

UPDATE: DEFERRED ACTION ON CHILDHOOD ARRIVALS

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While comprehensive immigration reform flounders in the United States Congress, the presidential decree known as DACA (Deferred Action for Childhood Arrivals) has now well passed its one year anniversary. Initiated in August 2012, DACA is an exercise in executive discretion that allows USCIS (United States Citizenship and Immigration Services) to grant temporary lawful status to qualified immigrant youth. People under 31, who arrived in the US before they were 16, and have resided permanently in the US for the past five years are potentially eligible for DACA as long as they are studying or have completed at least a high school degree or equivalent. The relevance of this limited form of immigration relief is underscored by the stalled attempts at wider reform. The common understanding is that some aspect of immigration reform will either pass Congress this month or not at all until 2015 given the coming election year. President Obama has promised to put immigration reform back in the spotlight after the October government shutdown put all government business on hold. His meeting on November 7th with Senator John McCain, a prominent Republican leader on immigration reform and one of the “gang of eight” who drafted the Senate bill, seems to indicate movement in this direction.¹ The political stars appear to be aligning in favor of some type of immigration reform. A recent poll by the Partnership for a New American Economy shows that 71% of those polled favor immigration reform and 54% would be less likely to support an elected representative who opposed reform.²

Latino voter pressure on Congress is becoming explicit following gubernatorial elections this month in which Chris Christie (R- NJ) was reelected and Ken Cuccinelli (R-Va.) was not. According to the Census Bureau, New Jersey has a Latino population of 18.5%, while Virginia has a Latino population of 8.4%.³ The national average is 16.5%.⁴ The candidates took diametrically opposed tacks toward Latino voters. Christie ran ads in Spanish and broke with mainstream Republicans to support a path to citizenship for undocumented immigrants, who are overwhelmingly Latino. Cuccinelli, on the other hand, wrote off the 4% of voters who were Latino, supporting a hardline initiative to deny citizenship to children born in the US to undocumented parents, voting against an in-state tuition bill and equating immigration policy with rat control.⁵ Christie won the majority of the Latino vote (51%), improving 19 percentage

¹ Campbell, John. “Immigration Reform News 2013 Update: Obama Meets John McCain at White House to Discuss Immigration Progress.” *The Christian Post*. November 8, 2013.

<<http://www.christianpost.com/news/immigration-reform-news-2013-update-obama-meets-john-mccain-at-white-house-to-discuss-immigration-progress-108334/>> [visited on: November 8, 2013]

² Navani, Sherrina. “Poll: Majority in U.S. support immigration reform.” *The Trentonian*. November 8, 2013. <<http://www.trentonian.com/general-news/20131108/poll-majority-in-us-support-immigration-reform>> [visited on: November 8, 2013]

³ United States Census Bureau. *State & County QuickFacts*.

<<http://quickfacts.census.gov/qfd/states/51000.html>> [visited on: November 8, 2013]

⁴ Id.

⁵ Preston, Julia. “Lessons on Immigration in Two Governors’ Races.” *New York Times*. November 6, 2013. <http://www.nytimes.com/2013/11/07/us/politics/lessons-on-immigration-in-two-governors-races.html?partner=rss&emc=rss&r=2&wpisrc=nl_wonk&> [visited on: November 8, 2013]

points from his last election.⁶ Christie lauds his achievement, stating: “Now find another Republican in America who’s won the Latino vote recently.”⁷ While many other factors contributed to Cuccinelli’s defeat, the Republican Party now has a model national candidate in Christie and his pro-Latino electoral posture.

Despite popular opinion and election results, House Republican leadership does not plan to bring any vote on immigration reform this year.⁸ The fiasco of the government shutdown and voter punishment of Tea Party republicans in the Virginia and Georgia gubernatorial races has left House Republicans, where the Tea Party is strongest, in disarray. A recent poll conducted by the Pew Research Center for the People and the Press found that support for the Tea Party has fallen to record lows, with 49% of those polled viewing the Tea Party unfavorably.⁹ The schism in the Republican Party between insulated, gerrymandered House members who have been tacking to the right and members with national aspirations, such as Christie, that necessitate more moderate views, is widening. Immigration reform represents another wedge issue that is driving Republicans apart.¹⁰ This political confusion bodes ill for any movement on immigration reform happening this year. That means reform will likely be delayed until 2015. Thus, DACA remains the only broad form of relief available for undocumented immigrants in the near future.

