



Resource from CLINIC

## **USCIS Resumes Accepting DACA Applications**

***Updated 1/18/2018***

On January 10, 2018, Judge Alsup of the Northern District of California issued a preliminary injunction in *Regents of the University of California, et al. V. Department of Homeland Security*. The lawsuit challenges the government's termination of DACA. The order temporarily stops the termination of the DACA program and directs USCIS to resume accepting certain DACA applications. This practice advisory answers common questions about applying for DACA in light of the court order and ongoing litigation.

### **What is the lawsuit about?**

Following the September 5, 2017 issuance of a DHS memorandum rescinding DACA<sup>[\[1\]](#)</sup> and an FAQ addressing elements of the implementation, several states, universities, NGOs and others filed lawsuits challenging the legality of the DACA rescission. The plaintiffs in *Regents of the University of California V. DHS* are asking the court to declare that the DHS rescission memo is unlawful and to stop any implementation of the DACA termination from going forward. On January 10, 2018 a federal judge in the Northern District of California ordered a nationwide preliminary injunction – a temporary order that remains in place for the duration of the lawsuit unless it is overturned by a higher court – halting the termination of the DACA program. The order restores the DACA program to the state it was in before its rescission on September 5, 2017, except that it does not require USCIS to accept new initial DACA applications or to grant advance parole to any DACA recipients. In issuing the order, the court held that the plaintiffs are likely to succeed on the merits of their claim that the DHS decision to rescind DACA was based on a flawed legal premise and must be set aside as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The court also held that, absent the preliminary injunction, DACA recipients were likely to suffer irreparable harm.

### **What does the court order say?**

According to the court, DHS must maintain the DACA program on a nationwide basis on the same terms and conditions in effect before the September 5, 2017 rescission, with the following exceptions:

- New initial applications from those who never before received DACA need not be processed.
- USCIS is not required to grant advance parole to DACA recipients. The order does not bar USCIS from granting advance parole. The USCIS, however, has clarified in recent guidance that it will not accept advance parole applications.[\[2\]](#)
- The order does not prohibit DHS from removing any individual, including a DACA grantee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgement, to be removed.
- The agency must keep records of its actions on all DACA-related applications and provide summary reports to the Court and counsel quarterly.

### **How long will the injunction last?**

The preliminary injunction will remain in place while the litigation continues unless the Department of Justice (DOJ) successfully challenges the order. On January 16, 2018, the DOJ filed notice that it would appeal the decision to the Ninth Circuit Court of Appeals and announced it will also request that the United States Supreme Court review the injunction on its merits.[\[3\]](#)

Because DOJ is seeking expedited review simultaneously from both the Ninth Circuit and the Supreme Court, either court could take temporary action as soon as next week to once again terminate the DACA program. Final review of the district court's order will probably not occur for a few months, at the earliest. If the injunction is blocked by the Ninth Circuit or the Supreme Court, USCIS may immediately stop accepting DACA requests and halt adjudicating any requests that have been accepted.

Given this uncertainty, clients should be advised that there is a risk they could lose application fees if a higher court decides that the temporary injunction should not remain in place. Those who are eligible to request DACA, particularly those whose deferred action has already expired or will expire within the next 180 days, should consider submitting applications as soon as possible.

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

No. Under the court order, USCIS must accept applications from anyone who was previously granted DACA. USCIS is not accepting first-time initial DACA requests from those who have never held DACA.

### **Can former DACA recipients whose deferred action expired more than a year ago apply?**

Yes. Those whose deferred action expired over a year ago may request DACA under the court order. Individuals whose DACA expired before September 5, 2016, or was terminated at any time, must apply as *initial* applicants and include the required supporting evidence. Those whose DACA expired on September 5, 2016 or later may request DACA as *renewal* applicants and should follow

the instructions for renewal requests. USCIS directs all applicants to include the date their DACA expired (or terminated) in Part 1 of the Form I-821D.

