



**Practice Alert:
Filing DACA Applications in the Wake of Federal Court Rulings**

UPDATE FROM NOVEMBER 6, 2019

On November 12, 2019, the [Supreme Court will hear](#) several arguments in several cases challenging the Trump administration's rescission of the DACA program. A decision could come as soon as early 2020. **While there are no new changes to the DACA program at this time, clients who want to renew their DACA should submit their applications to USCIS as soon as possible given USCIS processing times and an impending Supreme Court decision.**

UPDATE FROM JUNE 28, 2019

On June 28, 2019, the Supreme Court [consolidated and granted certiorari](#) in several cases challenging the Trump Administration's rescission of the DACA program. The Court set aside one hour for oral argument. There are no new changes to the DACA program at this time, it is still being implemented on the terms of the prior court rulings discussed below. However, the Court will be issuing a decision following oral arguments, likely sometime in the first half of 2020.

Given USCIS processing times and the Court's cert grant, clients who want to renew their DACA should submit their applications to USCIS as soon as possible. AILA members should continue to work with their clients to assess whether to submit a renewal application based on the individual facts in each case.

UPDATE FROM JANUARY 22, 2019

As of [Tuesday January 22, 2019](#), the U.S. Supreme Court had taken NO action on a [November 2018](#) request by the Trump Administration to [expedite](#) a ruling on the court decisions that keep the DACA program in place. As a result, it is [increasingly likely](#) that the earliest the Supreme Court would hear the case – if at all – is in its new term that starts October 2019. If that prediction holds true, DACA protections will likely remain in place under current court rulings through at least the end of 2019.

UPDATE FROM AUGUST 31, 2018

In an August 31, 2018 [opinion](#), the U.S. District Court for the Southern District of Texas declined to issue a preliminary injunction that would have halted the processing of DACA renewal applications. **This order means that there are no new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below.**

The case, [Texas v. Nielsen](#), is a lawsuit brought by seven states challenging the legality of the DACA program and requesting a nationwide injunction to block any DACA grants or renewals going forward. Declining to grant the injunction, Judge Hanen [stated](#) “that the States had delayed seeking this relief for years, that the balance of private interests fell in favor of the denial of the requested relief, and that implementing the relief at this point in time was contrary to the best interests of the public.” The decision specifically references other court injunctions that keep the DACA program partially in place until a final decision is reached, and says that issuing an immediate, opposing injunction would “upset the balance.” However, Judge Hanen also stated that the plaintiffs “have clearly shown” that DACA is likely unlawful, and certified his opinion for appeal to the Fifth Circuit.

Clients who want to renew their DACA should submit their applications to USCIS as soon as possible. AILA members should continue to work with their clients to assess whether to submit a renewal application based on the individual facts in each case.

UPDATE FROM AUGUST 17, 2018

On August 17, 2018, the U.S. District Court for the District of Columbia issued an [order](#) in [NAACP v. Trump](#) that partially stays its original order as to new DACA applications and applications for advance parole, but not as to renewal applications.

This order means that there are no new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below. USCIS will not consider first-time, initial applications or applications for advance parole based on a grant of DACA. It will, however, continue to accept and process renewal DACA applications, as well as initial DACA applications filed by individuals who have previously had DACA.

Previously, the district court held that the government’s decision to rescind DACA was unlawful and vacated the termination of the DACA program, requiring the government to accept and process both new and renewal DACA applications, as well as applications for advance parole. The August 17, 2018 order does not change the court’s conclusion, but does continue to hold it had placed on its own order, which continued to bar processing advance parole applications and first-time, initial applications, at least temporarily. The Court stated that it “is mindful that continuing the stay in this case will temporarily deprive certain DACA-eligible individuals, and plaintiffs in these cases, of relief to which the Court has concluded they are legally entitled.”

however that it was “aware of the significant confusion and uncertainty that currently surrounds the status of the DACA program.” Additionally, in their August 15, 2018 filing, the plaintiffs had not opposed keeping the stay in place for new applicants. Citing both the potential for additional confusion and the plaintiff’s position, the Court agreed to preserve the status quo for the time being.

Additionally, there was a preliminary injunction hearing on August 8, 2018 before U.S. District Court Judge Hanen in a Texas district court. That case, [Texas v. Nielsen](#), is a lawsuit brought by seven states, led by Texas, challenging the legality of the DACA program and requesting a nationwide injunction to block any DACA grants or renewals going forward. A decision on that hearing is still outstanding. We will update this practice alert when there is more information.

