Practice Advisory on Filing DACA Applications
August 24, 2020

This advisory answers frequently asked questions regarding filing Deferred Action for Childhood Arrivals (DACA) applications following the June 18, 2020, Supreme Court decision and the July 28, 2020, Department of Homeland Security (DHS) memorandum.

What did the Supreme Court decide in Department of Homeland Security v. Regents of University of California?  

The Supreme Court ruled on June 18, 2020, that the DHS decision to terminate DACA was unlawful and it vacated the 2017 DHS memorandum that rescinded DACA. In failing to consider the reliance interests of DACA recipients and key questions regarding how to address agency concerns about the program, DHS failed to follow proper procedures under the Administrative Procedures Act (APA). The Supreme Court decision did not address whether the DACA program itself is lawful.

Could the Administration try to terminate DACA again?

Yes. The Supreme Court’s decision made it clear that DHS has the authority to rescind DACA as long as it follows the proper procedures in doing so. DHS could issue a new memo that sets forth adequate reasons and reasoned explanations for the termination in compliance with the APA. This attempt would likely be met with litigation. Another option would be for DHS to attempt to terminate DACA through the regulatory process, which requires notice and comment. While the Supreme Court’s decision buys some additional time, DACA remains in jeopardy. Only Congress can provide a permanent solution by passing legislation, creating a path to permanent residence and citizenship for Dreamers.

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1 Following the Supreme Court’s decision, the U.S. District Court for the District of Maryland issued an order on July 17, 2020, in Casa de Maryland v. Dept. of Homeland Security restoring DACA to its pre-rescission status and enjoining DHS from implementing or enforcing the rescission. As of the date of this advisory, DHS has failed to comply with the court’s order.
How has DHS responded to the Supreme Court ruling?

DHS issued a memorandum on July 28, 2020, making certain, immediate changes to the administration of the DACA policy while it reconsiders the program in light of the Supreme Court’s ruling. The memo directs U.S. Citizenship and Immigration Services (USCIS) to reject all pending and future initial DACA applications from those who have never been granted DACA previously; to shorten DACA renewal grants from two years to one year; and to reject all pending and future advance parole applications, absent exceptional circumstances. While this memo does not attempt to terminate DACA again, it indicates DHS will carefully reconsider the future of the program and whether to maintain, modify or fully rescind it. USCIS issued its own memorandum on Aug. 21, 2020, providing additional guidance to adjudicators on implementing the DHS memo.

Can individuals who have never held DACA apply now?

Under current DHS guidance, USCIS will reject all pending and future DACA requests from initial applicants who have never been granted DACA. USCIS will refund all associated filing fees. Such rejections will not prejudice re-filing such requests in the future should DHS decide to begin accepting initial DACA applications. The DHS memo does state that it does not “preclude the exercise of deferred action on a truly individualized, case-by-case basis, when and if warranted.”

Can current DACA recipients apply for advance parole?

The DHS memo directs USCIS to reject all advance parole requests, “absent exceptional circumstances.” The USCIS memo clarifies that this is a case-by-case determination involving assessment of the totality of factors presented and references the “high statutory standard for parole found in INA Section 212(d)(5).” As examples of travel that may meet the exceptional circumstances standard, USCIS cites travel that supports U.S. national security or furthers federal law enforcement interests, travel to obtain “life-sustaining medical treatment” not available in the United States, and travel necessary “to support the immediate safety, well-being, or care of an immediate relative, particular minor children.” Travel for vacation is not a valid basis for advance parole. In most instances, travel for educational or employment-related purposes or to visit family abroad will not warrant advance parole. As advocates continue to file advance parole requests and CLINIC learns more about what scenarios USCIS will recognize as exceptional and warranting approval, it will share this information.

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2 Clients who want to file an initial DACA application in spite of current DHS policy or seek an individualized exercise of deferred action should consult with a qualified legal service provider to discuss the potential risks and benefits of doing so at this time. For example, it is possible that those who submitted initial DACA applications prior to the July 28, 2020, memo that were rejected and returned could become members of a class action if litigation challenges the administration’s failure to comply with the Supreme Court and U.S. District Court for the District of Maryland decisions.
According to the USCIS memo, the designated USCIS Service Center will make a preliminary assessment as to whether an advance parole request is approvable. The Deputy Associate Director for Service Center Operations Directorate (SCOPS) must concur with that assessment before the request may be approved. Requests that are denied are not appealable and the I-131 filing fee will not be refunded. According to USICS, public guidance on this adjudicatory process is forthcoming. The agency has also clarified that any I-131 application that was received and was being held since July 24, 2020, will be rejected and the filing fee returned but may be re-submitted consistent with the new I-131 filing instructions on the USCIS website.

In the event a DACA recipient does secure advance parole, keep in mind that travel restrictions imposed by the United States and other countries as a response to the COVID-19 pandemic may also limit their practical ability to travel abroad and return. Moreover, it is important to warn clients who do decide to travel with advance parole about the risks of DHS deciding to terminate DACA again while they are outside the United States.

Will USCIS accept DACA renewal requests?

Yes. Current DACA recipients remain protected from deportation and eligible for an employment authorization document (EAD), Social Security Number and other benefits they have qualified for with DACA. USCIS continues to accept and adjudicate renewal requests and associated EAD applications from anyone who has previously held DACA and continues to meet the DACA eligibility requirements. However, for applications adjudicated after July 28, 2020, USCIS will only grant deferred action and work authorization for a one-year period, rather than the previous two-year period. Those whose DACA and EAD was already issued for two years may continue to rely on those approvals. USCIS may only terminate individual DACA grants if the recipient no longer meets the eligibility guidelines for DACA, i.e., falls into certain criminal bars or poses a threat to public safety. DACA recipients who seek to replace a two-year EAD that is lost, stolen or mutilated will receive a replacement EAD with the same expiration date as the original two-year card.

