



September 6, 2017

## DACA PROGRAM TO BE PHASED OUT, ABSENT CONGRESSIONAL ACTION

On September 5, 2017, the Department of Homeland Security (DHS) announced the rescission of the program known as Deferred Action for Childhood Arrivals (DACA) and directed DHS personnel to execute a wind-down of the program, while making provision for a “limited window” to process certain initial and renewal requests for DACA benefits.<sup>1</sup>

*What is DACA?*

DACA was an immigration policy or program initiated by executive action pursuant to a memorandum from the Department of Homeland Security issued on June 15, 2012. Under this program, action was to be deferred on enforcement of deportation proceedings against certain individuals who came to the United States unlawfully before age 16; resided in the U.S. since June 15, 2007; were in school or graduated from high school (or obtained a GED) or honorably discharged from the armed forces; were under age 31 as of June 15, 2012; were not convicted of a felony or significant/multiple misdemeanors and did not pose a threat to national security or public safety. Applicants normally had to be at least age 15, and DACA benefits were generally valid for a two-year period and renewable. Since 2015, most applications have been for renewals.<sup>2</sup>

In addition to deferred action on deportation, program beneficiaries were able to request work authorization outside the usual work visa process.

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<sup>1</sup> A copy of the DHS memorandum rescinding the program is attached.

<sup>2</sup> A 2014 expansion of DACA, again by executive order, would have relaxed the criteria for qualifying for deferred action, and would have extended similar protection to parents of U.S. citizens or lawful residents, but the implementation of these measures was blocked by an injunction issued by a federal court, and they were rescinded in a June 15, 2017, DHS memorandum. See, Department of Homeland Security Memorandum dated November 20, 2014 entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents;” *United States v. Texas* 136 (2016) S.Ct. 2271, affirming the decisions of the 5<sup>th</sup> Circuit Court of Appeals and the United States District Court for the Southern District of Texas.

The program was based on a theory of “prosecutorial discretion” towards young people brought to the United States as children, known as “DREAMers” (referring to legislation known as the DREAM Act first introduced in 2001.) There are an estimated 800,000 DREAMers in the United States, 28 percent of whom reside in California, and 15,000 in Kern County alone.

#### *What Will Happen to Current DACA Recipients?*

As indicated in a document issued by DHS released on September 5, 2017, entitled “Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals,” DACA recipients will be permitted to retain both the period of deferred action from deportation and employment authorization until their benefits expire, “unless terminated or revoked.” DHS will process all properly filed initial and renewal requests accepted as of September 5, 2017, as well as renewal requests accepted by October 5, 2017, for recipients whose benefits will expire between September 5, 2017 and March 5, 2018.

DHS retains the discretion to terminate DACA benefits in individual cases before their expiration.

#### *What Happens When DACA Benefits Expire?*

The current DHS position as stated in the FAQs document is that if DACA benefits expire and there are no newly enacted legislative protections at that time, recipients continue to lack legal status and their removal from the U.S. would no longer be deferred. DHS is stating that information concerning DACA recipients will not be “proactively provided” to the Immigration & Customs Enforcement agency (“ICE”) for enforcement purposes, with certain exceptions such as where the person poses a risk to national security or public safety, but this policy could be withdrawn at any time.

Going forward, no further requests for “advance parole” (Form I-131) will be approved. These involve permission to return to the U.S. after traveling abroad and could impact DACA students studying abroad.

#### *Should We Doing Anything Differently Regarding DACA Students?*

Federal law prohibits states from denying any student a public education based on immigration status, including undocumented students in general and status as a DREAMer specifically.<sup>3</sup> All students are permitted (and in the case of K-12 education, required) to attend school, free from discrimination, harassment, and bullying based on their national origin.

