



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory on Filing DACA Applications Dec. 10, 2020

This advisory answers frequently asked questions regarding filing Deferred Action for Childhood Arrivals (DACA) applications following the Dec. 4, 2020, federal district court order requiring the Department of Homeland Security (DHS) to restore the original 2012 DACA program.

What are the latest developments in the litigation challenging DACA's termination?

On Dec. 4, 2020, the U.S. District Court for the Eastern District of New York in *Batalla Vidal, et al., v. Wolf, et al.* vacated the July 28, 2020 Wolf memorandum suspending portions of DACA. This [order](#) follows the court's earlier ruling that DHS Acting Secretary Wolf was not lawfully serving in that role when he issued his memo. The court ordered the government to post on the U.S. Citizenship and Immigration Services (USCIS) website by Dec. 7, 2020, that it is accepting first-time DACA, renewal, and advance parole applications according to the terms of the DACA program before its attempted termination in 2017.

The order also requires USCIS to extend any one-year DACA approvals and associated Employment Authorization Documents (EADs) issued following the Wolf memo to a two-year validity period and to mail notices about these changes to all affected individuals.

How has DHS responded to the Dec. 4, 2020 court order?

On Dec. 7, 2020, both [DHS](#) and [USCIS](#) updated their websites to confirm that USCIS has restored the original DACA program. Those who are eligible for DACA under the 2012 guidelines may now file initial DACA applications, even if they have never been granted DACA in the past. In addition, USCIS is accepting DACA renewal applications, as well as applications for advance parole, under the 2012 DACA guidelines. Finally, USCIS confirmed that it will be extending to two years the one-year DACA grants and EADs issued on or after the July 28, 2020, Wolf memo.

Can individuals who have never held DACA apply now?

Yes. The court order requires DHS to allow those who have never held DACA to apply now under the same terms that were in place under the original 2012 program. An estimated 300,000 people, including recent high school graduates, may have been eligible to apply but were shut out after the Trump administration stopped accepting applications in September 2017 as part of efforts to phase out the program.¹ Eligible applicants should follow the Form I-821D instructions for initial DACA requests.

Can current DACA recipients apply for advance parole?

Yes. When USCIS announced the termination of DACA on Sept. 5, 2017, it ceased adjudicating all advance parole requests from DACA holders. Following issuance of the July 28, 2020 Wolf memo, USCIS [resumed](#) accepting advance parole applications, but its policy was to approve only applications where the applicant could establish “exceptional circumstances.” As of Dec. 7, 2020, DACA recipients may again apply for advance parole under the broader 2012 criteria. In other words, after receiving DACA, an individual may request advance parole if the planned travel abroad furthers: humanitarian purposes (such as medical treatment, visiting an ailing relative or attending a relative’s funeral); educational purposes (such as study-abroad programs or academic research); or employment purposes (such as overseas assignments, interviews, conferences, training, or client meetings). The Form I-131 may only be submitted after an individual is granted DACA.²

In the event a DACA recipient does secure advance parole, keep in mind that travel restrictions imposed by the United States and other countries in response to the COVID-19 pandemic may limit their practical ability to travel abroad and return. Moreover, it is important to warn clients who seek advance parole about the risks of traveling abroad. Legal challenges to the DACA program are ongoing and could impact DACA recipients’ ability to re-enter the United States based on advance parole authorization.

Can current DACA recipients still apply to renew?

Yes. USCIS continues to accept and adjudicate renewal applications and associated EAD applications from anyone who has previously held DACA and continues to meet the DACA eligibility requirements. USCIS will issue deferred action and work authorization for a two-year period. USCIS recommends submitting renewal requests between 120 and 150 days prior to the current DACA expiration date.