DACA is not a permanent solution to the undocumented population in the United States. The program functions only as stop-gap for comprehensive immigration reform that includes large scale regularization. An approved DACA application grants protection from deportation, a social security number and the ability to work legally in the United States, but only for a two-year period. The application may be renewed, potentially indefinitely. Mark Krikorian of the Center on Immigration Studies, a think tank that supports tighter controls on immigration, says: “The people who benefit from DACA get an irrevocable amnesty [...] It’s only nominally temporary. Everyone knows it’s permanent.”¹¹ However, DACA is unworkable as a permanent solution because it grants neither lawful permanent resident status, nor does it lead to eventual citizenship.

USCIS has released statistics on DACA applications and processing up through August 2013. During one year of operation there have been 588,725 DACA applications received by

⁶ Id.

⁷ Id.

⁸ Palmer, Anna and Sherman, Jake. “House GOP plans no immigration vote in 2013.” *Politico.com* October 25, 2013.

<<http://www.politico.com/story/2013/10/house-gop-plans-no-immigration-vote-in-2013-98824.html#ixzz2k4DpNe5C>> [visited on: November 8, 2013]

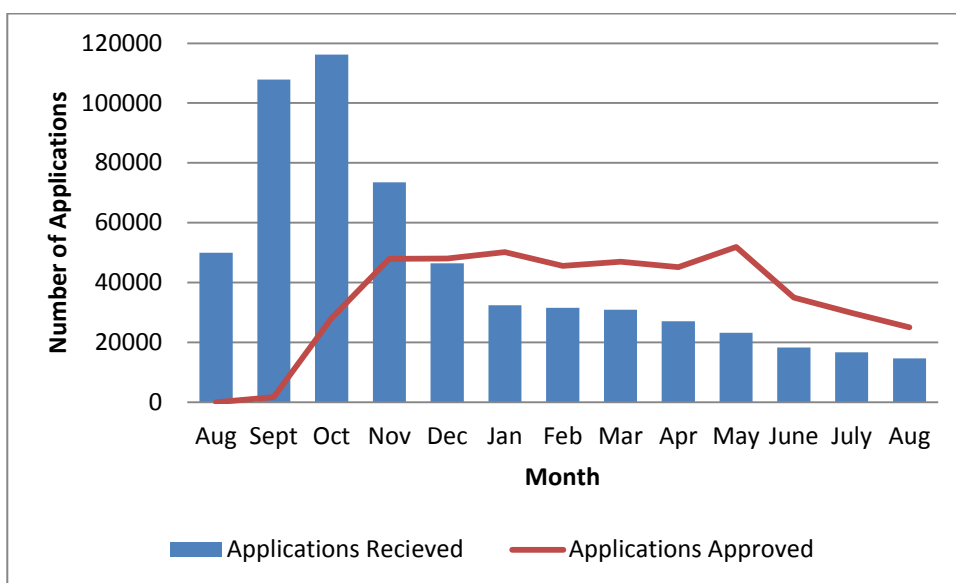
⁹ Pew Research Center for the People and the Press. “Tea Party’s Image Turns More Negative” October 16, 2013. <<http://www.people-press.org/2013/10/16/tea-partys-image-turns-more-negative/>> [visited on: November 8, 2013]

¹⁰ Lipton, Eric and Parker, Ashley. “Immigration Poses Threat of Another Republican Rift.” *New York Times*. October 25, 2013. <<http://www.nytimes.com/2013/10/26/us/politics/conservative-coalition-presses-house-republicans-to-act-on-immigration.html>> [visited on: November 8, 2013]

¹¹ Starr, Alexandra. “Immigration Program Fails To Attract Eligible Applicants.” National Public Radio. July 31, 2013. <<http://www.npr.org/2013/07/31/205125528/immigration-program-fails-to-attract-eligible-applicants>> [visited on: November 8, 2013]

