

Latest DACA development: On October 14, 2022, Texas-based U.S. District Judge Andrew Hanen issued an order that continues to block the Biden administration from approving new DACA applications. DACA renewals may continue for now.

This advisory provides answers to questions about:

- The impact of *Texas v. U.S.* and the Fifth Circuit's decision
- The status of Biden's DACA regulation
- What does this all mean for DACA renewals and initial applicants?
- The DACA and employment authorization renewal process

This advisory is not intended as legal advice but rather to provide information on the 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.

The impact of *Texas v. U.S.* and the Fifth Circuit's decision

1. What did courts decide in *Texas v. U.S.*?

On July 16, 2021, the Texas-based U.S. District Judge Andrew Hanen declared that the DACA program, implemented in 2012 through a policy memo, was illegal. He held that the statute did not authorize a DACA program with work authorization; and he also found that any program would have to be done by regulation. However, he stayed (or delayed) his decision to allow current DACA recipients to renew their DACA status. This decision was appealed to the Fifth Circuit Court of Appeals. Meanwhile, the Biden administration published a new DACA regulation on August 30, 2022, which would address at least part of Judge Hanen's findings.

On October 5, 2022, the Fifth Circuit Court of Appeals agreed with Judge Hanen's holding that DACA is illegal because the statute does not authorize the agency to create that sort of program. However, the appellate court sent the case back to Judge Hanen (the district court) to consider the Biden administration's DACA regulation, which was set to go into effect on October 31, 2022. On October 14, Judge Hanen issued an order finding that his previous injunction applies to the new regulation. As a result, DACA renewal applications will continue to be processed but first-time DACA applications will not.

In the meantime, the appellate court agreed that a stay (or delay) of its decision remained appropriate. That allows individuals with DACA to continue renewing their benefits for the time being.

At this point, it is unclear whether the federal government will immediately ask for Supreme Court review, or whether it might wish to allow the case to be remanded to Judge Hanen before it asks the Supreme Court to intervene.

The bottom line is that litigation will likely continue for some months, but it is unknown how long the

window to renew DACA benefits will remain open. As such, we highly recommend that, if eligible, you submit your application to renew your DACA benefits as soon as possible.

2. What will happen next in *Texas v. U.S.*? Will it go to the Supreme Court?

The litigation can proceed in several ways. An appeal to the Supreme Court seems likely at some point, and the Solicitor General could file an appeal right now. However, it is also possible that the Solicitor General would make a strategic decision to allow the case to be remanded to Judge Hanen first, so that the Supreme Court would be considering the 2022 DACA regulation rather than the 2012 policy memo. If the case reaches the Supreme Court, the court may decide not to hear the case. If this happens, the Fifth Circuit's decision would stand.

The status of Biden's DACA regulation

3. How does this recent decision affect the Biden administration's final regulation?

Judge Hanen's decision enjoined (or stopped) the DACA program before the new DACA regulation was finalized, but the federal government has stated that it believes it may not implement the regulation while the court's injunction is in place. Since the injunction is stayed (or delayed) only as to current DACA recipients, NIJC believes the regulation can still be implemented as to current DACA recipients.

The Court of Appeals has sent the case back to the district court to consider the final regulation that the Biden administration published on August 30, 2022. This would be a formality, since the Court of Appeals already agreed with Judge Hanen's earlier ruling that DACA is illegal because it is inconsistent with the immigration statutes.

4. Will anything change on October 31, 2022?

Not really. The DACA regulation should go into effect but only to the extent that Judge Hanen's injunction permits it.

The final regulation keeps the same DACA eligibility requirements that have been in place since the beginning of the program in 2012. The final regulation does 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.

What does this all mean for DACA renewals and initial applicants?

5. I have a pending application for **initial** DACA benefits with USCIS. How does the recent decision affect my pending application?

Even with the final regulation, USCIS cannot process your initial DACA application because of the ongoing litigation in *Texas v. U.S.*

This pause will continue until either the litigation resolves (either in favor or against processing new DACA applications) or Congress passes legislation to protect DACA. Unfortunately, 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 am eligible for **initial** DACA, but never applied; what can I do right now?

You may want to use this time to gather all of the evidence necessary to support an initial DACA application in the event that a filing window opens for this benefit.

If you have never had a legal consultation, we recommend that you speak to a licensed attorney or Department of Justice accredited representative to learn more about all of your possible options under our current immigration laws and policies. To schedule a consultation with our office, please call (312) 660-1370.

7. I have a pending application to **renew** my DACA benefits with USCIS. How does the latest decision affect my renewal?

USCIS will continue to adjudicate all properly filed DACA renewal requests. This is true so long as a judicial 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 solve your case, 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.

8. 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 is true so long as a judicial stay remains in place. It is unknown how long the judicial stay will remain in place, so you should renew your DACA benefits as soon as possible.

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 with NIJC by calling 312-660-1370.

The DACA and employment authorization renewal process

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

The cost to file your DACA application is \$495.00.

10. My DACA is expired; will USCIS refer my case to ICE for enforcement purposes (like detention or deportation proceedings)?

Under the final regulation, the Biden administration restricts the use of information gathered through DACA applications to initiate enforcement action against the DACA recipient or their family members. This is consistent with the 2012 Napolitano memo (which the final regulation will replace upon its implementation) and the instructions in USCIS's Form I-821D. Absent a criminal offense, fraud, a threat to national security, or public safety concerns, the information shared in a DACA application is shielded from enforcement action.

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.

11. 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.

12. Are DACA recipients still be able to apply for special permission to travel (“advance parole”)?

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

Traveling on advance parole may come with some risks. U.S. Customs and Border Protection retains the authority to refuse entry to an individual – even someone who 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.

Keep in mind that the Fifth Circuit is returning the case to Judge Hanen for review of the final regulation. There may be a subsequent court decision that affects a DACA recipient’s ability to apply for and travel on advance parole.

If you would like to explore advance parole, we strongly recommend that you schedule a consultation with a licensed attorney or DOJ recognized organization to see if advance parole is a safe and available option for you to pursue. To schedule a legal consultation with NIJC, please can call 312.660.1370.

13. I have or had DACA but I also have another application for an immigration benefit pending with USCIS. How does this most recent update 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. To discuss this further, 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.

14. Even though I have DACA, 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.

15. 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. You can continue using your SSN for various matters (banking, housing, education, etc.). In order to accept employment, you may need to present a valid EAD/work permit in order to use your SSN for employment.

16. 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. Your employer is obligated to make sure they are employing individuals who are authorized to work. If your 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 your employment. 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.

17. What can I do now?

We 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.