

AUGUST 2020

DACA PRACTICE UPDATE

GUIDANCE IN LIGHT OF THE U.S. SUPREME COURT'S DECISION IN *DEPARTMENT OF HOMELAND SECURITY V. REGENTS OF UNIVERSITY OF CALIFORNIA* AND DHS'S JULY 28, 2020 MEMORANDUM

On July 28, 2020, the U.S. Department of Homeland Security (DHS) released a memorandum (“Wolf Memo”) instructing U.S. Citizenship and Immigration Services (USCIS) to: **1)** reject all initial Deferred Action for Childhood Arrivals (DACA) requests from applicants who have not received DACA in the past; **2)** reject all advance parole applications from DACA recipients except where there are “exceptional circumstances;” and **3)** shorten the DACA renewal and work authorization period from two years to one year. Current and past DACA recipients may continue to renew their DACA and work authorization, although now they must do so annually. On August 21, 2020 USCIS provided additional guidance in response to the Wolf Memo (“Implementing Guidance”).

In this practice update, we provide background on DHS’ memorandum and USCIS’ Implementing Guidance, what this means moving forward, what advocates can do now, and other takeaways from this announcement.

BACKGROUND

On September 5, 2017, DHS issued a memorandum to terminate DACA— a program fought for by immigrant youth and implemented by the Obama administration in 2012 that currently protects over 650,000 undocumented young immigrants from deportation and allows them to work lawfully.

That same month, several DACA recipients and a variety of stakeholders, including states, universities, and corporations, challenged DHS’ decision to terminate DACA in different federal courts throughout the country. As a result, three U.S. district courts issued nationwide injunctions allowing people who had previously received DACA to continue renewing their DACA while the litigation continued. In many cases, the government sought and was granted an appeal from the district courts straight to the U.S. Supreme Court. Subsequently, three of those cases—*Department of Homeland Security v. Regents of University of California*; *Trump v. National Ass’n for the Advancement of Colored People*; and *Wolf v. Batalla Vidal*—were consolidated for U.S. Supreme Court review and oral argument on November 12, 2019.¹

WHAT DID THE U.S. SUPREME COURT DECIDE?

On June 18, 2020, the U.S. Supreme Court decided that DHS’s termination of DACA did not comply with federal law. It found the termination “arbitrary and capricious” because it failed to consider important aspects of the DACA program, including that DACA recipients, educational institutions, employers, and others have come to rely on the DACA program.² Accordingly, the Court **vacated** the September 5, 2017 memorandum terminating DACA, thereby restoring DACA to its original 2012 state.³ This meant that USCIS could have begun accepting both initial and renewal DACA requests, along with applications for advance parole from DACA recipients.

Specifically, the U.S. Supreme Court held that:

continued on next page

continued...

1. The claims arguing that the DACA termination was arbitrary and capricious were reviewable by the Court.⁴
2. The termination of the DACA program by the DHS was arbitrary and capricious because it **did not** consider:
 - a. DHS' authority to defer the deportation of DACA recipients when it terminated the program; or
 - b. the reliance interests of DACA recipients, who have relied on DACA in a variety of ways, including to earn a livelihood, and those of their families and other entities, such as their educational institutions and employers, who have invested time and money in training and educating DACA recipients.⁵
3. The claim that the DACA termination violated the Equal Protection Clause of the Fifth Amendment did not raise a plausible inference that the rescission was motivated by racial animus.⁶

However, the Supreme Court did not decide on DACA's legality, which was not a question before the Court. Nor did the Court require DHS to maintain DACA if it terminated the program in a lawful way.

WHAT DOES DHS' JULY 28, 2020 MEMORANDUM SAY?

