



FAQ: Advising DACA Clients in 2024

September 25, 2024

Over a year ago, Judge Hanen in the Southern District of Texas [ruled](#) that Deferred Action for Childhood Arrivals (DACA) is unlawful. In doing so, he determined that the [DACA Final Rule](#) issued by the Biden administration with the intent to “preserve and fortify DACA” suffers from the same legal defects that previously led him to find the original DACA policy unlawful. An injunction has prevented U.S. Citizenship and Immigration Services (USCIS) from adjudicating new initial DACA applications. However, USCIS continues to adjudicate and approve applications for DACA renewals, employment authorization, and advance parole. The Hanen ruling is now before the U.S. Court of Appeals for the Fifth Circuit, which will hear oral arguments on the legality of the DACA policy on Oct. 10, 2024. This resource summarizes latest developments and clarifies the current status of DACA.

How did we get here?

State of Texas, et al., v. The United States of America, et al., or Texas II is a lawsuit that was filed May 1, 2018, by Texas and nine other states challenging the legality of the original 2012 DACA program that was created under the Obama administration. The lawsuit raised several claims, including the allegation that the Department of Homeland Security (DHS) violated substantive and procedural aspects of the Administrative Procedures Act (APA) and the Take Care clause of the Constitution.

In his July 16, 2021, decision, Judge Andrew Hanen of the Southern District of Texas granted summary judgment based on plaintiffs’ APA claims and declined to rule on the constitutional claim. The court vacated the June 15, 2012, DACA memorandum issued by the former Secretary of DHS; remanded the memorandum to DHS for further consideration; and issued a permanent injunction prohibiting the government’s continued administration of DACA and the reimplementing of DACA without compliance with the APA. However, noting the reliance interest of DACA recipients, employers, and others, the court temporarily stayed the portion of its order vacating the DACA memorandum with regard to individuals who had obtained DACA on or before July 16, 2021.

On Aug. 30, 2022, DHS issued [final DACA regulations](#), following President Biden’s [directive](#) to “preserve and fortify DACA” consistent with applicable law. The regulations maintained the existing DACA eligibility guidelines and largely preserved the policies that have been in place since the program’s beginning.

On Sept. 13, 2023, Judge Hanen [ruled](#) that the [DACA Final Rule](#) was also unlawful. The existing [injunction](#) and vacatur order, which Hanen first issued in July 2021, were supplemented to include the Final Rule. The court stayed the effective date of the vacatur. This means that

although DACA was found unlawful, the status quo has remained the same. Current DACA recipients are allowed to maintain their deferred action. USCIS continues to adjudicate and approve applications for DACA renewals, employment authorization, and advance parole. USCIS may choose to accept initial DACA applications but may not adjudicate them.

Judge Hanen's decision has been appealed to the U.S. Court of Appeals for the Fifth Circuit, which previously upheld his earlier ruling that the original DACA policy was unlawful. Though the timing of a decision is unpredictable, it is likely to be issued within the next few months and the court seems poised to uphold Hanen's ruling again. Any decision is expected to be appealed to the U.S. Supreme Court.

What will happen if the Fifth Circuit Court of Appeals upholds the Hanen order and injunction?

We do not know yet. The federal government appellants and DACA recipient intervenors have requested that the Fifth Circuit reverse and vacate the district court's order. If the Fifth Circuit agrees that DACA is unlawful, the appellants and intervenors have requested that at a minimum, the Fifth Circuit also affirm the district court's stay of its injunction pending further proceedings. That would maintain the status quo since it is expected that the decision will be appealed to the Supreme Court. DACA recipients would be allowed to continue renewing while the litigation is ongoing, based on the reliance interest of DACA recipients, employers, and others who have continued to depend on DACA during the years of legal challenges.

Another possibility is that existing DACA recipients would be allowed to maintain their deferred action and employment until they expire, but not be allowed to renew.

It seems less likely that DACA recipients would immediately lose their protection from removal and work authorization.

How does the Hanen ruling impact current DACA recipients?

These individuals may continue to renew their DACA and Employment Authorization Document (EAD) as they approach expiration. USCIS recommends submitting renewal requests between 120 and 150 days prior to the current DACA expiration date.

What about those whose DACA has expired?

Whether USCIS can approve DACA applications for former DACA recipients depends on how long ago their last DACA grant expired. Someone previously granted DACA who did not apply to renew within one year of its expiration is considered an "initial" applicant. Likewise, someone whose most recent DACA grant was terminated is considered now to be an initial applicant. While USCIS will accept initial applications, the agency cannot approve them if the court order remains in effect.

Former DACA recipients whose status expired less than one year ago may request DACA as "renewal" applicants, and USCIS can approve these DACA requests and EAD applications. Applicants should follow the Form I-821D instructions for renewal requests.

Can individuals who have never held DACA apply now?

Someone who has never been granted DACA can file a Form I-821D application following the instructions for initial DACA requests, but USCIS cannot currently approve these requests. The application will be on hold until and unless the injunction is lifted. Those who choose to apply now should be advised that they could lose their filing fee if USCIS is not able to adjudicate these requests in the future.

What about those who had pending initial applications as of July 16, 2021?

DHS is permanently enjoined from granting DACA to new applicants as of July 16, 2021. USCIS may continue to accept first-time DACA applications but is prohibited from approving any initial applications and accompanying EAD requests, including those that were pending on July 16, 2021, for as long as the court order is in effect.

Initial applications that were pending on or filed after July 16, 2021, will not be rejected or closed but will remain on hold until the injunction is lifted. USCIS will not refund filing fees for initial DACA requests that remain on hold during this time.

Is advance parole still available for current DACA recipients?

Current DACA recipients may continue to apply for and be granted advance parole if they can show a qualifying educational, employment or humanitarian reason, and they may travel with a valid advance parole travel document. Those with valid advance parole may continue to depart the United States and return under the same conditions in effect before the court order. For additional information about advance parole for DACA recipients, see CLINIC's [Advance Parole FAQs](#).

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

In accordance with long-standing USCIS policy, personal information contained in an applicant's DACA request will not be used by DHS for immigration enforcement purposes unless the agency is initiating enforcement proceedings against the applicant due to a criminal offense, fraud, a threat to national security or public safety concerns. Likewise, information about an applicant's family members or guardians will not be used for enforcement purposes against them.

Where can I find more guidance?

USCIS publishes DACA litigation information and FAQs on their website, available at: <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions>.

Best Practices:

Ensure that potential applicants understand the injunction's impact on DACA. Anyone who would be required to apply as an initial applicant, including those who previously had DACA but are applying more than a year after a lapse in deferred action, should be advised that USCIS will accept their application but cannot adjudicate it unless the injunction is lifted. They should also realize that a decision from the Fifth Circuit on the legality of DACA is expected soon. These clients should be

screened for additional risk factors (such as crimes), be advised of potential enforcement risks, and weigh the relative risks and benefits of filing an initial application in light of the current uncertainty.

Identify renewal-eligible clients and encourage them to file timely applications. Screen potential renewal applicants and ensure that all applications are properly completed before submitting. Make sure current DACA holders submit their renewal application within 1 year of their most recent DACA grant's expiration. Conduct outreach and educate the community about current developments and how they affect the adjudication of initial and renewal applications.

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) adjustment of status eligibility requirement of having been “inspected and admitted or paroled.” Screen clients carefully for inadmissibility issues before they travel. While DACA applicants are not required to demonstrate admissibility 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 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 if Congress contemplates legislation that would provide a path to permanent residence for DACA recipients and other undocumented immigrants.