Protecting Information in DACA Applications Against Deportation Under The Trump Administration

Introduction

This practice advisory lays out the reasons why DACA applicants should feel safe that the Trump Administration will not use information contained in a DACA application to deport them unless a limited exception applies.

Background

When President Obama announced the Deferred Action for Childhood Arrivals (DACA) program in 2012, the government assured applicants that it would not use information included in DACA applications to deport applicants or their families unless an exception applied. Relying on the government's promise, nearly 800,000 young people have applied for and received DACA.

In 2017, the Trump Administration changed its immigration policy to make it possible to disclose information shared by DACA applicants, and in 2018 it changed the guidelines to expand who it could place in deportation proceedings or refer to Immigration and Customs Enforcement (ICE). These policy changes caused much confusion and fear among DACA applicants who worried that the government will use their information against them.

However, litigation regarding the disclosure of DACA information and exemptions to the deportation guidance for DACA applicants put DACA applicants in a special category that may protect them from some of these changes.

In March 2018, a federal court temporarily forced the government to protect information from disclosure if the information came from a DACA application. In June 2018, United States Citizenship and Immigration Services (USCIS) also released a policy memorandum clarifying that DACA applicants are exempted from the new expanded guidelines, that it has not changed its policy as promsed under the Obama Administration, and that they would continue to pursue deportation against DACA applicants only under limited circumstances.[1]

What Did the Obama Administration Promise?

When the Obama Administration introduced the DACA program in 2012, the administration promised that it would protect information shared through DACA applications against disclosure except under limited non-deportation circumstances, such as for national security concerns or to help investigate or prosecute a criminal offense.[2] This protection extended not only to DACA

[1] *See* Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA (June 28, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf.

[2] Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS Form I-821D at 13 (Jan. 9, 2017), https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf (stating that "[i]nformation provided in this request is protected from disclosure to 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 or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA)").

applicants but also to their family members and guardians.[3] The Obama Administration reasserted this promise several times in order to encourage young people to submit their DACA applications.[4]

What Did the Trump Administration Change?

When the government implemented the DACA program, it actively protected DACA application information against disclosure. Conversely, under the Trump Administration, the government released a general privacy policy in January 2017 that "permits the sharing of information about immigrants and non-immigrants with federal, state, and local law enforcement."[5] Similarly, under revised USCIS DACA FAQs under the Trump Administration, the government now states that such information "will not be *proactively* provided to ICE and CBP for the purpose of immigration enforcement proceedings."[6] This means that the government had made it *possible* to share information provided by DACA applicants to initiate deportation proceedings against them and their family members if other agencies make a request.

Where Do We Stand Now?

Many of the ongoing lawsuits against the Trump Administration's rescission of the DACA program have mandated the government to continue accepting DACA renewal applications.[7] In March 2018, the U.S. District Court for the District of Maryland enjoined the government to prevent it from disclosing information contained in a DACA application.[8] Citing Due Process concerns, the court accepted that it is theoretically possible for the government to use or share information from DACA applicants for deportation purposes.[9] The court stated that if the government needed to use such information "for national security or some purpose implicating public safety or public interest," the government must ask the court for permission on a case-by-case basis.[10]

Similarly, in June 2018, USCIS issued two new policy memorandums. One applied to non-DACA-related applications (such as a family-based petition) and expanded the criteria to assess when USCIS could commence deportation or refer the applicant to ICE.[11] The second clarified that it will follow existing policy when reviewing initial DACA applications or renewals.[12] Under its existing policy, USCIS will only commence deportation when DACA applicants are found to: 1) be a threat to national security; 2) have committed fraud in the DACA application; or 3) have engaged in a serious criminal offense.[13]

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[3] *Id.*
[4] *See, e.g.*, Letter from Secretary Jeh Charles Johnson to The Honorable Judy Chu (Dec. 30, 2016), https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20Chu%2012.30.16.pdf.
[5] DHS, Privacy Policy 2017-01 Questions & Answers, at 3 (Apr. 27, 2017), https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Questions%20%20Answers%2C%2020170427%2C%20Final.pdf.
[6] DHS, Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017) (emphasis added), https://www.dhs.gov/news/2017/09/05/frequentlyaskedquestions-rescission-deferred-action-childhood-arrivals-daca.
[7] *See, e.g.*, *Regents of Univ. of California v. United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1018 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018).
[8] *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 778 (D. Md. 2018).
[9] *Id.* at 779.
[10] *Id.*
[11] *See supra* note 1.
[12] *Id.*
[13] *Id.*

However, USCIS clarified that these exceptions only apply when processing an initial DACA application or renewal.[14] If applicants decide to apply for a non-DACA-related benefit, they should assess whether any previous or subsequent conduct (e.g. criminal activity) would make them subject to deportation under the expanded policy memorandum.[15] DACA applicants who are concerned should seek advice from an expert immigration attorney.

For now, DACA applicants should feel safe that the government will not use information contained in their DACA or DACA-related future, past or pending applications to deport them or their families unless an exception applies, such as a national security threat, fraud or a serious crime, or when applying for a non-DACA-related benefit. Those who are scared of submitting a DACA application should know that having DACA would protect them from deportation so long as they remain eligible. Applicants submitting a renewal should also remember that the government already has their information from the previous times that they submitted their DACA applications.

[14] *Id.*
[15] *Id.*