FAQ: Advising DACA Clients in 2025

Jan. 22, 2025

This resource summarizes latest developments and clarifies the current status of DACA.

What is the background of the litigation challenging DACA?

State of Texas, et al., v. The United States of America, et al., or *Texas II* is a lawsuit that was filed May 1, 2018, by Texas and nine other states challenging the legality of the original 2012 DACA program that was created under the Obama Administration. The lawsuit raised several claims, including the allegation that the Department of Homeland Security (DHS) violated substantive and procedural aspects of the Administrative Procedures Act (APA) and the Take Care clause of the Constitution.

In his July 16, 2021, decision, Judge Andrew Hanen of the Southern District of Texas granted summary judgment based on plaintiffs' APA claims and declined to rule on the constitutional claim. The court vacated the June 15, 2012, DACA memorandum issued by the former Secretary of DHS; remanded the memorandum to DHS for further consideration; and issued a permanent injunction prohibiting the government's continued administration of DACA and the reimplementation of DACA without compliance with the APA. However, noting the reliance interest of DACA recipients, employers, and others, the court temporarily stayed the portion of its order vacating the DACA memorandum with regard to individuals who had obtained DACA on or before July 16, 2021.

On Aug. 30, 2022, DHS issued final DACA regulations, following President Biden's directive to "preserve and fortify DACA" consistent with applicable law. The regulations maintained the existing DACA eligibility guidelines and largely preserved the policies that have been in place since the program's beginning.

On Sept. 13, 2023, Judge Hanen ruled that the DACA Final Rule was also unlawful. The existing injunction and vacatur order, which Hanen first issued in July 2021, were supplemented to include the Final Rule. The court stayed the effective date of the vacatur. This means that although DACA was found unlawful, the status quo has remained the same. Current DACA recipients are allowed to maintain their deferred action. U.S. Citizenship and Immigration Services (USCIS) continues to adjudicate and approve applications for DACA renewals, employment authorization, and advance parole. USCIS may choose to accept initial DACA applications but may not adjudicate them.

This decision was appealed to the U.S. Court of Appeals for the Fifth Circuit. On Jan. 17, 2025, the Fifth Circuit ruled again that DACA is unlawful. In doing so, it upheld the lower court's ruling

that the DACA Final Rule issued by the Biden administration suffered from the same legal defects that led the court to find the DACA program unlawful.

The existing injunction and vacatur of the Final Rule, which the lower court first issued in July 2021, has been affirmed in part and modified so that it is now limited to Texas. The Fifth Circuit also ruled that the provisions of DACA were severable, meaning that the DHS could grant affected persons deferred action without also entitling them to a work permit. The Fifth Circuit's decision, at least in theory, could allow DHS to adjudicate initial DACA applications filed by persons residing outside of Texas. However, there is no current expectation that USCIS will resume adjudicating initial DACA applications.

The case is being remanded, and the circuit court's decision will not take effect until the lower court issues its decision. The Fifth Circuit has maintained a stay until then. It is likely that the district court will grant a stay while the case is on further appeal to the Supreme Court. Existing DACA beneficiaries will not lose their protection from removal or their employment authorization. DHS may continue to adjudicate and approve applications for DACA ***renewals***, employment authorization, and advance parole.

What did the Fifth Circuit Court of Appeals rule?

- **DACA renewals continue:** The stay remains in place and current DACA beneficiaries nationwide may continue to apply for DACA renewal and employment authorization document (EAD) renewal, and these renewals remain intact across the country.
- **Injunction limited to Texas:** The nationwide injunction, which prevents USCIS from adjudicating initial DACA applications, was narrowed to apply only in Texas. In theory, this could allow USCIS to adjudicate initial DACA requests. However, this part of the ruling has not yet been implemented. CLINIC will continue to monitor the situation for new developments. Note that the decision does not mean that DACA recipients in Texas will lose DACA or their employment authorization. All eligible DACA recipients are encouraged to renew.
- **Forbearance from removal was upheld:** The circuit court upheld the part of DACA that allows immigration officials to defer removal for those who are considered low priorities for enforcement. However, states will have the opportunity to respond as this decision is not yet mandated.

As of the date of publication, the mandate has not become effective, and the decision is not yet being implemented.

How does the Fifth Circuit ruling impact current DACA recipients?

