



RECENT DEVELOPMENTS IN THE DACA LITIGATION

By ILRC and NILC

On September 13, 2023, Judge Andrew S. Hanen, a federal judge in the Southern District of Texas, ruled that the Biden administration's final DACA rule, issued in August 2022, is unlawful. Judge Hanen previously ruled in July 2021 that the 2012 DACA memorandum, which preceded the rule, was. His earlier ruling was affirmed by the U.S. Court of Appeals for the Fifth Circuit, but the appellate court sent the case back to Judge Hanen to consider whether there are any material differences between the DACA rule and the 2012 memo.

Judge Hanen's latest ruling and amended order does not change the status quo. Current DACA recipients, or those whose DACA has lapsed for less than a year, can continue to renew their DACA and work authorization, as well as apply for Advance Parole. However, first-time DACA applications continue to be blocked and cannot be processed.

I. Texas v. United States DACA Litigation History

Several States led by Texas brought this case in 2018, asking the federal court to declare the 2012 DACA memorandum unlawful. Soon after the case was filed, the State of New Jersey and 22 DACA recipients, represented by the Mexican American Legal Defense and Educational Fund (MALDEF), intervened in the case to defend DACA. Meanwhile, separate lawsuits challenging the Trump Administration's decision to terminate or restrict DACA made their way through the courts. As that litigation progressed, Judge Hanen issued a decision on July 16, 2021, finding that the 2012 memo was unlawful. In his decision, Judge Hanen vacated the original 2012 DACA memo and issued a permanent injunction prohibiting the government's continued administration of DACA. However, he temporarily stayed his order while the case went on appeal with respect to individuals who obtained DACA on or before July 16, 2021.

The government and intervenors appealed that ruling to the U.S. Court of Appeals for the Fifth Circuit. While the appeal was pending, the government proposed and, following a public comment period, issued a final DACA rule on August 30, 2022. In October 2022, the Fifth Circuit agreed with Judge Hanen that DACA was invalid as it existed under the 2012 memo. The Fifth Circuit stated that: (1) the States have standing; (2) the 2012 memo, adopted without rule making, violated procedural requirements of the Administrative Procedures Act (APA); and (3) the program contravened the Immigration and Nationality Act (INA), therefore failing to comply with substantive requirements of the APA. However, the Fifth Circuit remanded the case back to Judge Hanen to review the administrative record for the DACA rule and consider whether there are "material differences" between the 2012 memo and the DACA rule. Once

the case was back before the district court, Judge Hanen immediately limited implementation of the DACA rule, which was scheduled to go into effect on October 30, 2022. He then scheduled a briefing and held a hearing to decide the case.

II. September 23, 2023 Decision

In his most recent decision, Judge Hanen emphasized that the instruction from the Fifth Circuit was limited to addressing whether there are material differences between the DACA rule and the 2012 memo, and therefore did not permit the parties to re-litigate previously decided issues. Although the issue of state standing (the ability to sue) has been contested throughout the litigation, Judge Hanen stated that standing was already decided in favor of Texas and therefore was “not before the court.” However, if he were to reconsider standing, Judge Hanen said he would find that “recent developments” have fortified Texas’ claim to standing. Among the recent developments cited by Judge Hanen are the Supreme Court’s decision in the enforcement priorities case and the Department of Health and Human Services (HHS)’s proposed rule expanding Medicaid and Affordable Care Act eligibility to DACA recipients.

Judge Hanen found that there are no material differences between the DACA rule and the 2012 memo. He deferred to his prior analysis of the 2012 memo, but highlighted two specific examples of how the DACA rule, like its predecessor, contravenes the Immigration and Nationality Act (INA): (1) describing advance parole as “a troubling aspect of DACA,” stating it subverts statutory law and creates a “shortened pathway to citizenship” and (2) noting that the lack of temporal limits to DACA also contradicts DHS’ characterizations of DACA as a short-term, temporary solution.

In addition, Judge Hanen found that the DACA rule is not severable. That is, the deferred action or forbearance of deportation component cannot be separated and left intact without the work authorization and other “benefits” of the policy. He found that DHS would not have adopted the DACA rule, nor would the policy “function sensibly,” without the benefits provisions.

III. What Should DACA Recipients and DACA-Eligible Individuals Do Now?

Practitioners should continue to assure their clients who have DACA that they are eligible to renew both their DACA and work authorization and that there are currently no changes to advance parole for DACA recipients.

Current DACA recipients, as well as those whose DACA has lapsed for less than a year, can (and should!) continue to timely renew their DACA and work authorization, and may also apply for Advance Parole. Unfortunately, Judge Hanen’s order prevents the government from processing first-time applications.

It is likely that the government and intervenors will appeal Judge Hanen’s ruling to the Fifth Circuit and the case is almost certain to reach the U.S. Supreme Court sometime in the next two years. The Fifth Circuit can decide whether to continue to stay the district court’s order as to current DACA recipients. In the meantime, practitioners should be mindful of the timelines for renewal and continue to screen for other available forms of immigration relief for DACA

recipients. If possible, we recommend tracking and notifying clients of when they're approaching that one-year mark so that they do not miss the opportunity to renew.

Given that processing times for DACA have improved in recent months, DACA recipients and practitioners should be mindful of current processing times before filing. Case processing times are available on the USCIS website ([click here](#)). USCIS also publishes historical processing data and have reported processing times as short as one month ([click here](#)) for DACA renewals. With the uncertainty of DACA's future including whether or how DACA will end, to ensure that they are able to benefit from as much time with DACA as possible, DACA recipients whose DACA expires within a year should consult with a trusted legal practitioner before filing a renewal application.

NOTE: If a recipient's DACA is already expired, renewals are possible if one year has not yet passed. If it has been more than one year, USCIS will treat the request as an initial request and will accept the request but will not adjudicate it.

Finally, the precarious position that DACA recipients are in as a result of litigation make it clear that legislative action is necessary to protect DACA recipients and all undocumented immigrants in the United States regardless of race, gender, socioeconomic status and criminal history. Practitioners and clients alike can and should make their voices heard by contacting their members of Congress. Individuals can find contact information for their representative ([click here](#)) and their senators ([click here](#)).



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