#### *Could DREAMers be Apprehended at School?*

As to whether districts may expect enforcement action relating to DACA students once the program expires, as reported in our previous client memos on the subject, DHS has indicated that it will continue to adhere to the “sensitive locations” policy set forth in an October 24, 2011, memo from ICE entitled “Enforcement Actions at or Focused on Sensitive Locations.” ICE agents

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<sup>3</sup> *Plyler v. Doe* (1982) 457 U.S. 202

were directed that any planned enforcement action (arrests, interviews, searches and surveillance) must not take place at “sensitive locations” (defined to include preschools, elementary and secondary schools, post-secondary schools and vocational schools) without prior approval of specified high level officials or exigent circumstances such as pursuit of a felon, imminent danger of harm to person or property, etc.

As recently as March of 2017, DHS has affirmed that “the sensitive location guidance remains in effect. . . .”<sup>4</sup> There is no evidence that the sensitive locations policy has been rescinded with these recent developments concerning DACA recipients. (See our previous guidance regarding responding to possible requests for access to undocumented students by ICE agents.)

#### *What if Records Relating to DREAMers Are Requested?*

Federal and state student privacy laws (the Family Education Privacy Rights Act and California Education Code section 49070 and following) require districts to protect the confidentiality of student records. As with any other request for student records, documents relating to the immigration status of any undocumented students, including DREAMers, should not be turned over voluntarily without the consent of the parent or adult student. However, federal agencies such as ICE can access "directory information" concerning students to the extent authorized in District policy. Districts concerned about even the release of directory information may want to review their policies and make parents aware of "opt-out" provisions. In addition, confidential student records must be turned over in response to a valid court order or subpoena.

Your sites should be reminded of the protocols concerning student records and directory information. If a federal agency is seeking confidential student records, the request should immediately be referred to the District Office for further handling and consultation with legal counsel. In most instances, notice should be provided to the parents.

#### *How Can We Help Students Who Are Impacted?*

If you have students on your campuses who are DACA recipients or are family members of DACA recipients, they may be under a great deal of stress during this period of uncertainty. Making students aware of resources such as the school counselor may help them to focus on their education. You may want to make available referrals to local organizations who can assist with immigration status.

We will continue to keep you informed of developments on this issue. If you have any questions concerning this or related issues, do not hesitate to contact our office.

— Grant Herndon

*Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.*

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<sup>4</sup> See Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement, release date February 21, 2017, revised March 2, 2017.

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U.S. Department of  
Homeland Security

# Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)

**Release Date:** September 5, 2017

**MEMORANDUM FOR:**

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**FROM:**

Elaine C. Duke  
Acting Secretary

**SUBJECT:****Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children”**

This memorandum rescinds the June 15, 2012 memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” which established the program known as Deferred Action for Childhood Arrivals (“DACA”). For the reasons and in the manner outlined below, Department of Homeland Security personnel shall take all appropriate actions to execute a wind-down of the program, consistent with the parameters established in this memorandum.

## Background

The Department of Homeland Security established DACA through the issuance of a memorandum on June 15, 2012. The program purported to use deferred action—an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis—to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law.<sup>[1]</sup> (# ftn1) Specifically, DACA provided certain illegal aliens who entered the United States before the age of sixteen a period of deferred action and eligibility to request employment authorization.

On November 20, 2014, the Department issued a new memorandum, expanding the parameters of DACA and creating a new policy called Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”). Among other things—such as the expansion of the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and lengthening the period of deferred action and work authorization from two years to three—the November 20, 2014 memorandum directed USCIS “to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis,” to certain aliens who have “a son or daughter who is a U.S. citizen or lawful permanent resident.”

Prior to the implementation of DAPA, twenty-six states—led by Texas—challenged the policies announced in the November 20, 2014 memorandum in the U.S. District Court for the Southern District of Texas. In an order issued on February 16, 2015, the district court preliminarily enjoined the policies nationwide.<sup>[2]</sup> (# ftn2) The district court held that the plaintiff states were likely to succeed on their claim that the DAPA program did not comply with relevant authorities.

The United States Court of Appeals for the Fifth Circuit affirmed, holding that Texas and the other states had demonstrated a substantial likelihood of success on the merits and satisfied

the other requirements for a preliminary injunction.<sup>[3]</sup> (# ftn3) The Fifth Circuit concluded that the Department's DAPA policy conflicted with the discretion authorized by Congress. In considering the DAPA program, the court noted that the Immigration and Nationality Act "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization." According to the court, "DAPA is foreclosed by Congress's careful plan; the program is 'manifestly contrary to the statute' and therefore was properly enjoined."