USCIS.¹² Of the accepted applications (ie. those without facial errors or omissions) 80% have been approved and only 2% have been denied.¹³ The number of applications received has dropped steadily after the initial burst of activity from September to November 2012. (See Figure 1). The rate of approval fluctuates between 25,000 and 50,000 per month and the current backlog of applications is just over 100,000.¹⁴ Based only on USCIS public data, the declining trend in applications and approvals appears set to continue. The Immigration Policy Center estimated in October 2012 that there could be up to 1.8 million immigrants in the United States who might be or may become eligible for DACA.¹⁵ The same report estimated that some 936,933 individuals were immediately eligible for DACA when it was announced in August 2012.¹⁶ Assuming this estimate, approximately 62.8% of eligible applicants have sent in applications and 48.6% have been approved. The Immigration Policy Center estimated that 426,000 immigrant youth between 5 and 14 years of age may become eligible if DACA remains in place and they reach the minimum age of 15 to apply for DACA.¹⁷ However, if only 60% of those youth apply for DACA, as their older cohorts have done, the total number of people granted deferred action could be as low as 850,000. That is less than half of the estimated eligible population. However, given the decade it would take for a 5 year old in 2012 to become eligible in 2022, this estimate is of limited utility and reliability.

Figure 1: DACA Application Trends August 2012 - August 2013



Source: USCIS (<http://www.aila.org/content/default.aspx?docid=45806>)

¹² USCIS. Deferred Action for Childhood Arrivals. September 13, 2013.

<<http://www.aila.org/content/default.aspx?docid=45806>> [visited on: November 15, 2013]

¹³ Id.

¹⁴ Id.

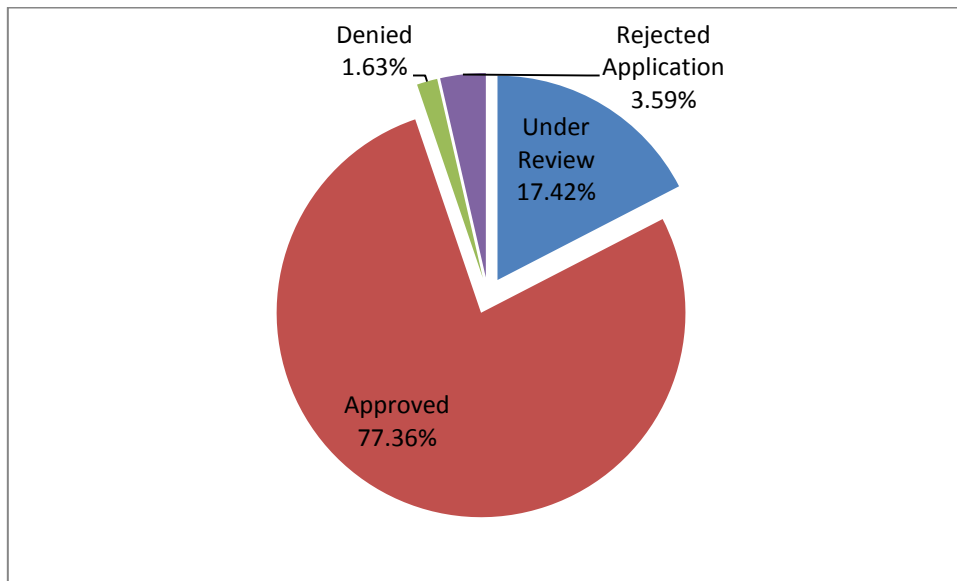
¹⁵ Immigration Policy Center. "Who And Where The Dreamers Are, Revised Estimates." October 2012.

<http://www.immigrationpolicy.org/sites/default/files/docs/who_and_where_the_dreamers_are_two.pdf> [visited on: November 15, 2013]

¹⁶ Id.

¹⁷ Id.

