



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory on Filing DACA Applications In Light of Recent Court Rulings

On June 18, 2020, the U.S. Supreme Court [ruled](#) that the 2017 termination of DACA was arbitrary and capricious under the Administrative Procedures Act (APA) and vacated the 2017 DHS memo that rescinded DACA.¹ Based on this decision, the U.S. District Court for the District of Maryland issued an [order](#) on July 17 in *Casa de Maryland v. Dept. of Homeland Security* restoring DACA to its pre-rescission status and enjoining DHS from implementing or enforcing the rescission.² This advisory summarizes the current status of DACA in light of these rulings.

What does the Supreme Court's ruling mean for DACA recipients and Dreamers?

The Supreme Court's decision did not address whether the DACA program itself is lawful. The ruling held that the Trump administration did not follow the law when it attempted to terminate DACA. Nothing prevents the administration from making a new attempt to end the program in a way that complies with the APA.

Current DACA recipients remain protected from deportation and are still eligible for work authorization, a Social Security Number and other benefits they have qualified for with DACA. U.S. Citizenship and Immigration Services (USCIS) may only terminate individual DACA grants if the recipient no longer meets the eligibility guidelines for DACA, i.e., falls into certain criminal bars or poses a threat to public safety. The DACA renewals process is unchanged and recipients may continue to renew their DACA grants in two-year increments.

The *Casa de Maryland* decision goes beyond the Supreme Court's determination that the DACA rescission was unlawful and explicitly orders USCIS to accept both first-time DACA requests from those who have never held DACA (initial DACA requests) and advance parole requests. As of the

¹ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) available at https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf.

² *Casa de Maryland v. Dept. of Homeland Security*, No. 8:17-cv-02942-PWG (D. Md. July 17, 2020) available at courtlistener.com/recap/gov.uscourts.mdd.403497/gov.uscourts.mdd.403497.97.0.pdf.

date of this advisory, however, USCIS has not issued any guidance or confirmed that it will process initial DACA applications and advance parole requests in compliance with the Supreme Court and U.S. District Court for the District of Maryland decisions.

Could the Administration try to terminate DACA again?

Yes. The Supreme Court's decision made it clear that DHS has the authority to rescind DACA as long as it follows the proper procedures in doing so. DHS could issue a new memo that sets forth adequate reasons and reasoned explanations for the termination in compliance with the APA. This attempt would likely be met with litigation. Another option would be for DHS to attempt to terminate DACA through the regulatory process, which requires notice and comment. While the Supreme Court's decision buys some additional time, DACA remains in jeopardy. Only Congress can provide a permanent solution by passing legislation creating a path to permanent residence and citizenship for Dreamers.

Can individuals who have never held DACA apply now?

As a result of the June 18, 2020, Supreme Court ruling and the July 17, 2020, order from the U.S. District Court for the District of Maryland, USCIS *should* accept initial DACA requests from those who have never held DACA. In the immediate wake of the Supreme Court decision, practitioners reported that USCIS was rejecting initial DACA applications. Following the subsequent U.S. District Court order which explicitly requires USCIS to accept initial DACA applications, the expectation is that USCIS will begin accepting these requests. However, as of the date this advisory, the agency has not confirmed that it is accepting and processing initial DACA requests. As of July 20, 2020, the agency's website still states: "USCIS is not accepting requests from individuals who have never before been granted deferred action under DACA." In the absence of guidance from USCIS, practitioners who file initial DACA applications should make sure their clients have been advised of the uncertainty regarding how USCIS will handle these requests.

What are the benefits in filing initial DACA applications at this time?

There are a number of benefits to filing initial DACA applications as soon as possible. The window for submitting these applications could be short if the administration attempts to rescind DACA a second time. If DHS issues a new rescission memo in an attempt to comply with the APA, depending on how it is drafted, initial applications filed before the new rescission (or before a particular date set forth in the memo) could *potentially* be grandfathered and adjudicated by USCIS even after the rescission announcement. Those who have submitted initial DACA applications could become members of a class action if litigation challenges the administration's failure to process requests in compliance with the Supreme Court and U.S. District Court for the District of Maryland decisions.

Additional considerations include the anticipated increase in the DACA application fee to \$765 in the coming months as well as the announced furlough of thousands of USCIS employees beginning in August.

What are the risks in filing initial DACA applications at this time?

While the U.S. District Court for the District of Maryland order explicitly requires USCIS to accept initial DACA requests, the agency has not issued public guidance indicating that it has restored the initial application process. Furthermore, following the Supreme Court decision, the administration maintained that DACA is an unlawful program³ and, in unofficial statements, threatened to continue its attempts to rescind DACA. In fact, several practitioners reported receiving rejections of newly filed initial requests. Therefore, initial DACA requests filed prior to USCIS officially reopening its application process are at risk of being rejected and returned. Alternatively, initial requests may be accepted but then denied, resulting in applicants losing the filing fee.

