

**Latest DACA development:** On September 28, 2021, the Biden administration published a notice of proposed rulemaking on deferred action for childhood arrivals (DACA). This means the government is planning to issue formal rules in the form of regulations that will set forth who may benefit from DACA and how they may apply. **The proposed rules issued with the notice are not yet in effect, but rather a proposal on which the public – including DACA recipients – may provide feedback. Any changes to DACA as a result of the proposed rules will likely not happen for at least a few months.** The government will announce final rules and a date those rules will be in effect in the future. The proposed rules are available here: <https://public-inspection.federalregister.gov/2021-20898.pdf>

*This advisory is not intended as legal advice but rather to provide information on the current status of the DACA program. Individuals should seek a legal consultation from a qualified immigration attorney or DOJ accredited representative for a full assessment of their individual case. Please check our [website](#) or NIJC's social media channels for future updates about DACA.*

**This advisory provides answers to questions about:**

- How Biden's proposed rules may impact the DACA program
- The impact of the July 2021 Texas court ruling
- The DACA and employment authorization renewal process

## **How Biden's proposed rules may impact the DACA program**

### **1. Do the proposed rules change the DACA program?**

The proposed rules contain the same DACA eligibility requirements that have been in place since the beginning of the program. The proposed rules do not change the date and age by which one must have arrived in the U.S. to qualify for DACA or the evidentiary requirements necessary to prove eligibility. Keep in mind that these are just proposed rules, and the final rules could be different from the proposed rules the government has published.

### **2. Can I submit comments on the proposed DACA rules?**

Yes. You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. 2021-0006, through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the website instructions for submitting comments. Comments are due 60 days after the publication date of September 28, 2021, so on November 27, 2021.

## The impact of the July 2021 Texas court ruling

### 3. How are the proposed rules related to the July 16, 2021 decision from the federal court in Texas that found the DACA program was unlawful?

In the lawsuit *Texas v. U.S.*, Judge Hanen found the DACA program to be unlawful. His judgment vacates (or cancels) the DACA program. However, the judge also issued a preliminary injunction which stays (or delays) the judgment for DACA renewals. This means that even though the judge found DACA to be unlawful in its entirety, people who already had approved DACA prior to the ruling can continue renewing DACA for the time being. If the judgment ever becomes final (the federal court appeal process ends or the stay is lifted by another court) then DACA renewals will also stop and USCIS will no longer accept or rule on renewal applications. In his decision, Judge Hanen criticized DACA, as adopted by Secretary Napolitano, for not having gone through the formal rulemaking process. That is what is happening now. Until the rulemaking process reaches a conclusion, Judge Hanen's decision remains in force unless a higher court overturns it.

Here is how Judge Hanen's ruling affects how U.S. Citizenship and Immigration Services (USCIS) must treat the following types of cases:

- a. **USCIS can continue accepting new, initial DACA applications but cannot process them.** This means that USCIS will not reject initial DACA applications, but USCIS cannot issue a decision on them either.
  - b. **USCIS can continue accepting DACA renewal applications for the time being.** USCIS will continue to accept and make decisions on these applications. This holds true so long as Judge Hanen's stay remains in place.
4. **If USCIS can accept new, initial DACA applications but cannot process those applications, what is the point of filling out an initial DACA application?**

Judge Hanen's order indicates that USCIS can continue accepting, but not processing, new, initial DACA applications.

It may be worth filing an initial DACA application and having it pending in the hopes that the Executive Branch or Congress intervenes to remedy Judge Hanen's ruling or provide a pathway to legal status for DACA-eligible individuals. If you believe that you are eligible for initial DACA and are interested in learning more about this option, please call to schedule a consultation with our office at (312) 660-1370. You can call to schedule your consultation Tuesday through Thursday from 8:30 a.m. to 4:30 p.m.

This is a difficult decision to make. If you pursue this option, it is critical that you speak to a qualified immigration attorney or DOJ-accredited representative for a full assessment of your individual case.

