



SEPTEMBER 2021

## DACA PROPOSED RULE BREAKDOWN

On September 28, 2021, the Department of Homeland Security published a proposed federal regulation announcing its intent to codify Deferred Action for Childhood Arrivals (DACA).

### WHAT WOULD THIS PROPOSED RULE DO?

The proposed rule keeps the same [guidelines for eligibility](#) as DACA 2012<sup>1</sup> and would codify the following:

- Employment authorization will require a separate application and be optional. Although the total fees will remain the same (\$495), persons can pay \$85 when requesting DACA (Form I-821D) and have the option to request a work permit, which would cost an additional \$410 (Form I-765). The request for a work permit can be submitted at the same time or subsequently. Individuals should note that regardless of when they request employment authorization, the grant period for the work permit will not exceed the grant period given by DACA.
- DACA requestors must establish an economic need to be eligible for employment authorization by filling out Form I-765WS along with Form I-765.
- DACA recipients are lawfully present in the United States under the Social Security regulations.
- DACA recipients do not accrue unlawful presence.
- DACA recipients are eligible to petition for Advance Parole for urgent humanitarian or significant public benefit reasons.
- DACA recipients returning with advance parole can satisfy the “inspected and admitted or paroled” requirement for adjustment of status purposes under INA § 245(a).
- Information about DACA recipients and their family members included in DACA requests will not be shared affirmatively with Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP) or law enforcement agencies for immigration enforcement-related purposes, unless an exception applies, 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.
- While the requirements for DACA eligibility would remain the same, DHS is proposing to clarify the term “significant misdemeanor” as specific misdemeanors which would be automatic bars to DACA: 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. Additionally, DHS is welcoming comments on whether to include a more detailed definition of these offenses, including “minor traffic

<sup>1</sup> A person may qualify for DACA if they can show that they: (1) Were born after June 15, 1981; (2) Entered the United States before turning 16; (3) Have continuously resided in the United States since June 15, 2007 up to the present; (4) Were physically present in the United States on June 15, 2012, and at the time of making the request for DACA; (5) Were without lawful immigration status as of June 15, 2012 and at the time of requesting DACA; (6) Are currently enrolled in school, have graduated from high school, have obtained a certificate of completion, or are an honorably discharged veteran of the U.S. Coast Guard or U.S. Armed Forces; and (7) Have not been convicted of a felony offense, a significant misdemeanor offense, three or more non-significant misdemeanor offenses, or do not otherwise pose a threat to national security or public safety.

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offenses.”

- USCIS has the discretion to terminate a person’s DACA at any time with or without the issuance of a Notice of Intent to Terminate (NOIT) when a person does not meet the threshold criteria<sup>2</sup>, commits disqualifying crimes, presents national security, public safety concerns or other adverse factors.
- USCIS will automatically terminate DACA when a Notice to Appear (NTA) is filed with the immigration court (unless USCIS issues the NTA in relation to an asylum application) or a DACA recipient leaves the United States without advance parole.
- A DACA termination automatically results in the termination of the employment authorization document.
- DACA does not confer any rights or entitlements to remain in or re-enter the United States. DHS may initiate any criminal or other enforcement action against a DACA recipient at any time.

## **DOES THIS PROPOSED RULE MEAN USCIS CAN BEGIN PROCESSING INITIAL DACA REQUESTS?**

This proposed rule does not yet change the DACA policy or which DACA requests USCIS can process and approve. At the moment, USCIS cannot process initial DACA requests due to a court order<sup>3</sup>. USCIS is only processing DACA renewals. The proposed rule must go through a notice-and-comment period before being finalized and going into effect. The public has until November 29, 2021, to submit comments and inform the government what it thinks about this rule.

If there is no court order preventing DHS to continue with the DACA policy and the proposed rule becomes final, after comments are submitted to and reviewed by DHS, USCIS may begin to accept and adjudicate initial DACA requests from persons who never had DACA and otherwise qualify.

## **WHEN WILL THIS RULE BE FINAL?**

We do not know when the proposed rule will go into effect. Federal law requires that the government read and consider every unique comment before issuing a final rule. This can be anytime after November 29, 2021.

## **WHAT CAN I DO TO PREPARE IF I WANT TO SUBMIT AN INITIAL DACA REQUEST?**

In the meantime, persons who want to submit an initial DACA request may begin gathering documents to prove they qualify for DACA. Keep in mind that DHS may still make changes to the proposed rule, informed by the comments submitted by the public, and USCIS will later share specific instructions on what documents they will be accepting.

Here are some steps you can begin to take now:

- Gather documents that prove that you (1) were in the United States on June 15, 2012; (2) have been in the United States since June 15, 2007; and (3) are enrolled in school, have graduated or obtained a certification of completion from high school or GED.
- A DACA termination automatically results in the termination of the employment authorization Save up the fees: \$85 for DACA and \$410 if you plan on requesting employment authorization (\$495 total).
- Get your criminal background checked by a qualified immigration attorney or DOJ accredited representative if you have ever had contact with law enforcement.

<sup>2</sup> *Id.*

<sup>3</sup> See NILC’s DACA page for more information on this and related litigation <https://www.nilc.org/issues/daca/>.



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### NEXT STEPS TO TAKE NOW:

Our show of support needs to be strong because the stakes are high. The existing DACA policy remains under threat. If you wish to submit a comment, please visit Home Is Here's website at <https://comment.homeishere.us/>.

We will continue to update this factsheet as we learn more. Please check the ILRC and NILC websites for updated information.

