

April 11, 2025

Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
Attention: CMS-9884-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: CMS-9884-P: Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability

The undersigned [number] national, state and local organizations are writing to comment on the proposed rule published in the Federal Register on March 19. Our comment has two major points:

1. We oppose the proposal to change the definition of “lawfully present” to exclude people with Deferred Action for Childhood Arrivals status (DACA) from the health insurance marketplace and the Basic Health Program (BHP).
2. We agree that the Department of Health and Human Services (HHS) should retain the other immigrant eligibility clarifications and technical adjustments included in the 2024 final rule.

We oppose the proposal to change the definition of “lawfully present” to exclude people with DACA from health insurance marketplace eligibility, premium tax credits and cost sharing reductions, and BHP.

People granted deferred action under the DACA program are lawfully present and should be treated as such for health insurance purposes. People with DACA should have been classified along with other persons granted deferred action as “lawfully present” and “lawfully residing” under the HHS definitions in the Pre-Existing Condition Insurance Plan (PCIP) program, Medicaid, the Children’s Health Insurance Program (CHIP), the Basic Health Program (BHP) and the marketplace. HHS has maintained eligibility for insurance affordability programs for all others granted “deferred action” over the years. Here is a brief history:

The Affordable Care Act (ACA) created the “lawfully present” standard for eligibility for PCIP and the marketplace. Because the ACA did not define lawfully present, HHS issued an interim final rule that adopted the definition of lawfully residing from a 2010 HHS letter that defined this standard for the Children’s Health Insurance Program Reauthorization Act (CHIPRA) state option providing coverage for “lawfully residing”

children and pregnant women. It included all those granted deferred action as well as other temporary immigration categories, such as Temporary Protected Status and Deferred Enforced Departure.

In March 2012, HHS issued a rule adopting the PCIP definition of lawfully present for eligibility determinations in the ACA marketplaces. Three months later, when the Department of Homeland Security (DHS) announced DACA as its newest deferred action category, people with DACA would have been classified as “lawfully present” and “lawfully residing” under the existing HHS definition and therefore eligible for CHIPRA’s state option. However, in August 2012, the Centers for Medicare & Medicaid (CMS) issued a letter to states stating that health benefits should not be extended as a result of DHS deferring action under DACA.¹ HHS then issued an interim final rule that modified the PCIP program definition of lawfully present to explicitly exclude people with DACA.² HHS and Treasury’s marketplace regulations then cross-referenced the PCIP definition, leaving people with DACA excluded from the marketplace and all other health insurance affordability programs.³

While most people with DACA are working and in good health, many face challenges accessing health coverage and care, including being uninsured. Ending marketplace eligibility for DACA recipients will cause harm.

A 2024 analysis of federal survey data found that a majority of immigrants who are likely eligible for DACA are working and have self-reported excellent or very good health.⁴ However, data show that DACA recipients continue to have high uninsured rates, reflecting their limited eligibility for coverage.⁵ In a survey, DACA recipients expressed concerns about out of pocket expenses and lack of access to mental health care due to their lack of affordable coverage options.⁶

¹ State Health Official Letter (SHO #12-002) from Cindy Mann, Director, Center for Medicaid and CHIP Services, U.S. Department of Health and Human Services, “Individuals with Deferred Action for Childhood Arrivals,” August 28, 2012, available at: <https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-12-002.pdf>. Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52614, August 30, 2012, available at: <https://www.govinfo.gov/content/pkg/FR-2012-08-30/pdf/2012-21519.pdf>.

² *ibid.*

³ The marketplace eligibility regulations define “lawfully present” at 45 C.F.R. § 155.20 by cross-referencing the PCIP definition at 45 C.F.R. § 155.2, which means the marketplace also excludes people with DACA.

⁴ KFF, Key Facts on Deferred Action for Childhood Arrivals (DACA), February 11, 2025, <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-deferred-action-for-childhood-arrivals-daca/>

⁵ *ibid.*

⁶ National Immigration Law Center, DACA Recipients’ Access to Health Care: 2024 Report, May 2024, https://www.nilc.org/wp-content/uploads/2024/05/NILC_DACA-Report_2024_06-27-24.pdf

The current rule indicates that HHS initially estimated in 2023 that about 100,000 people with DACA were likely to benefit from eligibility for marketplace coverage. However, in the current proposed rule HHS estimates a reduced enrollment of only 10,000 people in the qualified health plans and 1,000 more in the basic health plan. This number –11,000 people– is not a fair estimate of the potential harm of excluding DACA recipients from marketplace and BHP eligibility for many reasons, including:

- The coverage was brand new. The rule granting eligibility was finalized in May, only six months before open enrollment in November. Many DACA recipients have never had access to health coverage before and may not have known about the opportunity in its first year.
- Due to pending court challenges, DACA recipients in 19 states were unable to enroll in coverage after the first month of open enrollment.⁷ With one in five DACA recipients in the U.S. living in Florida and Texas, two states where coverage was “closed” for the majority of open enrollment, this is not a fair estimate.⁸

CMS should not finalize this portion of the rule and retain DACA recipients’ current eligibility for the marketplace and BHP.

We agree that HHS should retain the immigrant eligibility clarifications and technical adjustments included in the 2024 final rule.

We endorse the decision to retain the clarifications and technical adjustments to the definition of lawfully present included in the 2024 final rule.⁹ These include the

⁷ KFF, How Pending Health-Related Lawsuits Could be Impacted by the Incoming Trump Administration, November 25, 2024, <https://www.kff.org/medicare/issue-brief/how-pending-health-related-lawsuits-could-be-impacted-by-the-incoming-trump-administration/> The impacted states were Alabama, Arkansas, Florida, Iowa, Idaho, Indiana, Kansas, Kentucky, Mississippi, Montana, North Dakota, Nebraska, New Hampshire, Ohio, South Carolina, South Dakota, Tennessee, Texas, and Virginia. The District Court blocked coverage on December 9, There was a one week re-opening of enrollment from Dec 16 to 23, and then it was blocked by a federal court again.

⁸ KFF, Key Facts on Deferred Action for Childhood Arrivals (DACA), February 11, 202g, <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-deferred-action-for-childhood-arrivals-daca/>

⁹“Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program, 89 Fed Reg 39392 (May 8, 2024).

clarification that people in the following categories are lawfully present: 1) people *granted* Special Immigrant Juvenile Status and not only those with an *application pending*; and 2) children seeking asylum or other humanitarian relief without the 180 day waiting period. These clarifications eliminate needless complexity and make it easier for service providers and consumers to understand who is eligible as well as providing coverage for children who have experienced destabilizing crises and trauma.

In closing, we believe that our country is stronger when more people have access to affordable health coverage. For this reason, we oppose the proposal to change the definition of “lawfully present” to exclude people with DACA from the health insurance marketplace and the BHP.

Sincerely,

[list orgs here]
