

Navigating DACA After SCOTUS Halts Its Rescission: Key Points

An overview of the DACA program and eligibility requirements including practical effect of the SCOTUS decision on practitioners and eligible applicants.

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In 2012, President Barack Obama issued an executive branch memorandum initiating the Deferred Action for Childhood Arrivals (DACA) program. DACA permitted qualifying aliens unlawfully present in the United States, who entered as children, to apply for and obtain deferred action. This group of aliens are also referred to as “Dreamers.” Deferred action is a limited immigration benefit granted by the Department of Homeland Security (DHS) to certain individuals unlawfully present in the United States. DHS makes a discretionary determination not to pursue enforcement, removal and/or deportation against them for a specified period of time.

If approved for DACA, a qualified alien would receive an employment authorization document (EAD) valid for two years; obtain a social security number; obtain lawful employment; be obligated to file tax returns and pay taxes; and in certain states be entitled to obtain a driver’s license. DACA approval does not confer any legal immigration status nor does it provide a path to citizenship. As discussed below, DHS suspended the filing of all new DACA applications and most renewal applications in October 2017. The following refresher on the DACA program provides a reminder of the parameters of the program.

To be eligible for DACA, individual applicants must establish that they:

- were under the age of 31 on June 15, 2012
- arrived in the United States before their 16th birthday

- continuously resided in the United States from June 15, 2007 to present – or to the date their application was submitted
- were physically present in the United States on June 15, 2012, and on the date their application was submitted
- entered unlawfully or without inspection or, in the alternative, their lawful status had expired on or before June 15, 2012
- were awarded a GED certificate or were a veteran of The United States Coast Guard or Armed Forces at the time of their application
- have not been convicted of a felony or a serious misdemeanor or three or more unrelated misdemeanors (not stemming from the same crime or series of crimes) and do not pose a threat to national security or public safety.

Following the introduction of the DACA program and related guidelines and applications, practitioners dealt with multiple issues raised by the above criteria. Questions such as: did a prior removal or deportation order render an applicant ineligible? Which specific misdemeanors were “serious” and led to ineligibility? Would brief departures negate continuous presence? What types of evidence would be sufficient to prove physical presence? These issues require a case-by-case legal analysis and review of guidelines, regulations and memoranda before clients can be advised on their particular situation.

If individuals did receive DACA status, they were eligible to apply for an additional two-year extension 150 days before their status expired. In support of a renewal application, they would have to show:

- they had not left the United States after August 15, 2012, without permission or advance parole (travel document allowing travel outside the United States and permission to reenter – the holder of this travel document **may** be allowed to reenter at the discretion of the officer at the port of entry)
- they had resided in the United States since their application was submitted
- since their initial application, they had not been convicted of a felony or a significant misdemeanor or three or more unrelated misdemeanors and do not pose a threat to national security or public safety.

DHS’ Rescission of DACA

In 2014, DHS, under the Obama administration, sought to expand DACA by enacting a new policy called Deferred Action for Parents of Americans and Lawful Permanent

Residents (DAPA). DAPA sought to expand DACA eligibility requirements by broadening the age range of applicants and physical presence requirements. A group of 26 states challenged DAPA in a Texas District Court and sought a preliminary injunction to enjoin it from taking effect.

The District Court granted the injunction and in 2015, the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's decision. The Fifth Circuit concluded that DAPA conflicted with the discretionary authority granted to the President by Congress and the Administrative Procedure Act (APA) and stated "DAPA is foreclosed by Congress's careful plan; the program is manifestly contrary to the statute and was therefore properly enjoined." (*Texas v. The United States*).

On June 23, 2016, The Supreme Court of the United States (SCOTUS) affirmed the Fifth Circuit decision and blocked the implementation of DAPA.

Although DACA was not directly addressed in *Texas v. The United States*, nor was it part of the lawsuit, relying upon SCOTUS' rationale, on Jan. 25, 2017, President Donald Trump issued Executive Order No. 13,768. Based upon the directives of this executive order and a letter from then Attorney General Jeff Sessions, on Sept. 5, 2017, DHS issued a Memorandum of Rescission of DACA. The memorandum, among other things, immediately suspended any new DACA applications, and announced that renewal applications would be accepted until Oct. 5, 2017, but only from those DACA recipients whose status was due to expire during the period from the date of the Memorandum through March 5, 2018.

Litigation

The DHS Memorandum prompted several lawsuits instituted in New York, California and the District of Columbia that resulted in three nationwide injunctions. The injunctions allowed prior DACA recipients to submit applications for renewal and approximately 616,000 renewal applications have been submitted over the last two years. No new or initial DACA applications were permitted. In June 2019, SCOTUS consolidated the three cases and agreed to review the injunctions. Oral arguments were held on Nov. 12, 2019.

Last week, SCOTUS decided the cases and held that the rationale offered by DHS in its rescission memorandum was inadequate and violated the APA. (*DHS v. Regents*

of the University of California). The decision invalidated the rescission memorandum on procedural grounds but also implied that DHS could rescind the program if it followed the correct procedures.

The Current State of Affairs

Practitioners who represent DACA eligible clients or employers of DACA recipients should update themselves on eligibility requirements and related issues and apply them carefully to the particular facts of each case. The SCOTUS decision provides a lifeline, albeit temporarily, to this beleaguered program. In brief, the decision allows the following:

- Individuals whose DACA status is due to expire within 150 days can immediately apply for renewal, subject to the eligibility requirements detailed above.
- Although the injunctions permitted renewal applications, all new or initial applications were suspended. The SCOTUS decision invalidates the Rescission Memorandum thus clearing the way for DACA applicants to submit these applications. It is expected that DHS will issue new guidelines and/or applications for these cases. However, until that happens, Practitioners should recommend that such applications be filed pursuant to prior guidelines, using the previous application form, making certain to obtain a receipt number. Clients should be made aware that a second application may be required.
- Current DACA recipients are eligible to file for renewal of their status even if it has been expired for a period of one year or less.
- DACA recipients whose status expired more than one year ago cannot file a renewal application, but must file a new or initial DACA application provided they meet all eligibility requirements.
- DACA recipients whose previously conferred status was terminated by the United States Citizenship and Immigration Services (USCIS) based upon the DHS Rescission Memorandum, can file a new or initial DACA application provided they continue to meet all eligibility requirements
- DACA permitted recipients to travel outside the United States with permission or advance parole. The Rescission Memorandum had suspended adjudication of all pending advance parole applications. DHS should issue new guidance on new advance parole applications. Although these applications technically may be submitted and even accepted, out of an

abundance of caution, clients should be advised against any travel outside the United States. Even with an advance parole document, permission to reenter the United States is not guaranteed.

- Practice Note: On June 19 USCIS issued a statement denouncing the DACA program. In the event an initial DACA application or advance parole application is rejected by USCIS, the applicant may have a claim under the APA or a basis for a mandamus action in reliance on the SCOTUS ruling in *Texas v. United States*. A litigation attorney specializing in immigration should be consulted in such event.

In Closing

The SCOTUS decision offers a temporary reprieve to Dreamers, but does not, by any means, provide a long-term solution. It has given the Trump administration a road map to follow to terminate the program lawfully, and it has provided Congress the opportunity to legislate a solution. However, as immigration practitioners know from past experience, temporary reprieves can provide necessary lifelines to their clients. As of the date of this article there are an estimated 700,000 DACA recipients in the country. Those are definitely a lot of lifelines.

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