

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA): PRACTICE UPDATE

Prepared by the National Immigration Law Center and the Immigrant Legal Resource Center

I. Introduction

On November 14, 2020, a U.S. District Court found that the U.S. Department of Homeland Security (DHS) memorandum issued in July 2020 limiting the DACA program was invalid. The invalidated DHS memorandum, known as the “Wolf Memo,” had instructed the U.S. Citizenship and Immigration Services (USCIS) to reject all first-time DACA applications, to reject applications from advance parole from DACA recipients unless they could show an exceptional circumstance, and to continue processing DACA renewal applicants, but limited the grant period and work authorization to only one year.

In this practice update, we provide background on the Wolf Memo, and the order issued by the U.S. District Court for the Eastern District of New York on December 4, 2020 vacating the Wolf Memo, what this means moving forward, what advocates can do now, and other takeaways from this decision.

Advocates and DACA-eligible individuals can find updates regarding the litigation described above by visiting dacaclassaction.com.

II. Background

Since September 2017, the Trump administration has repeatedly tried to terminate or severely curtail DACA. On September 5, 2017, DHS issued a memorandum to terminate DACA – a program fought for by immigrant youth and implemented by the Obama administration in 2012 that currently protects over 650,000 undocumented young immigrants from deportation and allows them to work lawfully.

That same month, several DACA recipients and a variety of stakeholders, including states, universities, and corporations, challenged DHS’s decision to terminate DACA in several different federal courts throughout the country. As a result, three U.S. district courts issued nationwide injunctions allowing people who had previously received DACA to continue renewing their DACA while the litigation continued. The government sought review of most of the cases in the U.S. Supreme Court. Subsequently, cases from three different district courts—referred to as *Department of Homeland Security v. Regents of University of California*; *Trump v. National Association for the Advancement of Colored People*; and *Wolf v. Batalla Vidal*—were consolidated for U.S. Supreme Court review and oral argument on November 12, 2019.¹

¹ See National Immigration Law Center (NILC) *Litigation Related to Deferred Action for Childhood Arrivals* available at <https://www.nilc.org/issues/daca/litigation-related-to-the-daca-program/> for more information on the cases.

III. What did the U.S. Supreme Court Decide?

On June 18, 2020, the U.S. Supreme Court decided that DHS's termination of DACA did not comply with federal law. It found the termination "arbitrary and capricious" because it failed to consider important aspects of the DACA program, including that DACA recipients, educational institutions, employers, and others have come to rely on the DACA program.² Accordingly, the Court upheld a lower court decision that **vacated** the September 5, 2017 memorandum terminating DACA, thereby restoring DACA to its original 2012 state.³ This meant that USCIS could have begun accepting both initial and renewal DACA requests, along with applications for advance parole from DACA recipients.

Specifically, the U.S. Supreme Court held that:

1. The claims arguing that the DACA termination was arbitrary and capricious were reviewable by the Court.⁴
2. The termination of the DACA program by DHS was arbitrary and capricious because it **did not** consider:
 - a. DHS' authority to maintain the deportation protections of DACA recipients when it terminated the program; or
 - b. The reliance interests of DACA recipients, who have relied on DACA in a variety of ways, including to earn a livelihood, and those of their families and other entities, such as their educational institutions and employers, who have invested time and money in training and educating DACA recipients.⁵
3. The claim that the DACA termination violated the Equal Protection Clause of the Fifth Amendment did not raise a plausible inference that the rescission was motivated by racial animus.⁶

The Supreme Court did not address DACA's legality, which was not a question before the Court. Nor did the Court require DHS to maintain DACA if it terminated the program in a lawful way.

