



Advising DACA Clients in the Wake of the *Texas v. U.S.* Decision

July 28, 2021

In a long-anticipated decision in *State of Texas, et al., v. The United States of America, et al.*, a federal judge in the Southern District of Texas [ruled](#) on July 16, 2021 that Deferred Action for Childhood Arrivals (DACA) is unlawful under its current terms and vacated the 2012 memorandum that created DACA. The court also issued a [permanent injunction](#) making immediate changes to the implementation of DACA. This resource summarizes the recent ruling and clarifies what the injunction means for current and past DACA recipients as well as those eligible for DACA who had not yet filed initial applications, or had a pending initial application, as of July 16, 2021.

What was the basis of the *Texas v. U.S.* decision?

State of Texas, et al., v. The United States of America, et al. was a lawsuit filed May 1, 2018 by Texas and nine other states challenging the legality of the original 2012 DACA program as 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 its July 16 decision, the court 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 former Secretary of Homeland Security Napolitano; 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.

How does the ruling impact current DACA recipients?

Anyone with valid DACA on July 16, 2021 retains their grant of deferred action and related employment authorization document (EAD). These individuals may continue to renew their DACA and EAD as they approach expiration. U.S. Citizenship and Immigration Services (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 to be 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 as long as 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.

What does the decision mean for clients with 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.

Pending initial applications and initials 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.

Should initial applicants still attend their biometrics appointments or respond to Requests for Evidence?

USCIS has instructed initial DACA applicants who were scheduled for biometrics appointments after July 16, 2021 not to attend and has cancelled biometrics appointments for all initial DACA requestors.¹ It has advised initial DACA applicants with a pending Request for Evidence or Notice of Intent to Deny to respond within the requested timeframe to ensure that the application can be adjudicated in a timely fashion if and when USCIS is allowed to resume approving initial applications in the future.

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 may travel with a valid advance

¹ Note that this does not apply to biometrics appointments connected to a pending advance parole application filed by a current DACA recipient.

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.

Where can I find more guidance?

USCIS published a set of FAQs specific to the court's decision on July 27, 2021. These are available at: uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.

What will happen next?

The Department of Justice [intends](#) to appeal the court's decision. It is likely to go to the Fifth Circuit Court of Appeals and then to the U.S. Supreme Court.

In the meantime, DHS has [announced](#) it will comply with the *Texas* injunction but the agency also reiterated its intent to engage in a rulemaking process to preserve and fortify DACA. While a final regulation on DACA could resolve some of the APA concerns with the DACA policy raised in the *Texas* decision, ultimately only Congress can create a pathway to citizenship for DACA recipients and Dreamers.