



## **Practice Alert: Advising Clients on the Future of DACA** **(Revised March 13, 2017)**

As part of his campaign platform, President Donald Trump pledged to end the Deferred Action for Childhood Arrivals (DACA) initiative that was announced in a [June 15, 2012 memorandum](#) written by DHS Secretary Janet Napolitano. After President Trump's inauguration, a **draft Executive Order** titled *Ending Unconstitutional Executive Amnesties* was leaked in [news reports](#). The draft Order, which is dated January 23, 2017 and has not been signed by the President, would rescind the 2012 DACA memo, halt approval of initial and renewal DACA applications, allow current employment authorization documents (EADs) to remain valid until they expire, and stop the issuance of Advance Parole to DACA recipients.<sup>1</sup>

However, since taking office, President Trump and his Administration have made a number of confusing statements about the future of DACA that make it difficult to discern whether and when they intend to rescind DACA. For example, on January 22, White House Chief of Staff [Reince Priebus foreshadowed](#) that President Trump did not have immediate plans to end DACA. Just a few days before that, Trump had told "Fox & Friends" that he understands DREAMers' predicament and [pledged a "firm" immigration plan, with "a lot of heart."](#) When asked about rescinding DACA at a February 16 press conference, the President again promised to ["show great heart."](#) Trump also stated that although some DACA recipients are "drug dealers and gang members" most are "incredible kids," and he will "deal with DACA with heart."

At this time, we do not know what the future of the DACA program holds. The draft Order may never be signed, it may be substantially rewritten before being signed, or it may be executed as currently written. If action is taken on DACA, it is possible that USCIS could stop approving all DACA applications, as laid out in the draft order. Alternatively, USCIS could halt only certain components of DACA. For example it could stop accepting initial DACA applications, stop accepting or approving renewal applications, or revoke DACA/EADs for individuals who currently have them. However, as of March 13, 2017, there have been no changes to the DACA program. USCIS continues to process both initial and renewal Forms I-821D and accompanying Forms I-765.

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<sup>1</sup> See *Draft Presidential Executive Order: Ending Unconstitutional Executive Amnesties*, AILA Doc. No. 17020105, available at <http://www.aila.org/infonet/draft-ending-unconstitutional-exec-amnesties>. Among other provisions, the draft EO also would rescind the November 20, 2014 DAPA memorandum (*Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*), and would direct employees not to rely on the November 19, 2014, DOJ Office of Legal Counsel [memorandum](#), which concluded that deferred action for parents of U.S. Citizens and LPRs would be legally permissible, but that a deferred action program for parents of DACA recipients would not be permissible.

Given the uncertainty surrounding the DACA program, AILA members will undoubtedly get questions from clients who want to know whether they should file for initial DACA, renew their current DACA, or travel on advance parole. Ultimately, this decision will depend on the individual facts and circumstances that are unique to each case, and should be made only after a thorough and candid discussion with your client, which includes a full analysis of possible eligibility for other immigration benefits. However, in assessing the pros and cons, and risks and rewards, members are advised to take into consideration the following.

### **Risk of Enforcement Action**

Because DACA was created through executive action in the form of a policy memorandum, there are no statutory or regulatory confidentiality provisions that completely protect the information applicants provided to DHS from being used for enforcement purposes. According to DACA FAQ #19:

#### **Will the information I share in my request for consideration of DACA be used for immigration enforcement purposes?**

Information provided in [a] request is protected from disclosure to ICE and 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's Notice to Appear guidance ([www.uscis.gov/NTA](http://www.uscis.gov/NTA)). Individuals whose cases are deferred pursuant to DACA will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor. This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

Thus, information provided in a DACA application may be shared with ICE and CBP for immigration enforcement purposes only if the requestor meets the criteria for NTA issuance, but information may be shared with other law enforcement agencies (including ICE and CBP) for purposes other than removal. "Other purposes" may include identifying and preventing fraud, national security concerns, and the investigation or prosecution of criminal offenses. However, because the FAQ "may be modified, superseded, or rescinded at any time without notice," individuals may not be able to rely on it to protect them from enforcement actions in either the immediate or long-term future.