UPDATE FROM AUGUST 6, 2018

On August 3, 2018, the U.S. District Court for the District of Columbia issued an [order](#) reaffirming its April 24, 2018 ruling that the government’s decision to rescind DACA was unlawful and requiring the government to fully restore the DACA program. The court’s order is on hold for 20 days, until August 23, 2018, to allow the government time to determine whether it intends to appeal the court’s decision and, if so, to seek a stay pending appeal.

Note that there are no new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below. USCIS is still accepting and processing DACA renewal applications for eligible DACA recipients who have previously been approved for DACA, due to two nationwide injunctions issued in California and New York earlier this year. No new or initial applications are being accepted for individuals seeking to apply for DACA for the first time. In light of pending litigation, eligible DACA recipients who would like to renew their DACA, and who should renew given the circumstances in their case, are encouraged to consult with an attorney and submit their DACA renewal applications to USCIS as soon as possible.

Previously, on [April 24, 2018](#), the court held that the government’s decision to rescind DACA was unlawful and vacated the termination of the DACA program, requiring the government to accept and process both new and renewal DACA applications. The court stayed its order of vacatur for 90 days to allow the government the opportunity to “better explain its view that DACA is unlawful.”

In response to the court’s April 24, 2018 order, U.S. Department of Homeland Security (DHS) Secretary Kirstjen Nielsen [issued a new memorandum](#) on June 22, 2018, concurring with and declining to disturb the government’s September 5, 2017 memorandum that rescinded the DACA program and purporting to offer further explanation for DHS’ decision to rescind DACA. Subsequently, in July 2018, the government moved the court to revise its April 24, 2018 order, arguing that Secretary Nielsen’s new memorandum demonstrates that DACA’s rescission was neither unlawful nor subject to judicial review.

The court's August 3, 2018 order denied the government's motion to reconsider its April 24, 2018 order and upheld the vacatur of DACA's rescission; however, the order does not take effect for 20 days. Thus, the memorandum terminating DACA will be vacated on August 23, 2018, unless the federal government appeals the decision and/or obtains a stay of the court's August 3, 2018, order, pending appeal. If the court's order goes into effect on August 23, the original DACA program will be restored in full and the administration will be required to accept not only DACA renewals, but also new DACA applications as well.

There could be developments in other pending litigation before August 23, 2018, however, that could impact the U.S. District Court for the District of Columbia's August 3, 2018 order, as well as the status of the DACA program. In particular, on August 8, 2018, there will be a preliminary injunction hearing before U.S. District Court Judge Hanen in the U.S. District Court for the Southern District of Texas in the case [Texas v. Nielsen](#), a lawsuit brought by seven states, led by Texas, challenging the legality of the DACA program and requesting a nationwide injunction to block any DACA grants or renewals going forward. Following the August 8th hearing, Judge Hanen will decide whether to issue a preliminary injunction against the DACA program, potentially ordering USCIS to stop accepting DACA applications, including renewal applications. If Judge Hanen orders USCIS to stop accepting DACA renewal applications and if that order is not "stayed"—or if the courts stay all the orders, including the New York and California injunctions—USCIS could stop accepting DACA renewal applications, potentially as early as mid-August. We will update this practice alert when there is more information.

UPDATE FROM MAY 8, 2018

On May 1, 2018, seven states, led by Texas, [filed a lawsuit](#) in a Texas district court challenging the DACA program and requesting a nationwide injunction that would block any DACA grants or renewals moving forward. The case is assigned to Judge Andrew Hanen, who issued the [February 16, 2015 injunction](#) blocking the implementation of DAPA and the expansion of DACA. On May 8, 2017, several DACA recipients – represented by MALDEF – filed a motion to intervene as defendants in the lawsuit, which was granted by the court.

There are NO new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below, and we will update this practice alert when there is more information. However, this case opens the possibility of having competing nationwide injunctions: if Judge Hanen were to grant the injunction requested by the plaintiff states, it would contradict the injunctions discussed below that direct the government to temporarily maintain the DACA program. It is unclear what would happen if there were to be competing nationwide injunctions, but it may be more likely that the issue would reach the Supreme Court quickly (though the exact timeline is unclear and would depend on several variables).

Applicants who want to renew their DACA, and who should renew given the circumstances in their case, should submit their renewal applications to USCIS as soon as possible. The case scheduling for this lawsuit is still being determined by the court, but there is a possibility

that it will move forward very quickly. The first hearing was initially set for July by the court, but the Plaintiffs requested an accelerated schedule.

UPDATE FROM APRIL 24, 2018

On April 24, 2018, the U.S. District Court for the District of Columbia held that DHS's decision to rescind DACA was "arbitrary and capricious" and vacated the termination of the program.