Figure 2: DACA Processing as Percent of Total Received



Source: USCIS (<http://www.aila.org/content/default.aspx?docid=45806>)

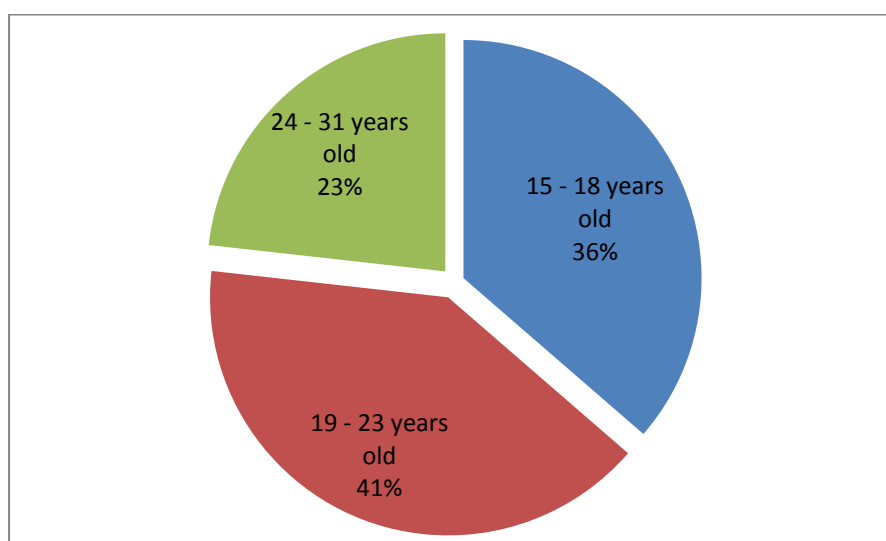
New Detail on DACA Applicants from Brookings

The Brookings Institute recently filed a Freedom of Information Act (FOIA) request with USCIS to get better information about who DACA applicants are.¹⁸ The figures in blue are taken from the report drafted by Brookings on the basis of the FOIA data which covers 465,509 applicants between August 15, 2012 and March 22, 2013. This represents 87% of all applications through June 2013.¹⁹ The report confirms what UCSIS data already demonstrates: 75% of applicants are from Mexico and applications are concentrated in California, New York and Texas. However, the report also adds new levels of detail. It found that 36% of DACA applicants are between 15 and 18 years old, 40% are between 19 and 23 and 24% are over the age of 24. (See Figure 3). The average age of entry in the United States was eight and nearly three-quarters of applicants have been in the United States for at least a decade. (See Brookings figures on page 7).

¹⁸ Singer, Audrey and Svajlenka, Nicole Prchal. "Immigration Facts: Deferred Action for Childhood Arrivals (DACA)." The Brookings Institute. http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca_singer_svajlenka_final.pdf [visited on: November 8, 2013]

¹⁹ Id.

Figure 3: Age Breakdown of DACA Applicants



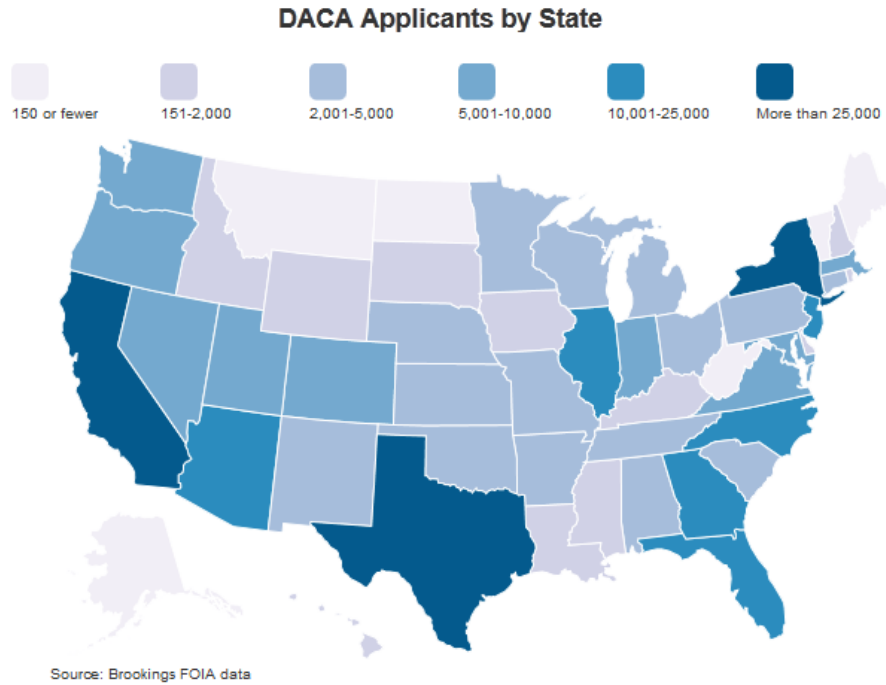
Source: Singer, Audrey and Svajlenka, Nicole Prchal. "Immigration Facts: Deferred Action for Childhood Arrivals (DACA)." The Brookings Institute. (http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca_singer_svajlenka_final.pdf)