IV. What did DHS' July 28, 2020 Wolf Memo say?

After the U.S. Supreme Court decision, DHS did not immediately provide any guidance about how they would implement the decision and begin processing initial DACA applications and advance parole applications. Then on July 28, 2020, DHS released a new memorandum titled, "Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'" ("Wolf Memo"). The Wolf Memo states that DHS is "considering anew the DACA policy" to assess "whether the DACA policy should be maintained, rescinded, or modified."⁷

In summary, the Wolf Memo stated that while DHS was reviewing the DACA policy, USCIS must: 1) reject all initial DACA requests from applicants who have never received DACA in the past; 2) reject all advance parole⁸ applications from DACA recipients except where there are "exceptional circumstances"; and 3) shorten the

² *Dep't of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. ____ (2020) (slip op., at 26).

³ *Id.* at 29 n.7. (noting that the Court has affirmed an order of the *NAACP* case below, which vacated the DACA termination).

⁴ *Id.* at 9-13.

⁵ *Id.* at 13-26.

⁶ *Id.* at 27-29.

⁷ U.S. Department of Homeland Security, *Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"* July 28, 2020, available at https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.

⁸ Advance Parole is a benefit in immigration law that allows DACA recipients to travel outside the country and reenter on advance parole for humanitarian, employment, and educational purposes.

DACA renewal and work authorization period from two years to one year. On August 21, 2020 USCIS released new implementation guidance to its personnel in response to the Wolf Memo. (“Implementing Guidance”).⁹

V. What do the latest U.S. District Court Orders do?

On December 4, 2020, the Eastern District of New York issued an order vacating the Wolf Memo. The court had previously concluded, in an opinion issued on November 14, 2020, that Chad Wolf was not lawfully serving as the Secretary of Homeland Security and thus had no lawful authority to issue the Wolf Memo. By vacating the Wolf Memo, the December 4th court order restored DACA to its pre-September 5, 2017 status, the date the Trump administration attempted to terminate DACA.

The court’s November 14, 2020 order also certified a nationwide class. The class includes all persons who are or will be prima facie eligible for DACA under the terms of the 2012 Napolitano Memo that implemented DACA for the first time under the Obama administration. The class excludes the small number of people who bring their own federal lawsuit challenging the Wolf Memo. The court also certified a nationwide subclass consisting of individuals who had applications pending at USCIS between June 30, 2020 and July 28, 2020 that have been adjudicated according to the Wolf Memo. Individuals do not need to take any additional steps to be part of the class or subclass. The court also appointed the National Immigration Law Center, Jerome N. Frank Legal Services Organization at Yale Law School, and Make the Road New York as attorneys for the class. Class members and their immigration attorneys can find additional information at www.dacaclassaction.org.

The December 4th order requires DHS to accept applications from first-time DACA applicants as well as renewals, that renewals must now receive two-year grants of DACA and work authorization, and that DHS must accept requests for advance parole for DACA recipients under the pre-September 2017 standards. Under the pre-September 2017 standards, advance parole is available for individuals who demonstrate that their need to travel is for “humanitarian, education, or employment” purposes.

Applicants will also not be barred from applying before the 150-day mark, as stated in the Wolf Memo.¹⁰

On December 10, 2020, the district court also directed the government to mail by January 8, 2021 individualized notices and the provision of new EADs to certain class members. Class counsel reviewed the notices on December 11, 2020. The government will provide the following to the class members in the categories listed below:

A. Individuals who were granted only one-year DACA and work authorization instead of two years will receive:

A notice stating that the period of their DACA and work authorization was extended to two years. The document can be presented, in combination with the individual’s one-year EAD, until the expiration date of the individual’s one-year EAD to employers, state departments of motor vehicles, and government agencies

⁹ U.S. Citizenship and Immigration Services, *Implementing Acting Secretary Chad Wolf’s July 28, 2020 Memorandum, “Reconsideration of the June 15, 2012 Memorandum ‘Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children’”*, August 21, 2020, available at <https://www.uscis.gov/sites/default/files/document/policy-alerts/DACA%20implementation%20memo%20v2%208.21.20%20final.pdf>.

¹⁰ DHS updated its websites to reflect these changes on December 7, 2020.

to establish that the individual has two years of DACA and work authorization. The notice will be mailed by January 8, 2021.