After the U.S. Supreme Court decision, DHS did not immediately provide any guidance about how they would implement the decision and begin processing initial DACA applications and advance parole applications. Then on July 28, 2020, DHS released a new memorandum titled, "Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'" ("Wolf Memo"). The Wolf Memo states that DHS is "considering anew the DACA policy" to assess "whether the DACA policy should be maintained, rescinded, or modified."⁷

While DHS reviews the DACA policy, the Wolf Memo instructs USCIS to: 1) reject all initial DACA requests from applicants who have never received DACA in the past; 2) reject all advance parole⁸ applications from DACA recipients except where there are "exceptional circumstances"; and 3) shorten the DACA renewal and work authorization period from two years to one year.

On August 21, 2020 USCIS released new implementation guidance in response to the Wolf Memo. ("Implementing Guidance").⁹ In it, USCIS gave its personnel additional information summarized below.

WHAT DOES THE USCIS IMPLEMENTING GUIDANCE CLARIFY?

USCIS' Implementing Guidance instructs immigration officers to reject all initial DACA requests without prejudice from applicants who have not received DACA in the past and associated applications for employment authorization. This includes initial DACA requests that were submitted after the June 18th Supreme Court decision and on hold by USCIS. This means that people who have never had DACA and apply for the first time will have their application packets returned along with the associated fee without prejudice, meaning they will not be prevented from reapplying in the future if USCIS changes its policies to begin accepting initial DACA requests.

People who have DACA or had DACA in the past can continue submitting DACA renewal requests regardless of when their DACA expired or was terminated in the past. The Wolf Memo instructs USCIS to grant DACA renewal and work authorization for a one-year period, not a two-year period. If someone has already been granted DACA and work authorization for a two-year period, their DACA grant will remain valid for the two-year period it was granted.

continued on next page



continued...

If someone has already been granted DACA and work authorization for a two-year period and needs a replacement work authorization document now, their replacement work authorization document will be for the same two-year period. Those who had renewal requests approved on or before July 28th will not be affected by the Wolf Memo until the next time they apply for renewal. Individuals with pending renewal requests or who will file for renewal in the future, their DACA and work authorization will be granted for a one-year period instead of the previous two-year period.

People should submit their applications between 150 days and 120 days prior to their DACA expiration. The Implementing Guidance states that USCIS will generally reject any application submitted more than 150 days prior to their expiration unless there are legitimate reasons for accepting earlier filings. To avoid delays in processing, which can occur for example if the applicant does not receive timely notice of their application's rejection, applicants should apply on the 150-day mark.

Those whose most recent period of DACA expired more than one year ago, or their most recent DACA grant was previously terminated, will need to file their renewals with supporting documentation as if they are filing for the first time. In such cases, the applicant should be sure to include supporting documentation demonstrating eligibility for all of the DACA requirements and list the date the prior DACA expired or was terminated on Part 1 of the Form I-821D, if available. The current fee for applying for DACA is \$410 for the employment authorization and \$85 for biometrics, though USCIS states that it is considering whether they can lower these fees.

People who currently have DACA can submit advance parole applications to travel abroad, but immigration officers will only grant applications under "exceptional circumstances." USCIS, under its Implementing Guidance, interprets this to mean that advance parole grants should be reserved for urgent humanitarian reasons or significant public benefit under INA § 212(d)(5). USCIS officers will determine advance parole requests on a case-by-case basis under the totality of the circumstances present in each request. Examples include, but are not limited to: travel to support the national security interests of the United States, including U.S. military interests; travel in the furtherance of U.S. federal law enforcement interests; travel to obtain life-sustaining medical treatment that is not otherwise available to the applicant in the United States; or travel needed to support the immediate safety, well-being, or care of an immediate relative, particularly minor children of the applicant. This means that travel for other reasons, including employment or educational reasons, will generally be denied. A denied advance parole application is not appealable and the applicant will not get the associated fee returned.

People who currently have DACA and submitted advance parole applications to travel abroad prior to the Implementing Guidance's release, will have their application and fees returned but they may refile if they meet the new criteria for requesting advance parole.