DACA recipients nationwide may continue to renew their DACA and EAD as they approach expiration. U.S. Citizenship and Immigration Services recommends submitting renewal requests between 120 and 150 days prior to the current DACA expiration date. The part of the ruling that allows the forbearance aspect of DACA to be separated from the EAD portion of DACA has not yet been implemented.

What about those whose DACA has expired?

Whether USCIS can approve DACA applications for former DACA recipients depends on how long ago their last DACA grant expired. Someone previously granted DACA who did not apply to renew within one year of its expiration is considered an "initial" applicant. Likewise, someone whose most recent DACA grant was terminated is considered now to be an initial applicant. While USCIS will accept initial applications, the agency cannot approve them if the court order remains in effect.

Former DACA recipients whose status expired less than one year ago may request DACA as "renewal" applicants, and USCIS can approve these DACA requests and EAD applications. Applicants should follow the Form I-821D instructions for renewal requests.

Can individuals who have never held DACA apply now?

USCIS updated its website on Jan. 18, 2025, to reflect the Fifth Circuit's ruling. USCIS confirmed that for now, it will continue to process DACA renewals and applications for advance parole, but that it would not adjudicate initial applications.

Someone who has never been granted DACA can file a Form I-821D application following the instructions for initial DACA requests, but USCIS cannot currently approve these requests. The application will be on hold until and unless the injunction is lifted.

What about those who had pending initial applications as of July 16, 2021?

DHS is permanently enjoined from granting DACA to new applicants as of July 16, 2021. USCIS may continue to accept first-time DACA applications but is prohibited from approving any initial applications and accompanying EAD requests, including those that were pending on July 16, 2021, for as long as the court order is in effect.

Initial applications that were pending on or filed after July 16, 2021, will not be rejected or closed but will remain on hold until the injunction is lifted. USCIS will not refund filing fees for initial DACA requests that remain on hold during this time.

Is advance parole still available for current DACA recipients?

Current DACA recipients may continue to apply for and be granted advance parole if they can show a qualifying educational, employment or humanitarian reason, and they may travel with a valid advance parole travel document. Those with valid advance parole may continue to depart the United States and return under the same conditions in effect before the court order. For additional information about advance parole for DACA recipients, see CLINIC's Advance Parole FAQs.

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

In accordance with long-standing USCIS policy, personal information contained in an applicant's DACA request has not been used by DHS for immigration enforcement purposes unless the agency is initiating enforcement proceedings against the applicant due to a criminal offense, fraud, a threat to national security or public safety concerns. Likewise, information about an

applicant's family members or guardians have not been used for enforcement purposes against them. This could potentially change under the new administration.

Where can I find more guidance?

USCIS publishes DACA litigation information and FAQs on their website, available at: https://www.uscis.gov/DACA

Best Practices:

Ensure that potential applicants understand the injunction's impact on DACA. Anyone who would be required to apply as an initial applicant, including those who previously had DACA but are applying more than a year after a lapse in deferred action, should be advised that USCIS will accept their application but cannot adjudicate it unless the injunction is lifted. They should also realize that the litigation is ongoing and there are still many unknowns about what will happen in the future. Practitioners should continue to monitor developments. Clients should be screened for additional risk factors (such as crimes), be advised of potential enforcement risks, and weigh the relative risks and benefits of filing an initial application in light of the current uncertainty.

Identify renewal-eligible clients and encourage them to file timely applications. Screen potential renewal applicants and ensure that all applications are properly completed before submitting. Make sure current DACA holders submit their renewal application within one year of their most recent DACA grant's expiration. Conduct outreach and educate the community about current developments and how they affect the adjudication of initial and renewal applications.

Advise clients of the benefits and risks of travel with advance parole. Traveling and returning to the United States with advance parole authorization may help some immediate relatives to satisfy the INA § 245(a) adjustment of status eligibility requirement of having been "inspected and admitted or paroled." Screen clients carefully for inadmissibility issues before they travel. While DACA applicants are not required to demonstrate admissibility to receive DACA, inadmissibility issues, particularly related to crimes, may be considered when determining whether to allow a DACA recipient to re-enter, even if they have been granted advance authorization to travel.

Screen clients for other immigration relief. DACA recipients and potential applicants 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 to clients in removal proceedings, such as non-LPR or VAWA cancellation. Visit CLINIC's DACA page and monitor political developments if Congress contemplates legislation that would provide a path to permanent residence for DACA recipients and other undocumented immigrants.