A new *Employment Authorization Document (EAD)*, to be issued at least 30 days before the expiration date listed on the individual's current one-year EAD. The government will issue these automatically and at no additional cost.

B. Individuals who submitted a DACA application (Form I-821D) as a first time DACA request, that was received at a USCIS Lockbox on or after June 18, 2020:

These individuals will receive a notice of their right to reapply for DACA and work authorization under the pre-September 2017 DACA standards. The notice will be mailed by January 8, 2021. *Individuals do NOT need to wait to receive the notice before reapplying for DACA; they can reapply for DACA now.*

C. Individuals who filled a DACA based Form I-131 Application for a Travel Document seeking advance parole, that was received at a USCIS Lockbox and was rejected or administratively closed pursuant to the Wolf Memo:

These individuals will receive a notice of their right to reapply and to be considered for advance parole under the pre-September 2017 standards. This notice will be mailed by January 8, 2021. *Individuals do NOT need to wait to receive the notice before reapplying for advance parole; they can do so now.*

VI. What can advocates do?

Advocates should screen clients for DACA eligibility and help connect DACA-eligible individuals to immigration attorneys who can assist with their applications. USCIS must accept applications from individuals who are interested in applying even if they never have been granted DACA in the past. It is important that these individuals are screened thoroughly and that applications are submitted with proper documentations to show eligibility. Additionally, advocates can inform current DACA recipients that they can continue to renew their DACA and will now receive a two-year grant of DACA protections and work authorization. Moreover, while USCIS encourages applicants to submit their renewals within 120-150 days prior to expiration, they should once again accept applications filed outside this window.

Advocates should note that individuals who received DACA protections and work permits for one year pursuant to the Wolf Memo have been automatically extended to two years. As noted above, the government will mail by January 8, 2021 these individuals a notice that they can present in combination with their one-year work authorization as proof that their work authorization has been extended to two-years. They can use the notice as proof of the extension until the expiration of their one-year work authorization. At least 30 days before the expiration of their one-year work authorization, the government will mail these individuals new work authorization cards at no additional cost.

DACA recipients who are interested in applying for Advance Parole can do so if they are seeking to apply for a travel permit for education, employment, or humanitarian reasons. Thorough screenings are especially important for applicants who seek to apply for advance parole and travel outside the country due to current

travel restrictions and the likelihood that the DACA policies could change again in the future. While advance parole permits a person to request admission to the United States, travelers will be screened for inadmissibility and possibly questioned about their immigration and criminal history. Before filing a request for advance parole, advocates need to discuss and learn the applicant's immigration history and, in some cases, conduct a background check or collect criminal or immigration records. It is essential to understand the person's immigration history and know if it includes something that could present a risk or complication, such as a prior removal order and other inadmissibility grounds under INA § 212.

DACA class members can sign up for case updates by visiting the website set for them: dacaclassaction.org.

Additionally, advocates should continue to follow the DACA program for developments. While the program was reinstated through the December 4th Order, there is still a possibility that the government will request a stay of the Court's Order restoring DACA and potentially ask the Supreme Court to review this case. Also, a case brought by Texas and other states challenging the legality of DACA in *Texas v. United States* continues to pose a threat to the status of the DACA program. The Southern District of Texas is reviewing that challenge had a hearing on December 22, 2020 and may rule shortly thereafter.

Advocates should make sure to visit the ILRC's website at <https://www.ilrc.org/daca>, NILC's website at <https://www.nilc.org/issues/daca/> and USCIS's website <https://www.uscis.gov/> for updates on the program and practice tips. Advocates can also post questions and information and monitor DACA cases in the field by joining the DACA Experts listserv via <https://www.ilrc.org/legal-listservs>.

A. Should I advise eligible individuals to submit applications for DACA now, or should I encourage them to wait until we see what happens with DACA?