The court held that its decision meant that DHS must accept and process new DACA applications, as well as renewal DACA applications – however, it stayed its order for 90 days to give the government a chance to respond.

The decision of the court differed from previous court rulings because it would affect new applications – i.e. initial applications from individuals who have never applied for DACA previously but who are eligible to apply. However, the court's decision is on hold for 90 days. In the interim, the government has the chance to better explain its decision to rescind the program. That means that the court may reconsider its decision before the 90 days is over, and before its decision to allow new applications would go into effect.

As a result of the decision being on hold for 90 days, there are NO new changes to the program as of now. It is still being implemented on the terms of the prior court rulings discussed below. We will update this practice alert when there is more information.

UPDATE FROM MARCH 5, 2018

On March 5, 2018, a Maryland district court [declined](#) to halt the government's rescission of the DACA program. However, this decision does not affect the other preliminary injunctions currently in effect, which means that USCIS will continue to process renewal applications under the guidelines specified below while those cases go through the regular appellate review process.

The Maryland court did, however, enjoin the government from using information provided through the DACA program for enforcement purposes, stating "[i]n the event that the Government needs to make use of an individual Dreamer's information for national security or some purpose implicating public safety or public interest, the Government may petition the Court for permission to do so on a case-by-case basis with *in camera* review."

UPDATE FROM FEBRUARY 26, 2018

On February 26, 2018, the Supreme Court [denied certiorari](#) in [DHS v. Regents of the University of California](#), noting that it "assumed that the Court of Appeals will proceed expeditiously to decide this case." This decision means that, for the time being, USCIS will continue to process

renewal applications under the guidelines specified below while the litigation works through the regular appellate review process.

UPDATE FROM FEBRUARY 13, 2018

On February 13, 2018, a New York district court issued a [nationwide preliminary injunction](#) ordering the government to maintain the DACA program on the same terms and conditions that existed prior to the September 5, 2017, [rescission memo](#), subject to the same limitations as the January 9, 2018, injunction issued in [DHS v. Regents of the University of California](#). Check AILA's webpages on [Batalla Vidal v. Nielsen](#) and [New York v. Trump](#) for updates.

UPDATE FROM JANUARY 26, 2018

On January 13, 2018, USCIS [updated its website](#) to include guidance on submitting DACA renewal applications in light of the January 9, 2018 [district court decision](#). The guidance includes the following information:

- **Clients Who Have Never Had DACA:** USCIS will not accept DACA requests from individuals who have not previously been granted DACA. The court decision states that applications from people who have never applied for DACA “need not be processed.”
- **Clients Who Currently Have DACA:** Clients who currently have DACA and are eligible to renew may request renewal by filing [Form I-821D](#), [Form I-765](#), and [Form I-765 Worksheet](#), with the appropriate fee or approved fee exemption request, at the [USCIS designated filing location](#), and in accordance with the form instructions.
- **Clients Whose DACA Expired On or After September 5, 2016:** Under the [policies](#) in effect before the rescission of DACA, applicants whose DACA had expired within the past year were eligible to apply for renewal. USCIS's guidance states that recipients whose previous DACA expired on or after Sept. 5, 2016, may still file a renewal request. USCIS asks applicants to list the date their prior DACA ended in the appropriate box on Part 1 of the Form I-821D.
- **Clients Whose DACA Expired Before September 5, 2016:** Under the [policies](#) in effect before the rescission of DACA, applicants whose DACA had expired more than a year prior to reapplying had to submit initial DACA request applications. USCIS's guidance states that recipients whose previous DACA expired before September 5, 2016 cannot request DACA as a renewal, but may file a new initial DACA request in accordance with the Form I-821D and Form I-765 instructions. These applicants are instructed to list the date their prior DACA expired on Part 1 of the Form I-821D, if available.

- **Clients Whose DACA Was Terminated:** DACA recipients whose previous DACA was terminated at any point cannot request DACA as a renewal, but may file a new initial DACA request in accordance with the Form I-821D and Form I-765 instructions. These applicants are instructed to list the date their prior DACA was terminated on Part 1 of the Form I-821D, if available.
- **Advance Parole:** USCIS will not accept or approve advance parole requests from DACA recipients. The court decision had stated that applications for advance parole based on DACA do not have to be processed for the time being.

When Should Clients Submit Their DACA Renewal Applications?

Because the defendants have already appealed the district court’s decision to both the Ninth Circuit and the Supreme Court, and given the [processing times](#) for DACA applications, practitioners should consider submitting renewal applications for eligible clients as soon as possible.