Although the original DACA policy was not challenged in the lawsuit, both the district and appellate court decisions relied on factual findings about the implementation of the 2012 DACA memorandum. The Fifth Circuit agreed with the lower court that DACA decisions were not truly discretionary,<sup>[4]</sup> (# ftn4), and that DAPA and expanded DACA would be substantially similar in execution. Both the district court and the Fifth Circuit concluded that implementation of the program did not comply with the Administrative Procedure Act because the Department did not implement it through notice-and-comment rulemaking.

The Supreme Court affirmed the Fifth Circuit's ruling by equally divided vote (4-4).<sup>[5]</sup> (# ftn5) The evenly divided ruling resulted in the Fifth Circuit order being affirmed. The preliminary injunction therefore remains in place today. In October 2016, the Supreme Court denied a request from DHS to rehear the case upon the appointment of a new Justice. After the 2016 election, both parties agreed to a stay in litigation to allow the new administration to review these issues.

On January 25, 2017, President Trump issued Executive Order No. 13,768, "Enhancing Public Safety in the Interior of the United States." In that Order, the President directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens," and established new immigration enforcement priorities. On February 20, 2017, then Secretary of Homeland Security John F. Kelly issued an implementing memorandum, stating "the Department no longer will exempt classes or categories of removable aliens from potential enforcement," except as provided in the Department's June 15, 2012 memorandum establishing DACA,<sup>[6]</sup> (# ftn6) and the November 20, 2014 memorandum establishing DAPA and expanding DACA.<sup>[7]</sup> (# ftn7)

On June 15, 2017, after consulting with the Attorney General, and considering the likelihood of success on the merits of the ongoing litigation, then Secretary John F. Kelly issued a memorandum rescinding DAPA and the expansion of DACA—but temporarily left in place the June 15, 2012 memorandum that initially created the DACA program.

Then, on June 29, 2017, Texas, along with several other states, sent a letter to Attorney General Sessions asserting that the original 2012 DACA memorandum is unlawful for the same

reasons stated in the Fifth Circuit and district court opinions regarding DAPA and expanded DACA. The letter notes that if DHS does not rescind the DACA memo by September 5, 2017, the States will seek to amend the DAPA lawsuit to include a challenge to DACA.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA “was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress’ repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.” The letter further stated that because DACA “has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.” Nevertheless, in light of the administrative complexities associated with ending the program, he recommended that the Department wind it down in an efficient and orderly fashion, and his office has reviewed the terms on which our Department will do so.

## Rescission of the June 15, 2012 DACA Memorandum

Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

Recognizing the complexities associated with winding down the program, the Department will provide a limited window in which it will adjudicate certain requests for DACA and associated applications meeting certain parameters specified below. Accordingly, effective immediately, the Department:

- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by the Department as of the date of this memorandum.
- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.
- Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.



- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.
- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.
- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, CBP will—of course—retain the authority it has always had and exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, USCIS will—of course—retain the authority to revoke or terminate an advance parole document at any time.
- Will administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program, and will refund all associated fees.
- Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

This document is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

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[\[1\] \(# ftnref1\)](#) Significantly, while the DACA denial notice indicates the decision to deny is made in the unreviewable discretion of USCIS, USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion.

[\[2\] \(# ftnref2\)](#) *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[\[3\] \(# ftnref3\)](#) *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

[\[4\] \(# ftnref4\)](#) *Id.*

[\[5\] \(# ftnref5\)](#) *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).



[6] (# [ftnref6](#)) Memorandum from Janet Napolitano, Secretary, DHS to David Aguilar, Acting Comm'r, CBP, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012).

[7] (# [ftnref7](#)) Memorandum from Jeh Johnson, Secretary, DHS, to Leon Rodriguez, Dir., USCIS, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents" (Nov. 20, 2014).

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