DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) FINAL RULE SUMMARY*

The final Deferred Action from Childhood Arrivals (DACA) rule was published on August 30, 2022 and is set to go into effect on October 31, 2022. This rule is an attempt to "preserve and fortify" the DACA policy as directed by President Biden's January 20, 2021, memorandum titled "Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)."[1]

Since the policy's implementation in 2012, DACA has existed by virtue of a Department of Homeland Security (DHS) memorandum signed by then DHS Secretary Janet Napolitano (the Napolitano Memorandum).[2] Acknowledging that undergoing notice and comment through a proposed rule puts the DACA policy on stronger footing in light of the lawsuits discussed below, DHS created this rule partly in an attempt to further protect DACA.

While this rule was an opportunity for the Biden administration to expand DACA protections to vulnerable immigrant youth, the rule falls short of creating a bigger impact by expanding eligibility for the program. As noted below, the rule maintains the same eligibility guidelines as determined by the Napolitano Memorandum. This practitioner's guide will delve into aspects of the rule and discuss the future of DACA considering the Texas-led lawsuit challenge to the legality of DACA now pending at the Fifth Circuit Court of Appeals, the current injunction barring the adjudication of initial DACA requests, and what to expect in the future.

I. Top Takeaways from the DACA Rule

While the proposed rule did not recommend changes to expand eligibility for DACA, there were a few provisions in the draft rule that advocates were concerned about. After receiving over 16,000 comments, DHS reversed course on some and clarified others. Below is information on

*This practice alert was written in collaboration with the National Immigration Law Center (NILC) and Immigrant Legal Resource Center (ILRC).

[1] 86 FR 7053.

[2] Dept. Of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,* June 15, 2012, https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

some of the areas of concern as well as other areas of note for practitioners and DACA recipients. Once the rule goes into effect, the DACA regulations will be found at 8 CFR § 236.21 through 8 CFR § 236.25. [3] Below is a list of the top takeaways.

- **The DACA Regulations will rescind the Napolitano Memorandum.** When the new rule goes into effect on October 31, 2022, its accompanying regulations will rescind and replace the DACA guidance set forth in the Napolitano Memorandum and will govern current and future DACA grants and requests.[4]

- **The Regulation will maintain the same guidelines for DACA from the Napolitano Memorandum, failing to expand DACA to individuals who arrived after June 15, 2007.** The DACA guidelines remain the same for those seeking deferred action. While this was an opportunity for the administration to expand DACA, they did not take the steps needed to make this happen and, as a result, failed to protect thousands of immigrant youth who came to the United States after June 15, 2007.

- **The proposal to separate a request for work authorization from a request for deferred action was not included in the final rule.** The proposed rule suggested separating a request for work authorization from deferred action so that persons could apply for deferred action without needing to apply for and pay for a work permit. As explained in the final rule, recipients will still need to request both deferred action and work authorization in a "bundled process." The difference now is that the fee has been separated to reflect a cost of $85 for the deferred action through Form I-821D and $410 for the accompanying employment authorization document (work authorization) through Form I-765. [5] Persons must also continue submitting Form I-765WS to explain their economic need to work.

- **The regulations will prevent DACA from being terminated without issuing a Notice of Intent to Terminate (NOIT) and allowing the DACA recipient the opportunity to respond (with limited exceptions).**The proposed rule included language that USCIS could terminate an individual's DACA grant at any time in its discretion with or without issuing a NOIT. Additionally, the proposed rule stated that DACA would terminate automatically upon departure from the United States without a prior grant of advance parole or upon the filing of

[3] For the complete rule, visit: https://www.federalregister.gov/documents/2022/08/30/2022-18401/deferred-action-for-childhood-arrivals

[4] 8 CFR 236.21(d).

[5] The overall cost of a DACA application with work authorization has not changed – $495. However, DHS clarified that the $85 fee is now a fee for the Form I-821D, Consideration of Deferred Action for Childhood Arrivals (previously it was listed as a biometrics fee) and the $410 is the fee to file Form I-765, Application for Employment Authorization.

a Notice to Appear (NTA) with the Department of Justice Executive Office for Immigration Review (EOIR) unless USCIS issued the NTA based on an asylum referral to EOIR.

After reviewing public comments, DHS clarified its position on terminations. While DHS maintains that USCIS may terminate DACA at any time in their discretion, the agency revised the final rule to require USCIS to provide a NOIT prior to terminating DACA unless a person has been convicted of certain national security related offenses[6] or an egregious public safety offense. This means that most DACA recipients will generally be afforded the opportunity to respond and make a case for why their DACA should not be terminated after receiving a NOIT.