USCIS is currently accepting first-time DACA requests, renewal requests, and requests for advanced parole under the pre-September 2017 DACA guidance. As the Eastern District of New York noted, "all parties agree that the DACA program is currently governed by its terms as they existed prior to the attempted rescission of September 2017."¹¹ However, given that the Southern District of Texas in *Texas v. United States* has fully briefed motions for summary judgment that address the legality of DACA and a hearing was scheduled for December 22, 2020, the future of DACA is uncertain. NILC and ILRC have been recommending that anyone considering requesting DACA for the first time consult with an expert immigration practitioner for individualized advice and screening. How you ultimately advise your clients will depend upon their individual circumstances, however you may wish to consider several factors:

- USCIS has *already* begun accepting first-time DACA requests, granting DACA renewal requests for two years rather than one, and considering DACA-related advance parole requests under the pre-September 2017 guidance.
- The court's order does not change USCIS' information-sharing policy. The policy currently in effect remains that reflected in the USCIS DACA Frequently Asked Questions and the USCIS's Form I-821D instructions. However, information obtained through a recent Freedom of Information (FOIA) lawsuit and uncovered through a ProPublica article show that ICE can access at least some of USCIS's data. It remains unclear how often or for what purposes ICE may be accessing the information.¹²

¹¹ *Batalla Vidal v. Wolf*, No. 16 Civ. 4756, slip op. at 2 (E.D.N.Y. Dec. 4, 2020), ECF 354.

¹² See "Pushing for Information on the Trump Administration's Decision to End DACA," NILC (Apr. 21, 2020), available at <https://www.nilc.org/issues/daca/daca-foia-documents/#disclosed>; Dara Lind, "ICE Has Access to DACA Recipient's Personal Information Despite

- The plaintiffs in the *Texas v. United States* lawsuit are not requesting that the court immediately terminate existing grants of deferred action granted under DACA. Texas and the other plaintiff states have stated that they would agree to stay a court order ruling that DACA is unlawful in order to allow for a wind down of DACA.¹³ The court currently has its hearing set for December 22, 2020, but that could change. Currently, there is a motion to move the court hearing to January 4, 2021. Additionally, although the court is expected to rule on the pending motions in a timely manner, it is unclear when the court will rule or the content of the court's ruling.
- The Eastern District of New York also certified a nationwide class of all individuals who are or will be *prima facie* eligible for deferred action under the terms of the 2012 Napolitano memorandum. The court appointed the National Immigration Law Center (NILC), the Jerome N. Frank Legal Services Organization at Yale Law School, and Make the Road New York as class counsel. Class Counsel are monitoring the government's compliance with the court's orders and are interested in hearing from individuals and their immigration attorneys who encounter potential violations of the court's orders.

VII. Takeaways

- The Wolf Memo and Implementing Guidance have been vacated.
- The DACA program has been restored to its original terms from 2012 and USCIS is accepting applications under the pre-September 2017 DACA guidance from first time applicants, applicants seeking to renew, and individuals applying for advance parole.
- DHS updated their websites to reflect that it is accepting these applications on December 7, 2020.
- All work authorizations and DACA grants that were issued for one-year have been automatically extended to two-years. USCIS will mail these individuals notices by January 8, 2021, that can be used, in conjunction with their one-year EAD, as proof that their EAD has been extended to two years. At least 30-days before their one-year EAD expires, the government will send these individuals a new EAD card at no additional cost.
- Almost all DACA-eligible individuals are now part of a class action lawsuit. Individuals do not need to do anything additional to be part of the class.
- DACA is still at risk and this information may change quickly. Class Members and their trusted legal representative can visit www.dacaclassaction.org for information and to sign up for updates from class counsel by email.

Promises Suggesting Otherwise, Internal Emails Show," PROPUBLICA (Apr. 21, 2020), <https://www.propublica.org/article/ice-has-access-to-daca-recipients-personal-information-despite-promises-suggesting-otherwise-internal-emails-show>.

¹³ See *Texas v. United States*, No. 18 Civ. 68, *slip op.* at 46 (S.D. Tex. Oct. 9, 2020), ECF. 486.