What we do know is that information pertaining to individuals who have been granted DACA is already known to the government. Therefore, it does not appear that individuals seeking to renew their DACA benefits would incur additional risks by submitting a renewal application, unless the applicant had additional adverse factors present since the last DACA approval. For example, a DACA recipient who had any encounter with law enforcement or who travelled without advance parole may want to carefully consider whether applying for renewal would be in his or her best

interest, given the broad enforcement priorities announced by the Administration.<sup>2</sup> On the other hand, the submission of an initial DACA application at this time would require the individual to disclose their personal information to DHS, thus potentially increasing their exposure to any enforcement actions the new administration decides to take.

### **Strength of the DACA Community**

The political power of the DACA population and their allies should not be underestimated. As of September 30, 2016, USCIS has approved more than 750,000 initial DACA applications and more than 580,000 renewals since the agency began accepting DACA applications in 2012.<sup>3</sup> The Trump Administration is likely aware of the political repercussions it would face by targeting a compelling population that generates sympathy with the public.

In addition, many members of Congress have vowed to defend the DACA population and the program. For example, on January 12, 2017, [Senators Lindsey Graham \(R-SC\) and Dick Durbin \(D-IL\) reintroduced the "Bar Removal of Immigrants who Dream and Grow the Economy," or BRIDGE Act](#), which would provide DACA-eligible individuals the chance to apply for "provisional protected presence," or temporary protection from deportation similar to that provided by DACA. [The House companion bill led by Representatives Mike Coffman \(R-CO\) and Luis Gutierrez \(D-IL\)](#) was introduced on January 13, 2017.

### **Cost and Processing Times**

Given that we do not know if, when, or how DACA might end, there is a chance that an application fee will be wasted if DACA is rescinded before an application has been processed. For current initial and renewal processing times, see [the USCIS website](#).

### **Travel on Advance Parole**

While USCIS is still processing applications for advance parole based on an underlying DACA grant, attorneys and clients should carefully weigh whether travel on advance parole is advisable. In a [February 20, 2017 memorandum](#) implementing the January 25, 2017 Executive Order entitled *Border Security and Immigration Enforcement Improvements*, DHS Secretary John Kelly directed USCIS, CBP and ICE to ensure that guidance is given to employees to exercise parole authority only on a case-by-case basis, and notes that it should be "exercised sparingly." The memorandum [also criticizes the exercise of parole](#) based on "pre-designated categories" and seems to contemplate the issuance of final regulations clarifying the use of parole in the future. As a result, it is questionable whether DACA recipients will be able to obtain advance parole in the future.

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<sup>2</sup> For more information on the enforcement priorities, see *Presidential Executive Order: Enhancing Public Safety in the Interior of the United States*, AILA Doc. No. 17012531, available at <http://www.aila.org/infonet/presidential-executive-order-enhancing-public>; and *AILA Summary and Analysis of the DHS Memorandum on Interior Enforcement*, AILA Doc. No. 17022000, available at <http://www.aila.org/infonet/analysis-of-dhs-memorandum-on-interior-enforcement>.

<sup>3</sup> See Deferred Action for Childhood Arrivals Process (Through Fiscal Year 2016, 4th Qtr), available at [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2016\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr4.pdf).

It is important to keep in mind that CBP maintains the position that advance parole does not guarantee admission to the United States. In addition, DHS may revoke or terminate an advance parole document at any time, including while your client is outside the U.S., which would inhibit or prohibit their ability to return. As always, DACA recipients should not travel outside the U.S. if they do not have a current, valid advance parole travel document.

## **Conclusion**

In light of the above considerations, some organizations are advising people to refrain from applying for initial DACA benefits for now, while suggesting that some individuals may consider still filing to renew existing DACA benefits. Many organizations are advising that individuals with DACA should not travel on advance parole. Again, this is a decision you will need to make in consultation with your client and may depend on the individual circumstances in each case. Either way, AILA members should screen all clients to determine whether they might be eligible for other, more lasting forms of relief. For more information, see the American Immigration Council's practice advisory, [\*Screening Potential DACA Requestors for Other Forms of Relief\*](#).