

UNITED STATES

THE END OF DACA: WHAT EVERY U.S. EMPLOYER SHOULD KNOW



September 5, 2017

After a determination by Attorney General Jeff Sessions that the Deferred Action for Childhood Arrivals (DACA) program was an “unconstitutional exercise of authority by the Executive Branch,” the Department of Homeland Security (DHS) announced today that it has rescinded the 2012 DACA memorandum and is ordering a “wind down” of the program.

Background

Since 2012, DACA has allowed undocumented immigrants who came to the United States as children and meet certain eligibility criteria to request a period of deferred action from the government and apply for authorization to work in the U.S. According to the Migration Policy Institute (MPI), approximately 1.5 million individuals may be eligible for the program, and over 800,000 have received DACA approvals since the program was launched. Though a grant of DACA represents the government’s decision not to take action to remove a person from the U.S., it does not impart any legal immigrant or nonimmigrant status. An estimated 700,000 DACA recipients are currently working for U.S. employers.

How will DHS phase out the DACA program?

DHS has announced that it has withdrawn the 2012 memorandum that implemented DACA and has issued a new memorandum that winds down the program. Effective immediately, DHS:

- Will adjudicate properly filed pending DACA initial requests and associated applications for Employment Authorization Documents (EADs) that have been accepted as of September 5, 2017.
- Will reject all DACA initial requests and associated applications for EADs filed after September 5, 2017.
- Will adjudicate properly filed pending DACA renewal requests and associated applications for EADs from current beneficiaries that have been accepted as of September 5; and from current beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018 that are filed and accepted on or before October 5, 2017. **Any DACA recipient whose EAD will expire on or before March 5, 2018 must therefore file an extension in the next month.**
- Will not terminate the grants of previously issued deferred action or revoke EADs solely on the basis of the directives in the memorandum for the remaining duration of their validity periods.

FREQUENTLY ASKED QUESTIONS (FAQS)

- Will not approve any new Form I-131 applications for advance parole (travel) under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole.
- Will administratively close all pending Form I-131 applications for advance parole (travel) filed under standards associated with the DACA program, and will refund all associated fees.

The date of expiration of an individual's DACA grant will dictate how he or she is affected by today's announcement:

Winding Down DACA			
Category	Description	Approx. Number	Impact
Eligible for DACA But No Initial Request Filed	Your request for initial DACA relief is filed (received by agency) on or after September 5.	500,000 ¹	You will not be eligible for DACA relief.
Pending Initial Request for DACA	Your request for initial DACA relief was already filed and remains pending on or after September 5.	36,000 ²	DHS may exercise discretion to approve for up to two years.
Renewal – more than 6 months away	Current DACA recipient whose EAD expires after March 5, 2018.	400,000 ³	Absent congressional action, your current EAD expiration will be your last day of DACA status and employment authorization.
Renewal – within next 6 months	Current DACA recipient whose EAD expires on or before March 5, 2018.	200,000 ⁴	A DACA beneficiary must file an extension by October 5, 2017. DHS may exercise discretion to approve an extension for up to two years.

¹ Migration Policy Institute, Issue Brief, “DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients,” p. 11, August 2016.

² Department of Homeland Security, FAQ: Recission of DACA, Sept. 5, 2017, <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-recission-deferred-action-childhood-arrivals-daca>.

³ Cato Institute, How DACA Will End: A Timeline of Expiration, Dec. 21, 2016, <https://www.cato.org/blog/how-daca-will-end-timeline-expiration>.

⁴ Ibid.

FREQUENTLY ASKED QUESTIONS (FAQS)

Will a DACA beneficiary continue to be authorized to work during the validity period of his or her current EAD?

Yes.

Will a DACA beneficiary be subject to removal (deportation) during the validity period of his or her current EAD?

No, an individual should not be removed (deported) from the country solely on the basis of his or her DACA status. Note that DACA is discretionary and DHS could terminate a DACA grant and remove (deport) an individual if he or she no longer meets the DACA criteria (e.g., criminal conduct).

What are the potential penalties for a company that continues to employ a DACA beneficiary after his or her EAD expires?

Federal law prohibits employers from employing an alien knowing that he or she is not authorized to work in the U.S., and from continuing to employ an alien in the U.S. knowing the alien is or has become unauthorized. Civil fines for violations range from \$539 to \$4,313 per unauthorized worker for a first offense. Engaging in a pattern or practice of violations can give rise to criminal liability.

Can a company transfer a DACA beneficiary to an overseas office?

Companies could certainly explore options for employing affected individuals outside the U.S. There are times when DACA beneficiaries can complete the process of obtaining overseas work options from within the U.S., and the fact that they are out of status in the U.S. may not impede their ability to move to other countries. Our firm has developed strategies for multinational companies facing similar scenarios.