According to the Wolf Memo and Implementing Guidance, these changes to the DACA program are temporary and will only be in place as DHS reviews the DACA program and decides whether to maintain, rescind, or modify the program. As such, advocates and community members should expect another DACA policy change in the future.

WHAT CAN ADVOCATES DO?

Advocates should continue to screen clients for DACA eligibility in case the program changes once again in the future, as well as to explore other potential forms of relief.

continued on next page

continued...

The Wolf Memo instructs USCIS officers to reject initial DACA requests and associated employment authorization applications. If someone decides to submit their initial request for DACA, they should know that their application will likely be rejected, and their filing fee returned.

Advocates should also monitor the processing of advance parole applications from DACA recipients to better understand how USCIS is defining “exceptional circumstances.” Tracking which applications are accepted and approved will help to gain an understanding of how the exception is being applied and how to best advise clients. Thorough screenings are especially important for applicants who seek to apply for advance parole and travel outside the country due to current travel restrictions and the likelihood that the DACA policies could change again in the future. While advance parole permits a person to request admission to the United States, travelers will be screened for inadmissibility and possibly questioned about their immigration and criminal history. Before filing a request for advance parole, advocates need to discuss and learn the applicant’s immigration history and, in some cases, conduct a background check or collect criminal or immigration records. It is essential to understand the person’s immigration history and know if it includes something that could present a risk or complication, such as a prior removal order and other inadmissibility grounds under INA § 212.

Lastly, advocates should also monitor the processing of DACA renewal requests. Although DACA renewal requests are still being accepted and processed by USCIS, there is concern that there may be delays in processing DACA renewal requests and in receiving employment authorization documents in the mail given USCIS’s potential furloughs.

Advocates should make sure to visit the ILRC’s website at <https://www.ilrc.org/daca> and NILC’s website at <https://www.nilc.org/issues/daca/> for updates on the program and practice tips. Advocates can also post questions and information and monitor DACA cases in the field by joining the DACA Experts listserv via <https://www.ilrc.org/legal-listservs>.

TAKEAWAYS

- The Wolf Memo and Implementing Guidance direct USCIS to reject initial DACA requests; only allow advance parole for DACA recipients in “exceptional circumstances”; and reduce the grant period for DACA renewals and work authorization from two years to one year.
- These changes are in place while DHS considers whether to maintain, rescind, or modify the DACA policy.
- We recommend that individuals considering renewing their DACA **consult an attorney or accredited representative**, who can identify any red flags that might put the applicant at risk of being denied DACA or even deported and whether they are eligible for another more permanent form of immigration relief.
- It is especially important to consult with an attorney if individuals have **prior removal orders, past contact with law enforcement, pending immigration court cases, or plans to travel on advance parole**.

continued on next page



continued...

Endnotes

1. See National Immigration Law Center (NILC) *Litigation Related to Deferred Action for Childhood Arrivals* available at <https://www.nilc.org/issues/daca/litigation-related-to-the-daca-program/> for more information on the cases.
2. *Dep't of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. ____ (2020) (slip op., at 26).
3. *Id.* at 29 n.7. (noting that the Court has affirmed the NAACP case from below, which vacated the DACA termination).
4. *Id.* at 9-13.
5. *Id.* at 13-26.
6. *Id.* at 27-29.
7. U.S. Department of Homeland Security, *Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"* July 28, 2020, available at https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.
8. Advance Parole is a benefit in immigration law that allows DACA recipients to travel outside the country and reenter on advance parole for humanitarian, employment, and educational purposes.
9. U.S. Citizenship and Immigration Services, *Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum, "Reconsideration of the June 15, 2012 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'"* August 21, 2020, available at <https://www.uscis.gov/sites/default/files/document/policy-alerts/DACA%20implementation%20memo%20v2%208.21.20%20final.pdf>.

In partnership between



WWW.ILRC.ORG



WWW.NILC.ORG