The report authors also offer their hypotheses for why DACA applications have tapered off. They estimate that older potential DACA applicants have been less likely to apply while younger applicants, who have a more straightforward application process, have been more likely to apply. Brookings data on the age of applicants partially supports this theory. (See Figure 3). Because younger applicants are still in school and living with their parents, it is easier for them to document their continual physical presence in the United States since June 15, 2007, as the DACA application requires. Proving continuous physical presence can be quite challenging, especially for applicants who are not currently enrolled in school. For example, a 17-year old high school student can show her presence by providing her academic transcripts and attendance records, with some difficulty proving presence during the summer. However, a 27-year old applicant who has been out of school since before 2007 and living without legal status has a much more difficult task. Without utility or phone bills, these applicants must be both creative and thorough to establish their presence. Those with jobs are advised not to provide pay stubs, unless absolutely necessary, as this implicates unlawful employment in the United States which can be grounds for denying discretion. The report authors postulate that this differential is exacerbated by the fact that younger applicants have better support from nonprofit organizations coordinating through schools than their older counterparts.²⁰

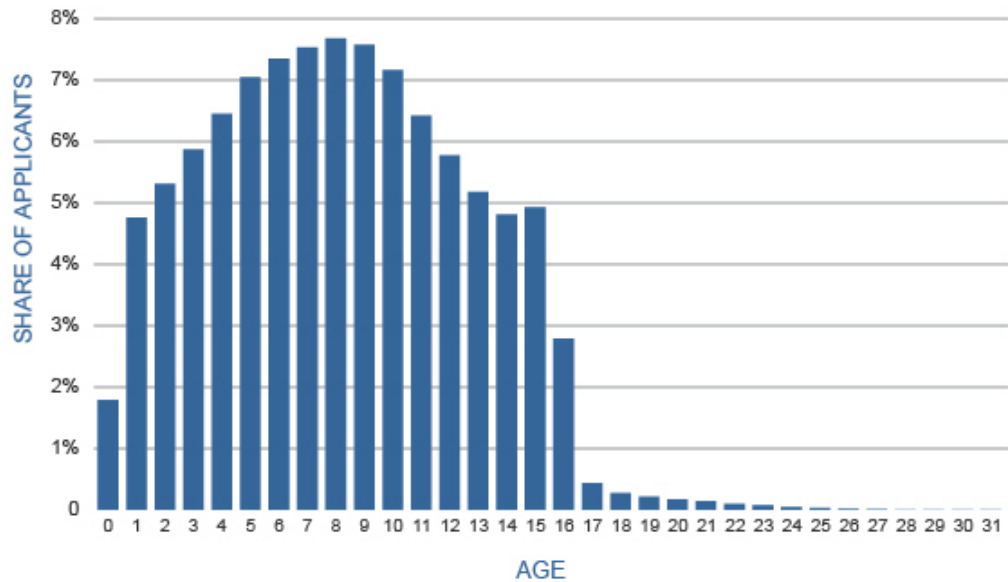
Older applicants may also have less access to information about the DACA program and thus not be aware of their eligibility. Individuals living on their own may also have more difficulty paying the \$465 application fee, while others may fail to meet the educational requirements. For young people already making their way in the world without documented status the force of inertia may play a role. A young woman who has successfully worked and driven for several years may not see the imperative of obtaining legal status through DACA. On the other hand, younger applicants or more importantly, their parents, may be more

²⁰ Id.