### **Which individuals who currently have DACA may apply to renew?**

Anyone who has previously held DACA may apply under the court order. However, USCIS has not provided specific guidance on how it will treat early renewal requests. Before DACA was rescinded on September 5, 2017, the FAQs recommended that DACA recipients file renewal requests between 120 and 150 days before their DACA expiration date.<sup>[4]</sup> While USCIS has indicated in its FAQs that it would accept renewals filed more than 150 days in advance, it also warned that those requests could result in an extension of less than two full years from the applicant's DACA expiration date. In addition, the instructions to Form I-821D state that USCIS may reject submissions filed more than 150 days prior to the expiration of a current DACA grant.

Until USCIS clarifies how early it will accept renewal requests, CLINIC's recommendation is that current DACA recipients consider filing renewals if their DACA will expire within the next 180 days. That said, those who apply more than 150 days in advance run the risk of their application being either rejected and returned or accepted and granted an extension less than two full years. We have also received reports that some renewal requests filed more than 150 days in advance were sometimes held for several months before being adjudicated.

As mentioned, if a higher court reverses the injunction, USCIS could immediately cease accepting and adjudicating DACA requests. In light of this uncertainty, anyone who requests DACA faces the risk of losing the application fee or having the application rejected. Ultimately, it is the decision of each DACA recipient to weigh these potential risks against the benefits of a DACA extension before deciding how early to apply or whether to apply at all.

### **How does this impact people who are challenging a previous DACA renewal rejection due to USCIS or USPS error? What about those who were rejected because of applicant error?**

Under the terms of DACA's rescission, DACA recipients whose benefits were to expire between September 5, 2017 and March 5, 2018 were eligible to request renewal on or before October 5, 2017. Approximately 4,000 renewal requests were erroneously rejected as late due to USCIS Lockbox error or U.S. Postal Service delays. Those DACA renewal applicants who have received a letter from USCIS inviting them to resubmit the renewal within 33 days should proceed by resubmitting them as instructed. They do not need to submit a new renewal based on the court injunction.

Those who filed to renew before the October 5, 2017 deadline but whose application was rejected due to what USCIS believes to be applicant or attorney error (such as a missing signature, incorrect fee, or failure to mark a checkbox) should strongly consider submitting a new DACA renewal request as soon as possible under the terms of the injunction.

### **Has USCIS issued guidance about how it will comply with the injunction?**

On January 13, 2018, USCIS published guidance on its website with information on who should submit applications and how they should be submitted.<sup>[5]</sup> A separate webpage last updated on January 15, 2018 included conflicting information regarding whether USCIS would accept applications from anyone who previously held DACA or only from those who are current DACA

recipients with expiration dates between September 5, 2017 and March 5, 2018.<sup>[6]</sup> USCIS has since corrected its guidance and confirmed to CLINIC that it is not following any date restrictions on DACA renewals.

### **What should I advise clients who want to apply for DACA?**

It is unclear how long DHS will be required to accept DACA requests and whether USCIS will adjudicate received applications if the injunction is reversed. Clients should also be advised of the potential for losing their application fees if the order is reversed after their case is accepted but before it is adjudicated. Finally, while the DACA FAQ states that USCIS will accept requests submitted earlier than 150 days before expiration, the deferred action period will likely be granted from the date of approval. In other words, filing earlier than 150 days out could result in an overlap between a current DACA grant and the renewal grant. This means that the new renewal period may extend for less than a full two years from the date that the applicant's current DACA period expires. We recommend counseling potential DACA applicants about the risks of possible rejection if the court order is reversed, the loss of application fees if USCIS stops adjudication, or a shortened DACA grant for early filers if adjudication continues. Those who choose to move forward despite the risks should file as soon as possible.