In addition, the final rule clarifies that USCIS may terminate a grant of DACA in its discretion and following issuance of a NOIT for individuals who depart the United States without first obtaining an advance parole document *and* subsequently enter the United States without inspection.[7]

- **The final rule reiterates the expunged convictions, as well as juvenile delinquency adjudications, and immigration-related offenses characterized as felonies or misdemeanors will not automatically disqualify an individual from DACA.** The proposed regulation stated that DHS would use the definition for a conviction found at INA § 101(a)(48), which left open questions as to whether expunged convictions, juvenile delinquency adjudications, and immigration-related offenses would bar those previously eligible for DACA. DHS has clarified in the final rule that "consistent with longstanding DACA policy, expunged convictions, juvenile delinquency adjudications, and immigration-related offenses characterized as felonies or misdemeanors under State laws are not considered automatically disqualifying convictions for purposes of this provision."[8]

- **The final rule includes language stating that DHS will not use the information provided in a DACA request to begin immigration enforcement against the requester and their family.** Information contained in a request for DACA related to the requestor will not be used by DHS for purposes of initiating immigration enforcement proceedings unless proceedings are being initiated due to a criminal offense, fraud, a threat to national security, or public safety concern. Moreover, information contained in a request for DACA related to the requestor's family or guardians will not be used for immigration enforcement purposes against the family members or guardians.

[6] The regulation specifically cites 8 U.S.C. 1182(a)(3)(B)(iii), 1182(a)(3)(B)(iv), or 1227(a)(4)(A)(i) as falling into national security related offenses. These grounds include terrorism, espionage, and related actions.

[7] *See* new 8 CFR 236.23(d)(1) and (2).

[8] *See* new 8 CFR 236.22(b)(6).

Comparison to the Napolitano Memorandum: As many practitioners will note, several of the definitions and requirements remain the same under the new DACA regulation as they were under the Napolitano Memorandum. As we get closer to the implementation for this regulation, it is possible that distinctions will become apparent as to how DACAs were processed prior to the implementation of this regulation. Legal service providers and advocates will continue analyzing how the regulation compares to the way the DACA policy operates under the Napolitana Memorandum.

II. Litigation and the DACA Regulation

There is much uncertainty around the current and potential litigation regarding DACA. Currently, pursuant to an injunction in a lawsuit led by the state of Texas challenging the legality of DACA, DACA recipients can continue to submit renewal requests and USCIS will continue to adjudicate DACA renewals per the terms of the Napolitano memo.[9] Practitioners should note that while this injunction remains in place, USCIS will not grant any initial DACA requests or requests from persons whose DACA expired for more than one year. Lastly, there remains the possibility that legal challenges to the rule could impact the rule from taking full effect on October 31, 2022.

On July 16, 2021, the U.S. District Court for the Southern District of Texas vacated the 2012 DACA policy, finding, among other things, that it was contrary to the Immigration and Nationality Act.[10] The Texas court also issued an injunction preventing USCIS from adjudicating initial DACA requests but partially stayed its injunction to allow DHS to continue to adjudicate DACA renewals. [11] Thus, while USCIS is currently accepting initial DACA requests, the agency will not process or adjudicate those initial requests and is only adjudicating renewal requests. DHS will not adjudicate any initial DACA requests while the injunction remains in place.

The Biden administration appealed the Texas court decision to the Fifth Circuit Court of Appeals, which heard oral argument on the matter in July 2022. It is currently not clear when the Fifth Circuit will issue its decision related to the legality of DACA and what impact the new rule will have on the litigation, though the Court ordered the parties in the lawsuit to submit new briefings in light of the new DACA rule. It is possible that the Fifth Circuit may take up consideration of the new rule or remand the issue back to the District Court for further consideration as part of the pending Texas-led challenge to DACA. It is also possible that additional litigation could be filed to challenge the new rule. Additional litigation developments could impact the rule from taking full effect on October 31, 2022. We will know more in the coming weeks and months.

[9] *Texas v. United States*, 549 F. Supp. 3d 572 (S.D. Tex. 2021).
[10] *Id*.
[11] *Id*.

If the rule goes into effect on October 31, the new rule will supersede the Napolitano Memorandum and USCIS will process all new and pending DACA requests under the new rule from that date forward.

III. Next Steps for Practitioners and DACA Recipients

The announcement of the DACA rule does not make any changes to the status of DACA. Those with DACA can continue to file renewal requests. Initial requests that are filed while the Texas court injunction is in effect will continue to be held, but not adjudicated, by USCIS.

There is no need for those with pending DACA requests to submit another application when the rule goes into effect. When the rule goes into effect, all pending and future applications will be processed under the new rule. Likewise, there is no need for current DACA recipients to wait until the new rule goes into effect to file their DACA renewals. DACA recipient should continue to file renewal requests, which will continue to be adjudicated by USCIS.

The future of DACA is still unknown, and it is important for practitioners and advocates to share updates and information with clients and community members to ensure people are receiving the most up to date and accurate information.