**5. I have a pending application for initial DACA benefits with USCIS. How does this ruling affect my pending application?**

USCIS will stop processing your application completely.

USCIS has started sending notifications (email and text) to initial DACA applicants stating that the agency has cancelled all biometrics appointments for initial DACA applications pursuant to Judge Hanen's ruling.

If USCIS cancels your biometrics appointment for your initial DACA application on or after 7/16/2021, please do not be alarmed. This does not mean that your case will necessarily be denied, it just means that USCIS is complying with the current court order and must stop processing your case - put your case on pause – for the time being.

This pause will continue until either the Executive Branch or Congress intervenes to remedy Judge Hanen's ruling (which could allow initial DACA applications to proceed) or the appeals process ends and the ruling is affirmed (which could end the entire DACA program). **There is nothing to do on your case at this time.**

If you have a pending initial DACA application at NIJC and you have further questions, please contact the phone number for the team handling your case. If NIJC is not representing you, please follow our [social media channels](#) or [website](#) for updated information regarding the status of the DACA program.

**6. I have a pending application to renew my DACA benefits with USCIS. How does this ruling affect my pending application?**

USCIS will continue to adjudicate all properly filed DACA renewal requests. This holds true so long as Judge Hanen's stay remains in place.

If your request has been pending for more than 105 days, you or your legal representative can submit a status inquiry via phone by calling 1-800-375-5283.

If that does not yield a result, you or your legal representative may wish to consider seeking congressional assistance. In Illinois, Senators [Duckworth](#) and [Durbin](#) each have the request process located on their congressional website.

**7. My DACA has expired or is close to expiring; can I still apply to renew my DACA?**

Yes. USCIS will continue to adjudicate all properly filed DACA renewal requests. This holds true so long as Judge Hanen's stay remains in place.

If you currently have DACA or your DACA has been expired for less than one year, you can submit a DACA renewal application. If you are interested in attending one of NIJC's upcoming, free DACA renewal clinics, you can register [here](#). We are updating the calendar frequently with new clinic offerings.

If your DACA expired more than one year ago or it was previously terminated, you must submit an initial DACA application. However, because of Judge Hanen's ruling, USCIS will not be able to process your case due to the indefinite pause on all initial DACA applications. This is a change in USCIS's prior policy. If you are in this position, please schedule a DACA consultation by calling 312-660-1370 Tuesday through Thursday from 8:30 a.m. to 4:30 p.m.

## The DACA and employment authorization renewal process

### 8. How much will it cost to apply for DACA benefits?

The cost to file your DACA application, whether it is a first time or a renewal application, is \$495.00.

### 9. My DACA is expired; will USCIS refer my case to ICE for enforcement purposes?

On January 20, 2021, President Biden also issued the following executive order: “Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities.” Through this order, the Biden administration officially revoked the far-reaching enforcement priorities set out by the prior administration. The Biden administration declared that it is resetting “the policies and practices for enforcing civil immigration laws to align enforcement” with the new administration’s core values. At the same time, the Biden administration is committed to adhering to due process of law and safeguarding the dignity and well-being of all families and communities.

Additionally, the previously issued 2011 Napolitano memo specifically guides enforcement for DACA applicants. This guidance is also set forth in USCIS’s Form I-821D instructions. In sum, the government has stated that information provided to USCIS in DACA requests will not be proactively provided to ICE and/or CBP for the purpose of immigration enforcement, unless the requestor meets the criteria for the issuance of a Notice to Appear set forth in USCIS’s 2011 guidance. USCIS will review its guidance to decide whether the agency deems the referral warranted.

If your DACA is expired, we recommend that, if eligible, you apply to renew as soon as possible. If you are interested in attending one of our upcoming, free DACA renewal clinics, you can register [here](#). We are updating the calendar frequently with new clinic offerings.

### 10. My work permit was lost, stolen or destroyed. Can I request a replacement?

If you are currently in a valid period of DACA, you may apply to replace a lost, stolen, or destroyed EAD/work permit by filing a new Form I-765 and paying the \$495.00 filing fee. If your DACA benefits have expired and you are within the timeframe to renew, you may seek to renew your DACA protection and, within that process, seek a new work permit.