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

No changes have been announced to confidentiality policies described in the DACA rescission [FAQs](#) posted by DHS on September 5, 2017. When an individual's DACA grant expires, USCIS will not proactively share his or her personal information with ICE or CBP for enforcement purposes unless the requestor meets the criteria in the current guidance for issuance of a Notice to Appear ([www.uscis.gov/NTA](http://www.uscis.gov/NTA)). When USCIS denies a DACA request, it will not provide the requestor's information to ICE or CBP unless it determines that he or she poses a risk to national security or public safety or meets the NTA guidance criteria. Note that the current NTA guidance and confidentiality policies are subject to change at any time.

### **What enforcement risks will individuals face once their DACA expires?**

Again, there have been no changes to current enforcement priorities as identified in a January 25, 2017 Executive Order and February 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. That said, the DACA rescission FAQs do not reference the enforcement priorities, but provide that referrals for enforcement will be made according to the USCIS NTA guidance issuance.

Remind DACA holders that DHS also reserves the right to terminate or revoke individual DACA grants, and those at greatest risk of termination include individuals convicted of a felony, significant misdemeanor, or three or more non-significant misdemeanors. DACA recipients who are suspected of or have been involved with gangs are also at risk of being considered a threat to national security or public safety and having their DACA grant terminated. The USCIS NTA guidance restricts issuance of an NTA or referral to ICE to cases that involve public safety threats, criminals, and aliens engaged in fraud. While there is some overlap between the grounds for termination and the

NTA issuance criteria, they are not identical, so ICE could still issue an NTA if it receives information about a DACA recipient from a source other than USCIS.

### **Best practices for advocates:**

#### **Identify clients for eligibility.**

Immediately review your caseload and contact those clients who are eligible to renew DACA, i.e. those who were previously granted DACA. Those whose DACA expired before September 5, 2016 must file as initial applicants, while those whose DACA expired on or after September 5, 2016 may apply as renewal applicants. Determine whether the volume of potential applicants is large enough to consider a workshop model or recruiting *pro bono* counsel to assist clients in submitting timely renewal applications. Prepare renewal requests as soon as possible since DOJ is challenging the court order that requires USCIS to accept DACA requests

#### **Make sure DACA requests are properly completed before submitting.**

This opportunity to renew DACA may be brief. Ensure that any applications filed are not rejected. Forms should be fully completed as advised by USCIS (they must include the previous DACA expiration date and be signed). The proper filing fees must be included. Consider submitting requests via a reliable overnight courier and retaining tracking information.

#### **Screen clients for other immigration relief.**

DACA recipients should be screened for permanent immigration relief. Some recipients may have requested DACA *pro se* without an in-depth screening for immigration options. Others may be eligible for remedies that were previously unavailable due to changed circumstances in their home country or personal circumstances. Do not overlook forms of relief available to clients in removal proceedings, such as non-LPR or VAWA cancellation. Visit CLINIC's website to access our screening tools and continue to monitor political developments as Congress continues to work towards passing legislation that would provide relief to DACA recipients.

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[1] Memorandum on Rescission of Deferred Action for Child Arrivals (DACA), Acting DHS Secretary Elaine C. Duke, (September 5, 2017) *available at* <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>

[2] Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction, USCIS (January 13, 2018) *available at* <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-re...>

[3] Justice Department Files Notice to Appeal and Intends to Petition for Immediate Supreme Court Review in DACA Lawsuit, Department of Justice Office of Public Affairs (Jan. 16, 2018) *available at* <https://www.justice.gov/opa/pr/justice-department-files-notice-appeal-an...>

[4] USCIS DACA FAQs(last updated Oct. 6, 2017) *available*  
at <https://www.uscis.gov/archive/frequently-asked-questions>

[5] Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction, USCIS (Jan. 13, 2018) *available* at <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-re...>

[6] Renew Your DACA, USCIS (last accessed Jan. 17, 2018) *available*  
at <https://www.uscis.gov/humanitarian/consideration-deferred-action-childho...>

## **Issues:**

[Deferred Action for Childhood Arrivals \(DACA\)](#)

## **Resource Lists:**

[Resources for Legal Practitioners](#)