



PROTECTING INFORMATION IN DACA APPLICATIONS AGAINST DEPORTATION IN LIGHT OF *DEPARTMENT OF HOMELAND SECURITY V. REGENTS OF UNIVERSITY OF CALIFORNIA* AND EXISTING POLICIES

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I. Introduction

This practice advisory discusses the confidentiality policies and practices currently in place protecting information submitted in Deferred Action for Childhood Arrivals (DACA) applications in light of the recent U.S. Supreme Court decision in *Department of Homeland Security v. Regents of University of California* that allowed the DACA program to remain open.

I. Background

When President Obama announced the Deferred Action for Childhood Arrivals (DACA) program in 2012, the federal government assured applicants that it would not use information included in their DACA applications to deport them or their families unless an exception applied. Relying on the government's promise, nearly 800,000 young people applied for and received DACA.

In 2018, U.S. Citizenship and Immigration Services (USCIS) also reassured DACA applicants and recipients that its guidelines expanding who it could place in deportation proceedings or refer to Immigration and Customs Enforcement (ICE) specifically exempted DACA applicants except under limited circumstances.¹

Early in 2020, however, documents obtained through a Freedom of Information Act lawsuit showed that information about DACA applications are easily accessed by ICE through various databases.²

On June 18, 2020, the U.S. Supreme Court rejected the Trump administration's 2017 attempt to terminate the DACA program. This decision restored the program completely, and both initial and renewal applications should be accepted by USCIS. However, as of July 2020, practitioners and DACA applicants continue to have questions about the protections surrounding the information submitted through DACA applications as well as the fate of the DACA program itself.

A. What did the Obama Administration Promise?

When the Obama administration introduced the DACA program in 2012, the administration promised that it would protect information shared through DACA applications against disclosure except under limited non-deportation circumstances, such as for national security concerns or to help investigate or prosecute a criminal offense.³ This protection extended not only to DACA applicants but also to the information of family members and guardians.⁴ The Obama administration reasserted this promise several times in order to encourage young people to submit their applications.⁵

II. What is the Trump Administration’s Existing Policy?

In June 2018, United States Citizenship and Immigration Services (USCIS) issued two new policy memoranda. One applied to non-DACA related applications (such as a family-based petitions) and expanded the criteria to assess when USCIS could commence deportation or refer an applicant to ICE.⁶

The second memorandum clarified that USCIS will follow existing policy for DACA applicants and recipients.⁷ Under this existing policy, USCIS will only issue Notices to Appear (NTA) or refer an applicant to ICE under limited exceptions, including when a person is found to: 1) be a threat to national security; 2) has committed fraud; or 3) has engaged in a serious criminal offense.⁸ This policy applies when USCIS is processing an initial or renewal DACA request or DACA-related benefit or when terminating a person’s DACA status.⁹

Similarly, the current I-812D Form Instructions that is used for DACA still reassures applicants that “[i]nformation provided in this request is protected from disclosure to ICE and U.S. Customs and Border Protection (CBP) for the purposes of immigration proceedings” except “for purposes other than removal, including for assistance in the consideration of deferred action for childhood arrivals request itself, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.”¹⁰ This is also reiterated by USCIS’ DACA FAQ, which states that this information-sharing policy applies to both DACA applicants and their family members and guardians.¹¹

USCIS’ existing policy also protects the information submitted in a DACA request or a DACA-related benefit when it is processing non-DACA related applications (such as family-based petitions).¹² According to their policy, USCIS cannot solely rely on information included in DACA requests or a related benefit if none of the limited exceptions outlined above apply.¹³

A. What Information is Shared with ICE?

It is important to reiterate that only information submitted in a DACA request or a DACA-related benefit are currently protected by existing policy.¹⁴ This means that other information, such as any previous or subsequent conduct (e.g. criminal activity) or information included in a non-DACA related application, could make a person subject to deportation if they fall under the June 2018 expanded criteria policy memorandum.¹⁵ DACA applicants who are concerned should seek advice from an expert immigration attorney.