### 11. Can a current DACA recipient apply for special permission to travel (“advance parole”)?

On July 19, 2021, the USCIS Acting Director Tracy Renaud stated that USCIS would continue to accept and adjudicate requests for DACA advance parole from individuals who were granted DACA benefits prior to the court’s decision.

You may qualify for advance parole if you currently have DACA and you can prove that your travel abroad is based on employment, educational, or humanitarian purposes.

Traveling on advance parole may come with some risks. CBP retains the authority to refuse entry to an individual – even one that has an approved advance parole document. Individuals who are interested in advance parole **should** speak to a qualified legal representative to assess their individual case and fully understand the potential risks associated with travel.

If you would like to explore advance parole, we recommend that you schedule a consultation with a licensed attorney or DOJ recognized organization to see if advance parole is a safe option for you to

pursue. To schedule a legal consultation with NIJC, individuals can call 312.660.1370 Tuesday through Thursday from 8:30 a.m. to 4:30 p.m.

#### **12. I have or had DACA but I also have another application for an immigration benefit pending with USCIS. How do these memos affect my pending application for other immigration benefits?**

USCIS will continue to process your pending application for other immigration benefits. If you have a legal representative, speak to them about whether you are eligible for a work permit based on your pending application or whether you should renew your DACA benefits and seek a work permit via those means.

There may be other reasons to maintain DACA benefits, even as you seek other immigration status. For example, it is possible future laws will recognize people with DACA as eligible for permanent status, or the other immigration status you seek may not be certain, in which case retaining DACA may be advantageous. If you do not have a legal representative, we recommend that you schedule a consultation with a licensed attorney or DOJ recognized organization. To schedule a legal consultation with NIJC, individuals can call 312.660.1370 on Tuesday through Thursday from 8:30 a.m. to 4:30 p.m.

#### **13. Even though DACA is partially still in effect, I am afraid I might one day be forced to return to my home country, where I fear harm. What can I do?**

U.S. immigration laws offer certain protection-based immigration benefits. For example, if you are afraid to return to your home country because you believe you will be harmed (“persecuted”) based on your race, religion, nationality, membership in a particular social group or political opinion, then you may be eligible for asylum or another protection-based immigration benefit. This is a complex area of the law and requires an in-depth analysis of your specific fear of return. If you are afraid to return to your home country, we recommend that you schedule a consultation with a licensed attorney or DOJ recognized organization.

#### **14. Does the Social Security Number (SSN) I received belong to me forever?**

The SSN that you received after to your initial DACA grant will belong to you for life. In fact, you can continue using your SSN for various matters (banking, housing, education, etc.). In terms of lawful employment, you may need to present a valid EAD/work permit in order to utilize your SSN for employment purposes.

#### **15. My work permit expires soon; do I have to tell my employer?**

If your DACA is close to expiring, we recommend that, if eligible, you apply to renew as soon as possible. If you are interested in attending one of our upcoming, free DACA renewal clinics, you can register [here](#). We are updating the calendar frequently with new clinic offerings.

You are not legally obligated to notify your employer that your work permit is expiring. The employer is obligated to make sure it is employing individuals that are authorized to work. If the employer asks you for a new work permit, you have until your current work permit expires to produce a new one. If you do not produce a new work permit when your current work permit expires, your employer can terminate you. However, the employer has to give you the opportunity to present a new work permit and cannot take negative action against you (i.e. terminate your employment) until your current work permit expires.

#### **16. What can I do now?**

We highly encourage you to consult with a legal service provider about the possibility of filing an application for initial or renewal DACA benefits. We also encourage you and your family members to seek

a legal consultation to explore other potential forms of immigration relief. NIJC has found that 14.3% of individuals screened for DACA eligibility were potentially eligible for more permanent forms of immigration relief. To schedule a legal consultation with NIJC, individuals can call 312.660.1370.