First-time applicants who have not had previous contact with DHS risk drawing new scrutiny by submitting a request to USCIS that is ultimately processed and then denied. The current USCIS policy states that the agency will not proactively share information contained in DACA requests with Immigration and Customs Enforcement (ICE). However, DHS could change that policy at any time in the future. USCIS currently follows its 2011 Notice to Appear (NTA) memo when determining whether to refer a DACA requestor's case to ICE for investigation or NTA issuance.⁴ An applicant who has a Statement of Findings substantiating fraud, who is under investigation for, has been arrested for (without disposition), or has been convicted of, an "Egregious Public Safety" crime, or who would be inadmissible based on a crime, are all potentially at risk of being referred to ICE and placed in removal proceedings.⁵

Can DACA recipients apply for advance parole following the Supreme Court's decision?

Under the original 2012 DACA policy, DACA recipients may apply for advance parole travel permission based on a need to travel for humanitarian, education, or employment purposes. Thus, as a result of both the Supreme Court decision and the U.S. District Court for the District of Maryland order restoring the DACA policy to its pre-rescission state, USCIS *should* accept advance parole requests. However, it remains unclear whether the agency will resume accepting and adjudicating

³ See *DHS Statement On Supreme Court Decision on DACA* (June 18, 2020,) available at: dhs.gov/news/2020/06/18/dhs-statement-supreme-court-decision-daca and *USCIS Statement on Supreme Court's DACA Decision* (June 19, 2020), available at: uscis.gov/news/news-releases/uscis-statement-supreme-courts-daca-decision.

⁴ USCIS Policy Memorandum, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible or Deportable Aliens, PM-602-0050.1 (June 28, 2018).

⁵ USCIS Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, PM-602-0050 (Nov. 7, 2011). See CLINIC's *Practice Pointer: New USCIS NTA Guidance Memo*, available at cliniclegal.org/resources/removal-proceedings/practice-pointer-new-uscis-nta-guidance-memo.

requests for advance parole. As of July 20, 2020, its website still states: “USCIS will not accept or approve advance parole requests from DACA recipients.” Those who choose to apply at this time should be advised that their request could be rejected or denied. Moreover, inform clients that processing times for I-131 applications range from 3.5 to 8 months, depending on the USCIS Service Center. Processing times could increase given the possibility of upcoming furloughs of USCIS adjudications staff.

In the event a DACA recipient does secure advance parole, keep in mind that travel restrictions imposed by the United States and other countries as a response to the COVID-19 pandemic may also limit their practical ability to travel abroad and return. Moreover, it is important to warn clients who do decide to travel with advance parole about the risks of DHS deciding to terminate DACA again while they are outside the United States.

Which DACA recipients may apply to renew?

Anyone who has previously held DACA and continues to meet the DACA eligibility requirements may apply to renew. USCIS policy on renewals remains unchanged by the Supreme Court’s decision. Those whose DACA expired one year ago or less may request DACA as *renewal* applicants and should follow the instructions for renewal requests.⁶ Those whose deferred action expired more than one year ago, or was terminated at any time, may request DACA renewal but must follow the instructions for *initial* applicants and include supporting evidence to show that they meet the eligibility criteria. USCIS directs all applicants to include the date their DACA expired (or was terminated) in Part 1 of Form I-821D.

When should DACA renewal requests be filed?

The archived DACA FAQs recommend submitting renewal requests between 150 and 120 days prior to the current DACA expiration date. The FAQs also state that, while USCIS will accept requests submitted earlier than 150 days before expiration, the deferred action period will likely be granted from the date the renewal is approved. In other words, filing earlier than 150 days out means that the new renewal period may extend for less than a full two years from the date the applicant’s current DACA period expires. Practitioners report that while USCIS has been accepting renewal requests that are filed more than 150 days before expiration, these applications are sometimes held for a period of time before being adjudicated. Another factor to consider is the proposed USCIS filing fee increases. Once the new fees take effect, the cost of a DACA renewal will increase from \$495 to \$765. Finally, renewal applicants should understand that the Trump administration may attempt to rescind DACA again in a lawful manner. A new attempt to rescind DACA would likely face legal

⁶ Note that this “one-year filing window” is a change in [policy](#) that went into effect on August 1, 2019. The previous policy (in effect from September 5, 2017 through July 31, 2019) was that those whose DACA expired on or after September 5, 2016, could apply as renewal applicants, but those whose DACA expired before September 5, 2016, had to file as initial applicants.

challenges, but the future of DACA remains uncertain. Ultimately, it is the decision of each DACA recipient to weigh these considerations before deciding whether to apply to renew and, if so, how early to file.