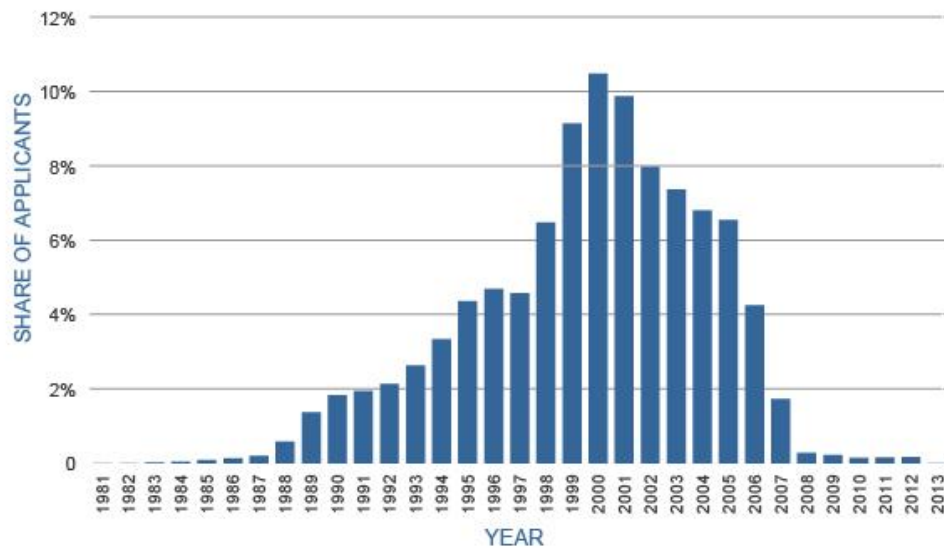
inclined to obtain the benefits that DACA can provide. Two key benefits are the ability to obtain a driver’s license in 45 states and to gain eligibility for in-state tuition at public colleges and universities in 19 states. Importantly, California, New York and Texas offer both such benefits to DACA recipients.



DACA Applicant Age at Entry



DACA Applicant Year of Entry



Problems with DACA Long-Term

There are several problems readily apparent with the long-term use of DACA as a regularization scheme and likely many more problems that have yet to become evident. The first problem will be the renewal process itself; principally that it has not yet been developed and made public. It is unclear what standards renewals will be held to. Will DACA renewal applicants be required to meet the same standards as their initial application? What happens if a DACA applicant cannot meet these standards? Will the applicant be put in deportation proceedings or will they simply fall out of status with the government turning a blind eye? What happens to the benefits already granted, such as a driver's license or work authorization? Does a DACA applicant who cannot renew lose their license and their job? Either way, the continued operation of DACA increases the level of complexity and uncertainty of US immigration policy and underscores the need for comprehensive reform.

One crucial example is the criminal history requirement. Currently, DACA candidates must not have been convicted of a "felony, significant misdemeanor, [or] three or more other misdemeanors" as outlined in the memo issued by then Secretary of Homeland Security, Janet Napolitano on June 15, 2012.²¹ If the government retains this requirement for DACA renewals starting next August, there will be the potential for more confusion and legal wrangling. The age cohort addressed by DACA is between 15 and 31 which is also statistically the most prone to be involved in criminal activity and arrested.²² Specifically, people between 18 and 24 reflect the highest arrest rate of any other age cohort.²³ The potential for an immigrant to lose their status due to criminal convictions is paralleled in other types of immigrant status, such as non-immigrant visa holders and legal permanent residents (LPRs). However, the standards for

²¹ Napolitano, Janet. US Department of Homeland Security. Memorandum. June 15, 2012. <<http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>> [visited on: November 15, 2013]

²² FBI Uniform Crime Reports. "Arrests and arrest rates per 100,000 population" <<http://www.youthfacts.org/indexarr.htm>> [visited on: November 14, 2013]

²³ Id.

