



## **FAQ: Advising DACA Clients in 2023**

**September 14, 2023**

On Sept. 13, 2023, Judge Andrew Hanen in the Southern District of Texas again [ruled](#) that the DACA program 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 led him to previously find the DACA program unlawful. The existing [injunction](#) and vacatur order, which Hanen first issued in July 2021, have been supplemented to include the Final Rule.

As it did before, the court has stayed the effective date of the vacatur. This means that although DACA was found unlawful, the status quo remains the same. Current DACA recipients will not lose their protection from removal. U.S. Citizenship and Immigration Services (USCIS) may continue 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.

This resource summarizes latest developments 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.

### **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 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, 2021 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.

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.

Judge Hanen's September 2023 decision held that despite the issuance of the final rule, DACA remained an unlawful program. The injunction and vacatur order have been supplemented to include the Final Rule.

### **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. 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.

### **Can individuals who have never held DACA apply now?**

Someone who has never been granted DACA can [file](#) an I-821D application following the instructions for initial DACA requests but USCIS cannot currently [approve](#) these requests. They 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.

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.

### **What will happen next?**

The Biden administration and other defendants in the case are expected to appeal the ruling to the U.S. Court of Appeals for the Fifth Circuit. In the meantime, DHS has [announced](#) it will continue to comply with the *Texas II* injunction. Ultimately, the case is expected to come before the Supreme Court.

### **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 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. 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) 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.