Those whose DACA expired one year ago or less may request DACA as renewal applicants and should follow the instructions for renewal requests. Those whose deferred action expired more than one year ago, or was terminated at any time, may request DACA renewal but must follow the instructions for initial applicants and include supporting evidence to show that they meet the eligibility criteria. USCIS directs all applicants to include the date their DACA expired (or was terminated) in Part 1 of Form I-821D.


4 Note that this “one-year filing window” is a change in policy that went into effect on Aug. 1, 2019. The previous policy (in effect from Sept. 5, 2017 through July 31, 2019) was that those whose DACA expired on or after Sept. 5, 2016, could apply as renewal applicants, but those whose DACA expired before Sept. 5, 2016, had to file as initial applicants.
When should DACA renewal requests be filed?

USCIS recommends submitting renewal requests between 150 and 120 days prior to the current DACA expiration date. In its Aug. 21, 2020, memo, USCIS announced that it would generally reject DACA renewal requests received more than 150 days prior to the requester’s current DACA validity period. Note that this was a change from the agency’s previous practice of accepting renewal requests filed more than 150 days before expiration and holding them until the 150-day mark before issuing an approval notice and EAD. Thus, unless there is a legitimate reason to anticipate that more time will be needed for adjudication (for example, a case where there are specific concerns about whether the requester continues to meet the DACA eligibility guidelines), CLINIC recommends not filing earlier than 150 days prior to expiration.

Renewal applicants should understand that the Trump administration may attempt to rescind DACA again in a lawful manner. A new attempt to rescind DACA would likely face legal challenges, but the future of DACA remains uncertain. Ultimately, it is the decision of each DACA recipient to weigh these considerations before deciding whether to apply to renew and, if so, how early to file.

How has COVID-19 impacted DACA renewal application processing?

In response to COVID-19 public health concerns, USCIS temporarily suspended all biometrics appointments on March 18, 2020. On March 30, 2020, USCIS indicated it may reuse a DACA applicant’s previously submitted biometrics (photograph and fingerprints) for purposes of processing DACA renewal requests and related Form I-765 applications for employment authorization. At this time, most Application Support Centers (ASCs) that were temporarily closed have reopened. CLINIC continues to post updates and resources related to the COVID-19 pandemic at: cliniclegal.org/covid-19.

Will information about DACA requestors or recipients be shared with ICE for enforcement?

Under the DACA confidentiality polices as described in the archived USCIS DACA FAQs, USCIS will not proactively share requestors’ personal information with Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) for immigration enforcement purposes unless the requester meets the criteria in the 2011 guidance for issuance of a Notice to Appear. These policies were confirmed in the June 28, 2018, NTA policy memo. Note that the DACA NTA guidance and confidentiality policies are subject to change at any time.

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What enforcement risks will individuals face once their DACA expires?

The current confidentiality policy prevents USCIS from sharing information contained in a DACA application with ICE for enforcement purposes, however someone whose DACA has lapsed could come to the attention of ICE in other ways and be placed in removal proceedings. There have been no changes to current enforcement priorities as identified in a Jan. 25, 2017, Executive Order and Feb. 20, 2017, DHS memorandum. These broad priorities essentially include all undocumented individuals, although those with any prior involvement in the criminal justice system or prior removal orders are at greater risk of enforcement.

**Best practices for advocates:**

**Identify clients for eligibility.** Conduct outreach and educate the community about the current state of DACA. Consider conducting virtual community education events through Zoom or Facebook Live. Continue to screen potential first-time applicants in the event that initial applications will be accepted in the future. Help potential initial applicants understand the eligibility requirements and what supporting evidence to gather. Review your caseload and contact clients who are eligible to renew DACA. Provide document checklists and self-screening forms to help clients understand the requirements and, if eligible, be ready to apply. Prepare renewal requests promptly in light of the possibility that DHS attempts to terminate DACA again.

**Screen DACA renewal applicants and ensure that renewal requests are properly completed before submitting.** Anyone who would like to apply now should be screened for additional risk factors, such as crimes, and be advised of potential enforcement risks. Applications should be carefully prepared with all required supporting evidence to avoid a discretionary denial. If an application is denied, the requestor would lose the filing fee. While current policy states that denied DACA requests will not be referred to ICE unless certain criminal or fraud issues are identified, that policy is subject to change, and the risk of enforcement may increase if President Trump is reelected.

Ensure that renewal applications are not rejected. Forms should be fully completed as advised by USCIS (renewal requests must include the previous DACA expiration date and all applications must be signed.) Be mindful of completing the I-821D form in its entirety. If a question does not apply to the applicant, provide an “N/A” or “none” answer. The proper filing fees must be included, and the current versions of the required forms must be used. Consider submitting requests via a reliable overnight courier and retaining tracking information.

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Screen clients for other immigration relief. DACA recipients and Dreamers should be screened for permanent immigration relief. Some may have requested DACA pro se without an in-depth screening for other immigration options. Others may be eligible for remedies that were previously unavailable due to changed circumstances in their home country or new personal circumstances. Do not overlook forms of relief available only to clients in removal proceedings, such as non-LPR or VAWA cancellation. Visit CLINIC’s DACA page to access our screening tools. Continue to monitor political developments in the event that Congress contemplates legislation that would provide a path to permanent residence for DACA recipients and Dreamers.