DACA are different and unclear. One of the most byzantine and arbitrary aspects of current immigration law involves the inadmissibility or deportability of individuals based on criminal offenses. For example, an LPR may be deportable if she is convicted of a “crime involving moral turpitude” or an “aggravated felony” among others.²⁴ These terms are not clearly defined and heavily litigated. The intricacy and unintelligibility of these rules has spawned an entire field of legal practice, resulting in a great deal of litigation and expense. The unique problem raised by DACA is that all of this litigation focuses on statutory interpretation. Here, the standards set out in the memo authorizing the DACA program are neither statute nor regulation. Thus, the meaning of a “felony” or “significant misdemeanor” for a DACA applicant cannot be litigated under normal procedures because the memo language is not law, and courts do not have jurisdiction to interpret it.

Another problem is the increasing difficulty for future DACA applicants to meet the requirements for deferred action. As more time passes, it becomes increasingly difficult for currently eligible applicants to obtain DACA protection. Older applicants continue to age-out, that is, they become too old to apply. For these potential applicants it becomes more and more difficult to establish physical presence since 2007, as discussed above. For younger applicants who age-in to the program (ie. turn 15 and become eligible), the period of proof is also getting longer, though school records should attenuate this difficulty. While it seems implausible that DACA will remain in effect until all 426,000 estimated immigrant youth between 5 and 14 years old age-in, it is increasingly clear that DACA will be in effect for at least a year more.

Like all immigration policy problems, DACA faces serious political challenges. Because DACA is based on presidential discretion, it hinges entirely on the person occupying the Oval Office. Therefore, DACA has a potential expiration date of 2016, when presidential elections will occur in the United States. It is far too early to predict the outcome, but the growing weight and visibility of the Latino voters may have a positive impact if DACA is still in effect in 2016. However, if a future president were to revoke DACA it is unclear what would become of DACA recipients and the limited rights vested in them.

The most fundamental problem with DACA is that it does not solve the undocumented crisis in the United States. By singling out “good” immigrants, DACA creates a false sense of progress on the issue of undocumented people living and working in the United States. It may also separate pressure groups and ultimately winnow the cumulative pressure exerted on Congress. Perhaps the most unfavorable aspect of DACA is the parsing of families. Immigration policy in the United States purports to further family unity. In practice, DACA separates children from their parents and destroys family unity. DACA recipients obtain a level of legal protection that their parents cannot enjoy. DACA applicants are also unable to help their parents obtain any legal status or prevent their deportation if they are placed in removal proceedings. A local anecdote helps illustrate this point.

²⁴ The actual basis for criminal deportability or inadmissibility may stem from an admission or even an unconvicted act. The entire process is complicated by federalism and the mismatch of state criminal laws and federal criminal and immigration laws.

Frank, not his real name, has been in the United States since 2001 with all of his immediate family. They work and live in Sacramento, California where Frank's children go to school. His daughters have applied for and received DACA status, at great cost to this low-income family. During the California State Fair, Frank and several of his friends were detained after a minor confrontation with security. Frank doesn't have papers and was immediately placed in removal proceedings and detained. He has been in jail for three months now and his DACA-protected children can only watch as their father faces deportation alone. If Frank is sent back to his home country, his children will lose their father. Their DACA status will allow them to stay in the United States, but their family will be rent by a failed and piecemeal immigration policy.

Arguably it is better that at least Frank's children have been spared the humiliation and upheaval of facing deportation through their DACA status. However, beyond these small gains, what DACA illustrates is that haphazard immigration policy making results in contradictory, unworkable and harsh results. DACA only offers limited protection for a limited time. It is not a durable solution. One of the debates among activist communities has been whether or not to accept partial and imperfect immigration reforms at the potential expense of broader lasting reform. Does DACA build-up or bleed-off steam for comprehensive immigration reform? The answer is not forthcoming, but for many young people without documents, DACA is the only option available for them to gain some sense of security while Congress dithers.