In regard to reports in early 2020 from documents obtained through a Freedom of Information Act lawsuit showing that information about DACA applications are easily accessed by ICE through various databases, although ICE might have access to DACA information, ICE should only be able to use this information for non-enforcement purposes as explained in the previous section.¹⁶

B. Can These Policies Change in the Future?

It is important to note that while the existing policy remains to protect DACA applicants' and their family members' information from immigration enforcement except under limited exceptions, USCIS states that their policy "may be modified, superseded, or rescinded at any time without notice."¹⁷

This language was the subject of various injunctions placed by courts throughout the country, but USCIS' June 2018 memorandum only cites one case when it explains that this language was enjoined from going into effect.¹⁸ Unfortunately, that case was overturned by the Fourth Circuit.¹⁹

If USCIS tries to change their NTA policy, advocates could argue that it would violate the other injunctions that were also in place at the time the June 2018 memo was written.²⁰

Moreover, there is also a strong argument that any change to USCIS policy would only apply prospectively instead of to information already received.²¹

III. Conclusion

For now, DACA applicants should know that current policy prevents the use of information contained in their DACA or DACA-related past or pending applications to deport them or their families unless an exception applies, such as a national security threat, fraud or a serious crime. Although ICE might have access to this information already, they should not be able to use it against them for removal purposes unless an exception applies or USCIS changes its policies. Those who are fearful of submitting a DACA application should know that having DACA would protect them from deportation so long as they remain eligible. Applicants submitting a renewal should also remember that the government already has their information from the previous DACA applications submitted.

End Notes

- ¹ See Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>; Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf>.
- ² Dara Lind, *ICE Has Access to DACA Recipients' Personal Information Despite Promises Suggesting Otherwise, Internal Emails Show*, Make the Road N.Y., <https://maketheroadny.org/ice-has-access-to-daca-recipients-personal-information-despite-promises-suggesting-otherwise-internal-emails-show/> (last visited June 29, 2020).
- ³ Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS Form I-821D at 13 (Jan. 9, 2017), <https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf> (stating that “[i]nformation provided in this request is protected from disclosure to ICE and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance (www.uscis.gov/NTA).”).
- ⁴ *Id.*
- ⁵ See, e.g., Letter from Secretary Jeh Charles Johnson to The Honorable Judy Chu (Dec. 30, 2016), <https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20Chu%2012.30.16.pdf>.
- ⁶ Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [hereinafter USCIS, NTA Memo].
- ⁷ Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf> [hereinafter USCIS, DACA Memo].
- ⁸ Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011).
- ⁹ NTA Memo, *supra* note 6.
- ¹⁰ Instructions for Consideration of Deferred Action for Childhood Arrivals (Apr. 24, 2019), <https://www.uscis.gov/i-821d>.
- ¹¹ USCIS’s DACA FAQ, www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.
- ¹² DACA Memo, *supra* note 7.
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ Dara Lind, *ICE Has Access to DACA Recipients' Personal Information Despite Promises Suggesting Otherwise, Internal Emails Show*, Make the Road N.Y., <https://maketheroadny.org/ice-has-access-to-daca-recipients-personal-information-despite-promises-suggesting-otherwise-internal-emails-show/> (last visited June 29, 2020).
- ¹⁷ USCIS’s DACA FAQ, www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.
- ¹⁸ *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 705 (4th Cir. 2019), *cert. denied sub nom. Dep't of Homeland Sec. v. CASA de Maryland*, No. 18-1469, 2020 WL 3492650 (U.S. June 29, 2020).
- ¹⁹ *Id.*
- ²⁰ See, e.g. *Regents of Univ. of California v. United States Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1312 (N.D. Cal.); *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437 (E.D.N.Y. February 13, 2018).
- ²¹ *Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, 908 F.3d 476, 516 (9th Cir. Cal. November 8, 2018) (finding that “[i]t is at least reasonable to think that a change in the policy would apply only to those applications submitted after that change takes effect.”).



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