How has COVID-19 impacted DACA renewal application processing?

In response to COVID-19 public health concerns, USCIS temporarily suspended all biometrics appointments on March 18, 2020. Many Application Support Centers (ASCs) remain temporarily closed but USCIS indicated it may reuse a DACA applicant's previously submitted biometrics (photograph and fingerprints) for purposes of processing DACA renewal requests and related Form I-765, Applications for Employment Authorization.⁷ Most ASCs are scheduled to reopen in late July.⁸ CLINIC continues to post updates and resources related to the COVID-19 pandemic at: cliniclegal.org/covid-19.

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

Under the DACA confidentiality policies as described in the [archived USCIS DACA FAQs](#), USCIS will not proactively share requestors' personal information with ICE or Customs and Border Protection (CBP) for immigration enforcement purposes unless the requestor meets the criteria in the 2011 guidance for issuance of a Notice to Appear. These policies were confirmed in the June 28, 2018, [NTA policy memo](#). Note that the DACA NTA guidance and confidentiality policies are subject to change at any time.

What enforcement risks will individuals face once their DACA expires?

The current confidentiality policy prevents USCIS from sharing information contained in a DACA application with ICE for enforcement purposes, however someone whose DACA has lapsed could come to the attention of ICE in other ways and be placed in removal proceedings. 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.

Best practices for advocates:

Identify clients for eligibility. Conduct outreach and educate the community about the current state of DACA. Consider conducting virtual community education events through Zoom or Facebook Live. Help potential first-time applicants understand the eligibility requirements; what supporting evidence

⁷ See uscis.gov/news/alerts/uscis-continue-processing-applications-employment-authorization-extension-requests-despite-application-support-center-closures and uscis.gov/about-us/uscis-response-covid-19.

⁸ See "USCIS Office Closings," available at: uscis.gov/about-us/uscis-office-closings

to gather; and the risks and benefits of applying for initial DACA at this time. Review your caseload and contact clients who are eligible to renew DACA or may be eligible to apply for the first time. Provide document checklists and self-screening forms to help clients understand the requirements and, if eligible, be ready to apply. Determine whether the volume of potential applicants is large enough to consider recruiting pro bono counsel to assist clients in submitting timely applications. Prepare initial and renewal requests promptly in light of the possibility that DHS attempts to terminate DACA again.

Advise clients about the pros and cons of filing an initial application before official USCIS guidance is issued. While recent court decisions require USCIS to accept initial DACA requests, the agency has not yet announced that it will comply. Thus far, USCIS has been rejecting and returning initial DACA applications filed after the Supreme Court decision. USCIS has yet to respond to the U.S. District Court for the District of Maryland order restoring the 2012 DACA policy and enjoining DHS from implementing any aspect of the DACA rescission. We may not learn how USCIS will treat initial applications until the agency begins to issue receipt notices or continues to issue rejections for requests filed following the district court's order.

For some, the potential advantages of filing immediately may outweigh the risks. Those who do apply now could potentially be a part of a future class action should USCIS refuse to adjudicate initial requests and litigation ensues. As mentioned, USCIS will increase application fees for DACA requests in the coming months and that may impact some individuals' decisions about when to apply. Those who are under 18 years of age may avoid accruing unlawful presence for purposes of the three- and ten-year inadmissibility bars under INA §§ 212(a)(9)(B) and (C) if they file now and their application is accepted. In particular, this may benefit a potential applicant who has an avenue for consular processing in the future. Those who are eligible for non-LPR cancellation of removal may be able to seek relief if they are placed in removal proceedings after having an initial DACA application denied.

Anyone who would like to apply now should be screened for additional risk factors, such as crimes, and be advised of potential enforcement risks. Applications should be carefully prepared with as much supporting evidence as possible to avoid a discretionary denial. If an application is denied, the requestor would lose the filing fee. While current policy states that denied DACA requests will not be referred to ICE unless certain criminal or fraud issues are identified, that policy is subject to change, and the risk of enforcement may increase if President Trump is reelected. Applicants should also understand, that at this point, there is no guarantee that their initial DACA request will be accepted and processed. Consider asking first-time applicants to sign a consent form indicating that they have been informed of the risks of filing before choosing to proceed.

Make sure DACA requests are properly completed before submitting. Ensure that initial and renewal applications are not rejected. Forms should be fully completed as advised by USCIS (renewal requests must include the previous DACA expiration date and all applications must be signed.) The proper filing fees must be included, and the current versions of the required forms must

be used. Be mindful of completing the I-821D form in its entirety to avoid the risk of rejection by the USCIS lockbox. If a question does not apply to the applicant, provide an “N/A” or “none” answer. Consider submitting requests via a reliable overnight courier and retaining tracking information.

Screen clients for other immigration relief. DACA recipients and Dreamers 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 Dreamers.