Can a company provide ongoing financial or other support to DACA beneficiaries after the expiration of their EAD?

Employers should consult counsel on this issue. Providing benefits (beyond legal services) could create exposure under other laws intended to prevent illegal immigration, including the prohibition against harboring unauthorized individuals. Therefore, even if it is permissible under I-9 laws to pay individuals after they have stopped working, there are risks associated with that practice under other laws. Companies should consult with counsel before proceeding.

What happens to individuals who currently have an initial DACA request pending?

U.S. Citizenship and Immigration Services (USCIS) will adjudicate all properly filed DACA initial requests and associated applications for EADs that have been accepted as of September 5, 2017. USCIS may approve those applications for up to two years.

What happens to individuals who currently have a pending request for renewal of DACA?

USCIS will adjudicate properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted as of September 5, 2017.

FREQUENTLY ASKED QUESTIONS (FAQS)

What happens to individuals whose benefits expire on or before March 5, 2018?

USCIS will adjudicate properly filed renewal requests and associated applications for Employment Authorization Documents from current beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018 that are filed and accepted before or on October 5, 2017.

USCIS will reject all requests to renew DACA and associated applications for EADs filed after October 5, 2017.

What happens when an individual's DACA benefits expire over the course of the next two years? Will individuals with expired DACA be considered illegally present in the country?

Current law does not grant any legal status for the class of individuals who are current recipients of DACA. When their period of deferred action expires or is terminated, their removal will no longer be deferred, they will no longer be eligible for lawful employment, and they may be subject to removal (deportation) from the country.

Once an individual's DACA expires, will the case be referred to ICE for enforcement purposes?

DHS states that information provided to USCIS in DACA requests will not be proactively provided to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear ("NTA") or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA).

Can DACA recipients whose valid EAD is lost, stolen, or destroyed request a new EAD during the phase out period?

If an individual's still-valid EAD is lost, stolen, or destroyed, he or she may request a replacement EAD by filing a new Form I-765.

Will DACA recipients still be able to travel outside of the United States while their DACA is valid?

Effective September 5, 2017, USCIS will no longer approve any new Form I-131 applications for advance parole under standards associated with the DACA program.

Those with a current advance parole validity period from a previously approved advance parole application will generally retain the benefit until it expires. However, CBP will retain the authority it has always exercised in determining the admissibility of any person presenting at the border. Further, USCIS retains the authority to revoke or terminate an advance parole document at any time. Individuals are encouraged to consult with counsel before departing the country.

What happens to individuals who have pending requests for advance parole to travel outside of the United States?

USCIS will administratively close (i.e., deny) all pending Form I-131 applications for advance parole under standards associated with the DACA program, and will refund all associated fees.

Will Texas and the other states still sue the federal government?

FREQUENTLY ASKED QUESTIONS (FAQS)

DHS made the announcement today after Texas and several other states threatened to challenge the legality of DACA if the federal government did not take action to terminate the program by September 5. It is not yet known how Texas and the other states that have threatened litigation will react to the DHS announcement. On Friday, Tennessee withdrew from the lawsuit citing a “human element.”

How likely is it that Congress will pass a law granting relief to DACA beneficiaries?

It is impossible to predict whether Congress will pass a law that grants some form of relief from removal to DACA beneficiaries. Immigration remains a polarizing issue and the legislative agenda was already full before today’s announcement.

Conclusion

DACA is a large program that has benefited approximately 800,000 individuals. The likelihood that a company employs a DACA beneficiary may be higher than many people realize, and termination of the program will negatively impact DACA beneficiaries, their families, colleagues, and company projects.

FREQUENTLY ASKED QUESTIONS (FAQS)

Additional Resources:

- U.S. Department of Homeland Security, Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA): <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca#>
- U.S. Department of Homeland Security, Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA): <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>
- U.S. Department of Homeland Security, Fact Sheet: Rescission Of Deferred Action For Childhood Arrivals (DACA): <https://www.dhs.gov/news/2017/09/05/fact-sheet-rescission-deferred-action-childhood-arrivals-daca>
- Migration Policy Institute (MPI), “Deferred Action for Childhood Arrivals (DACA) Data Tools:” <http://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles>; “DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients:” <http://www.migrationpolicy.org/research/daca-four-participation-deferred-action-program-and-impacts-recipients>
- Cato Institute, “How DACA Will End: A Timeline of Expiration:” <https://www.cato.org/blog/how-daca-will-end-timeline-expiration>; “What Will Happen If Trump Kills DACA: A Timeline of Expiration:” <https://www.cato.org/blog/what-will-happen-trump-kills-daca-timeline-expiration>