USCIS has encouraged applicants to apply 150 to 120 days in advance of the expiration of their prior DACA grants. AILA reached out to USCIS for clarification on how it will handle applications that are filed more than 150 days in advance of the expiration date of the underlying DACA grant, and was told that USCIS would accept DACA renewal requests in accordance with the [DACA policies in place before DACA was rescinded](#) on September 5, 2017.

Under the [instructions for Form I-821D](#) and the [DACA FAQs](#) on USCIS’s website, DACA applicants were instructed to file for renewal 150 to 120 days in advance of the expiration of their current DACA grant. The form instructions stated that USCIS “may” reject a renewal application that is filed more than 150 days in advance of the expiration. However, the [DACA FAQs](#) noted that requests received more than 150 days in advance of expiration would be accepted, but could result in overlap between the applicants’ current DACA and their renewal DACA. *See* Questions 49 and 50 of the [DACA FAQs](#).

AILA is not aware of widespread rejection of early-filed DACA renewals prior to the rescission of the DACA program, so USCIS lockboxes may continue to accept early-filed DACA renewals. However, USCIS may not prioritize adjudication of these early-filed applications, given that they are not as time-sensitive as timely-filed DACA renewals. If you file a DACA renewal application for a client more than 150 days in advance of the DACA expiration and it is rejected for being filed too early, please email reports@aila.org, with the subject line “rejected early-filed DACA renewal.”

Practitioners and their clients may want to consider several factors when deciding whether to submit a DACA renewal application more than 150 days in advance, including how early they would be applying to renew, the availability of renewal fees, and whether anything has changed since the last time they applied for DACA. It may be good to consider the possible outcomes of filing an early DACA renewal application under the court decision, as well, including (but not limited to): that the renewal could be rejected and take several weeks to be returned; that the application could be accepted but not prioritized for adjudication; that there could be an adverse

court decision after the application is submitted but before it is approved and the filing fee is lost; that there could be a court decision that grandfathers cases already filed under the district court decision; or that the case could be accepted and approved before the court makes a decision.

JANUARY 10, 2018

On September 5, 2017, the Trump Administration [rescinded](#) the Deferred Action for Childhood Arrivals (DACA) program. For more information on the rescission of DACA, see AILA's [Practice Alert: Trump Administration Rescinds DACA](#). On September 8, 2017, the University of California [filed a complaint](#) challenging the rescission of the DACA program and asking the court to enjoin the implementation of the rescission. On January 9, 2018, the district court [issued an order](#) directing the government to partially maintain the DACA program. This practice alert summarizes the provisional relief provided by the court.

Scope of Provisional Relief

The court's decision orders DHS to maintain the DACA program on a nationwide basis, under the same terms and conditions that were in effect before the program was rescinded, with the following exceptions:

- ***New Applications***: The court stated that applications from people who have never applied for DACA “need not be processed.” However, the court also noted that the decision does not prevent DHS from adjudicating new DACA applications.
- ***Advance Parole***: The court stated that applications for advance parole based on DACA do not have to be continued for the time being. However, the court also noted that the decision does not prevent DHS from adjudicating advance parole applications based on DACA.
- ***Discretion***: The court stated that the government can take steps to ensure that discretion is exercised fairly and on an individualized basis for each renewal application.

Importantly, the court also stated that the decision does not prohibit DHS from taking enforcement action against anyone, including those with DACA, who it determines may pose a risk to national security or public safety or who – in the judgement of DHS – “deserves ... to be removed.”

Filing Renewal Applications

The court's decision directs DHS to post “reasonable public notice that it will resume receiving DACA renewal applications” and to specify the process by which it will accept renewal applications. As of January 10, 2018, USCIS had not yet released any public guidance on the court's decision, although it has noted on at least [two different](#) USCIS webpages that “more information is forthcoming.”

Practitioners may want to consider waiting to file renewal DACA applications on behalf of their clients until USCIS has released public guidance on the process. Given that 1) the court directed USCIS to specify and publicize its renewal process, and 2) the fact that the USCIS lockboxes and service centers will be relying on guidance from USCIS Headquarters to process applications it receives, submitting a renewal application before guidance is released may cause confusion and ultimately lead to a delay in processing.

AILA has reached out to USCIS and will provide updates as soon as they are available.

Effect on Legislative Efforts to Protect Dreams

While the decision is good news in the short term, Dreamers need Congress to pass a permanent legislative solution now more than ever. It seems clear that this Administration will appeal the court's decision quickly, and the litigation itself is likely to be lengthy and drawn out. Moreover, the decision only relates to renewal applications, leaving Dreamers who were unable to apply for DACA without recourse. For more information on the need to pass the Dream Act now, see www.aila.org/dreamers.