¹ Maria Sacchetti, “Federal judge restores DACA, orders DHS to accept first-time applications from immigrants,” Washington Post, Dec. 4, 2020, available at: [washingtonpost.com/immigration/daca-restored-dreamers/2020/12/04/37254908-367a-11eb-8d38-6aea1adb3839_story.html?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&wpisrc=nl_headlines](https://www.washingtonpost.com/immigration/daca-restored-dreamers/2020/12/04/37254908-367a-11eb-8d38-6aea1adb3839_story.html?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&wpisrc=nl_headlines).

² USCIS Archived FAQ, Q57 and Q59, available at: uscis.gov/archive/frequently-asked-questions#renewal.

According to the current Form I-821D instructions, DACA recipients whose status expired one year ago or less may request DACA as *renewal* applicants and should follow the instructions for renewal requests.³ Those whose DACA status 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.

My client was issued a one-year EAD upon his most recent renewal. Do I need to take action to make sure he obtains a two-year EAD?

For now, practitioners and DACA clients do not need to take any action. USCIS has indicated that it will take steps to provide individualized notice to DACA recipients with one-year EADs, as well as evidence that their EAD and DACA has been extended to a two-year grant. More information on the specific steps that USCIS will take should become available in the coming weeks. Plaintiffs' counsel in the *Batalla Vidal* case are sharing updates regarding the litigation at dacaaction.org. This website also contains information for those who are members of the court-certified nationwide class, which includes **all individuals who are or will be eligible for DACA**, as well as a **subclass** of individuals who had DACA applications, whether initial or renewal, pending with USCIS between Jun. 30 and July 28, 2020, and that have not been or will not be adjudicated according to the original 2012 DACA memorandum.

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

Under the DACA confidentiality policies described in the [archived USCIS DACA FAQs](#), USCIS will not proactively share applicant's personal information with Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) for immigration enforcement purposes unless the requestor meets the criteria in the 2011 guidance for issuance of a Notice to Appear (NTA). 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.

How long will USCIS continue to accept initial DACA requests and adjudicate advance parole applications?

USCIS has confirmed that it will comply with the *Batalla Vidal* order for so long as it remains in effect. However, DHS may seek relief from the order. If the government does seek to stay or appeal the order and is successful, USCIS might stop accepting requests for initial DACA and advance parole. Since it is not clear how long the filing window will remain open, CLINIC recommends that practitioners file applications for eligible clients as soon as possible.

³See also USICS Archived FAQ Q50, available at: uscis.gov/archive/frequently-asked-questions#renewal.

A lawsuit challenging the legality of the original 2012 DACA program, *Texas, et al. v. Nielsen, et al.*, remains pending in the U.S. District Court for the Southern District of Texas. The next hearing in that case is scheduled for Dec. 22, 2020, and relates to motions for summary judgment.

While there is an expectation that the Biden administration will take steps to protect DACA, only Congress can provide a permanent solution by passing legislation that creates a path to permanent residence and citizenship for Dreamers.

Best practices for advocates:

Identify clients for eligibility. Conduct outreach and educate the community about current developments. Consider conducting virtual community education and screening events through Zoom or Facebook Live. Review your caseload and contact clients who are eligible to apply for initial DACA or renewal. Update document checklists and self-screening forms for initial DACA applications.

Screen potential applicants and ensure that all applications are properly completed before submitting. Anyone who would like to apply for initial DACA or renewal 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.

Ensure that 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 Form I-821D 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.

Advise clients of the benefits and risks of travel with advance parole. Traveling and returning to the United States with advance parole authorization may help some immediate relatives to satisfy the INA § 245(a) requirement of having been "inspected and admitted or paroled," and create eligibility for adjustment of status. Screen clients carefully for inadmissibility issues before they travel. While DACA applicants are not required to demonstrate admissibility in order to receive DACA, inadmissibility issues, particularly related to crimes, may be considered when determining whether to allow a DACA recipient to re-enter, even if they have been granted advance authorization to travel.

Screen clients for other immigration relief. DACA recipients and potential applicants 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 other undocumented immigrants.