitlement to remain in or re-enter the United States. A grant of deferred action under this section does not preclude DHS from commencing removal proceedings at any time or prohibit DHS or any other Federal agency from initiating any criminal or other enforcement action at any time.

(2) During this period of forbearance, on the basis of this subpart only, DACA recipients who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33).

(3) During this period of forbearance, on the basis of this subpart only, a DACA recipient is considered ''lawfully present'' under the provisions of 8 CFR 1.3(a)(4)(vi).

(4) During this period of forbearance, on the basis of this subpart only, a DACA recipient is not considered ''unlawfully present'' for the purpose of inadmissibility under section 212(a)(9) of the Act.

§ 236.22 Discretionary determination.

(a) *Deferred Action for Childhood Arrivals; in general.* (1) USCIS may consider requests for Deferred Action for Childhood Arrivals submitted by

[437] *See id.* at Section V.B(2)(a) through (c).

[438] *See id.* at Appendix A, Table 1.

aliens described in paragraph (b) of this section.

(2) A pending request for deferred action under this section does not authorize or confer any interim immigration benefits such as employment authorization or advance parole.

(3) Subject to paragraph (c) of this section, the requestor bears the burden of demonstrating by a preponderance of the evidence that he or she meets the threshold criteria described in paragraph (b) of this section.

(b) *Threshold criteria.* Subject to paragraph (c) of this section, a request for deferred action under this section may be granted only if USCIS determines in its sole discretion that the alien meets each of the following threshold criteria and merits a favorable exercise of discretion:

(1) *Came to the United States under the age of 16.* The requestor must demonstrate that he or she first resided in the United States before his or her sixteenth birthday.

(2) *Continuous residence in the United States from June 15, 2007, to the time of filing of the request.* The requestor also must demonstrate that he or she has been residing in the United States continuously from June 15, 2007, to the time of filing of the request. As used in this section, ''residence'' means the principal, actual dwelling place in fact, without regard to intent, and specifically the country of the actual dwelling place. In particular, brief, casual, and innocent absences from the United States will not break the continuity of one's residence. However, unauthorized travel outside of the United States on or after August 15, 2012, will interrupt continuous residence, regardless of whether it was otherwise brief, casual, and innocent. An absence will be considered brief, casual, and innocent if it occurred before August 15, 2012, and—

(i) The absence was short and reasonably calculated to accomplish the purpose for the absence;

(ii) The absence was not because of a post-June 15, 2007 order of exclusion, deportation, or removal;

(iii) The absence was not because of a post-June 15, 2007 order of voluntary departure, or an administrative grant of voluntary departure before the requestor was placed in exclusion, deportation, or removal proceedings; and

(iv) The purpose of the trip, and the requestor's actions while outside the United States, were not contrary to law.

(3) *Physical presence in the United States.* The requestor must demonstrate that he or she was physically present in the United States both on June 15, 2012, and at the time of filing of the request for Deferred Action for Childhood Arrivals under this section.

(4) *Lack of lawful immigration status.* Both on June 15, 2012, and at the time of filing of the request for Deferred Action for Childhood Arrivals under this section, the requestor must not have been in a lawful immigration status. If the requestor was in lawful immigration status at any time before June 15, 2012, or at any time after June 15, 2012, and before the submission date of the request, he or she must submit evidence that that lawful status had expired or otherwise terminated prior to those dates.

(5) *Education or veteran status.* The requestor must currently be enrolled in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development certificate, or be an honorably discharged veteran of the United States Coast Guard or Armed Forces of the United States.

(6) *Criminal history and public safety.* The requestor must not have been convicted (as defined in section 101(a)(48) of the Act and as demonstrated by any of the documents or records listed in § 1003.41 of this chapter) of a felony, a misdemeanor described in this paragraph (b)(6), or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety. For purposes of paragraph (b)(6) of this section only, a single misdemeanor is disqualifying if it is a misdemeanor as defined by Federal law (specifically, one for which the maximum term of imprisonment authorized is 1 year or less but greater than 5 days) and that meets the following criteria:

(i) Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or

(ii) If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody and, therefore, does not include a suspended sentence.

(7) *Age at time of request.* The requestor must have been born on or after June 16, 1981. Additionally, the requestor must be at least 15 years of age at the time of filing his or her request, unless, at the time of his or her request, he or she is in removal proceedings, has a final order of removal, or has a voluntary departure order.

(c) *Final discretionary determination.* Deferred action requests submitted under this section are determined on a case-by-case basis. Even if the threshold criteria in paragraph (b) are all found to have been met, USCIS retains the discretion to assess the individual's circumstances and to determine that any factor specific to that individual makes deferred action inappropriate.

§ 236.23 Procedures for request, terminations, and restrictions on information use.

(a) *General.* (1) A request for Deferred Action for Childhood Arrivals must be filed in the manner and on the form designated by USCIS, with the required fee, including any biometrics required by 8 CFR 103.16. A request for Deferred Action for Childhood Arrivals may also contain a request for employment authorization filed pursuant to 8 CFR 274a.12(c)(33) and 274a.13. If a request for Deferred Action for Childhood Arrivals does not include a request for employment authorization, employment authorization may still be requested subsequent to approval for deferred action, but not for a period of time to exceed the grant of deferred action.

(2) All requests for Deferred Action for Childhood Arrivals, including any requests made by aliens in removal proceedings before EOIR, must be filed with USCIS. USCIS has exclusive jurisdiction to consider requests for Deferred Action for Childhood Arrivals. EOIR shall have no jurisdiction to consider requests for Deferred Action for Childhood Arrivals or to review USCIS approvals or denials of such requests. A voluntary departure order or a final order of exclusion, deportation, or removal is not a bar to requesting Deferred Action for Childhood Arrivals. An alien who is in removal proceedings may request Deferred Action for Childhood Arrivals regardless of whether those proceedings have been administratively closed. An alien who is in immigration detention may request Deferred Action for Childhood Arrivals but may not be approved for Deferred Action for Childhood Arrivals unless the alien is released from detention by ICE prior to USCIS' decision on the Deferred Action for Childhood Arrivals request.

(3) USCIS may request additional evidence from the requestor, including, but not limited to, by notice, interview, or other appearance of the requestor. USCIS may deny a request for Deferred Action for Childhood Arrivals without prior issuance of a request for evidence or notice of intent to deny.

(4) A grant of Deferred Action for Childhood Arrivals will be provided for an initial or renewal period of 2 years, subject to DHS's discretion.

(b) *Consideration of a request for Deferred Action for Childhood Arrivals.* In considering requests for Deferred Action for Childhood Arrivals, USCIS may consult, as it deems appropriate in its discretion and without notice to the requestor, with any other component or office of DHS, including ICE and CBP, any other Federal agency, or any State or local law enforcement agency, in accordance with paragraph (e) of this section.

(c) *Notice of decision.* (1) USCIS will notify the requestor and, if applicable, the requestor's attorney of record or accredited representative of the decision in writing. Denial of a request for Deferred Action for Childhood Arrivals does not bar a requestor from applying for any benefit or form of relief under the immigration laws or requesting any other form of prosecutorial discretion, including another request for Deferred Action for Childhood Arrivals.

(2) If USCIS denies a request for Deferred Action for Childhood Arrivals under this section, USCIS will not issue a Notice to Appear or refer a requestor's case to U.S. Immigration and Customs Enforcement for possible enforcement action based on such denial unless the case involves denial for fraud, a threat to national security, or public safety concerns.

(3) There is no administrative appeal from a denial of a request for Deferred Action for Childhood Arrivals. The alien may not file, pursuant to 8 CFR 103.5 or otherwise, a motion to reopen or reconsider a denial of a request for Deferred Action for Childhood Arrivals.

(d) *Termination.* (1) *Discretionary termination.* USCIS may terminate a grant of Deferred Action for Childhood Arrivals at any time in its discretion with or without issuance of a notice of intent to terminate.

(2) *Automatic termination.* Deferred Action for Childhood Arrivals is terminated automatically without notice upon:

(i) Filing of a Notice to Appear for removal proceedings with EOIR, unless the Notice to Appear is issued by USCIS solely as part of an asylum case referral to EOIR; or

(ii) Departure of the noncitizen from the United States without advance parole.

(3) *Automatic termination of employment authorization.* Upon termination of a grant of Deferred Action for Childhood Arrivals, any grant of employment authorization pursuant to § 274a.12(c)(33) of this chapter will automatically terminate in accordance with § 274a.14(a)(1)(iv) of this chapter, and notice of intent to revoke employment authorization is not required pursuant to § 274a.14(a)(2) of this chapter.

(e) *Restrictions on information use.* (1) Information contained in a request for Deferred Action for Childhood Arrivals related to the requestor will not be used by DHS for the purpose of initiating immigration enforcement proceedings against such requestor, unless DHS is initiating immigration enforcement proceedings against the requestor due to a criminal offense, fraud, a threat to national security, or public safety concerns.

(2) Information contained in a request for Deferred Action for Childhood Arrivals related to the requestor's family members or guardians will not be used for immigration enforcement purposes against such family members or guardians.

§ 236.24 Severability.

(a) Any provision of this subpart held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this subpart is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.

(b) The provisions in § 236.21(c)(2) through (4) are intended to be severable from one another, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in those paragraphs, including such referenced provision's application to persons with deferred action generally.

§ 236.25 No private rights.

This subpart is an exercise of the Secretary's enforcement discretion. This subpart—

(a) Is not intended to and does not supplant or limit otherwise lawful activities of the Department or the Secretary; and

(b) Is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 6. Amend § 274a.12 by revising paragraph (c)(14) and adding paragraph (c)(33) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(14) Except as provided for in paragraph (c)(33) of this section, an alien who has been granted deferred action, an act of administrative convenience to the government that gives some cases lower priority, if the alien establishes an economic necessity for employment.

* * * * *

(33) An alien who has been granted deferred action pursuant to 8 CFR 236.21 through 236.23, Deferred Action for Childhood Arrivals, if the alien establishes an economic necessity for employment.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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