

## Rescission of DACA (Deferred Action for Childhood Arrivals)

On September 5, 2017, Acting Secretary of Homeland Security Elaine Duke issued a [memorandum](#) (the DACA Rescission Memorandum) rescinding a June 2012 memorandum that established the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) policy.<sup>1</sup> The previous week, ACE and 36 other associations had sent a letter to President Trump urging his administration to keep DACA intact until a permanent solution can be reached.<sup>2</sup> Instead, the DACA Rescission Memorandum directs Department of Homeland Security (DHS) personnel to take “all appropriate actions to execute a wind-down of the program” and effectively leaves it to Congress to find a legislative solution. That directive already has been challenged judicially, including by fifteen states and the District of Columbia, which filed a lawsuit, *New York v. Trump*, on September 6<sup>th</sup> in federal court in New York.<sup>3</sup>

DACA has allowed undocumented individuals who are currently between 10 and 36 years old<sup>4</sup> and satisfy certain other criteria to receive a renewable two-year period of deferred action from deportation and eligibility for a temporary work permit. According to DHS, about 800,000

<sup>1</sup> [“Memorandum on Rescission Of Deferred Action For Childhood Arrivals \(DACA\),”](#) Department of Homeland Security, September 5, 2017; [“Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,”](#) Department of Homeland Security, June 15, 2012.

<sup>2</sup> [Letter from T. Mitchell and M. Corbett Broad to President Trump,](#) Aug. 28, 2017.

<sup>3</sup> [State of New York et. al v. Donald Trump et al.,](#) Civil Action No. 17-cv-5228 (EDNY Sept. 6, 2017).

<sup>4</sup> U.S. Citizenship and Immigration Services (USCIS) generally requires DACA applicants to be at least 15 years of age at the time of filing. Under certain circumstances (e.g., if the applicant is in deportation proceedings), an applicant may request DACA even if the applicant is under the age of 15 at the time of filing. See [Frequently Asked Questions \(Archived\)](#), USCIS.

*This issue brief was prepared by ACE Vice President and General Counsel Peter McDonough and the international law firm Hogan Lovells US LLP (September 2017).*

### DISCLAIMER

This Issue Brief does not constitute legal advice. It incorporates and reflects high-level observations based on non-exhaustive research, and does not analyze any specific factual scenarios taking into account potentially relevant details. Institutions should examine issues addressed here based on the context and facts of each situation, institutional policies, geographical and political context, and on their own counsel’s interpretation of relevant law. This is a fluid environment and topic, including the potential for changes in current law or current enforcement practices.

DACA-eligible individuals have been approved as DACA grantees.<sup>5</sup> For background information about DACA, and perspective regarding related issues, including “sanctuary campuses,” please refer to ACE’s [December 2016 Issue Brief](#).<sup>6</sup>

## Key Elements of the DACA Rescission Memorandum

### **Current DACA grantees:**

Previously issued grants of DACA benefits, including temporary work permits (reflected by Employment Authorization Documents [EADs] issued by DHS), remain in place. The DACA Rescission Memorandum does not terminate or revoke the remainder of their validity periods. Therefore, ***current DACA grantees will retain the benefits of their status<sup>7</sup> until their existing grant expires (generally, two years from the date of issuance); importantly, they can continue to rely on a valid EAD for employment authorization until the expiration date reflected on that EAD.*** However, as before, DHS retains discretionary authority to terminate an individual’s grant of DACA benefits at any time, if immigration officials determine that termination is appropriate.<sup>8</sup>

***DACA grantees whose status and EADs will expire by March 5, 2018, are permitted to file for one additional two-year renewal, no later than October 5, 2017.*** DHS “will reject all requests to renew DACA and associated applications for EADs filed after October 5, 2017.”<sup>9</sup>

Absent new legislative or executive action, ***grantees whose DACA status and EADs expire on or after March 5, 2018, cannot obtain renewals unless they already have a renewal request pending.***

### **Initial (new) DACA applications:**

DHS will adjudicate on a case-by-case basis initial applications from DACA-eligible individuals that were accepted by DHS as of September 5, 2017. ***DHS will reject all initial requests filed after September 5, 2017.***

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<sup>5</sup> [Frequently Asked Questions: Rescission of Deferred Action For Childhood Arrivals \(DACA\)](#), DHS, Sept. 5, 2017 at Q15/A15.

<sup>6</sup> [“Immigration Post-Election Q&A: DACA Students, ‘Sanctuary Campuses,’ and Institutional or Community Assistance,”](#) ACE, Dec. 2016.

<sup>7</sup> Although DACA does not confer legal status for immigration law purposes, we use the term “status” to refer to a grant of deferred deportation and work authorization under the DACA program.

<sup>8</sup> [“Consideration of Deferred Action for Childhood Arrivals.”](#) U.S. Citizenship and Immigration Services. (“DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS’s discretion.”)

<sup>9</sup> [Frequently Asked Questions: Rescission of Deferred Action For Childhood Arrivals \(DACA\)](#), DHS, Sept. 5, 2017 at Q4/A4.

### **Advance parole/traveling outside the United States:**

The DACA Rescission Memorandum indicates that ***DHS will honor the stated validity period for already-approved applications for “advance parole”*** (i.e., permission to travel abroad and re-enter as a parolee, which DACA grantees need since they do not have proper visa or other immigration status in the United States). ***DHS will not approve pending or new applications for advance parole.***<sup>10</sup> Therefore, if a current DACA grantee has not already received advance parole, there is no legally sanctioned process by which the DACA grantee may leave and then re-enter the United States.

Importantly, advance parole has never been a guarantee of re-entry. Thus, ***even with an approved grant of advance parole, there are significant risks for DACA grantees who decide to travel outside the country.*** The DACA Rescission Memorandum makes clear that U.S. Customs and Border Protection (CBP) retains authority to determine admissibility of any person presenting himself or herself at the border, and U.S. Citizenship and Immigration Services (USCIS) retains authority to revoke or terminate advance parole at any time.

## **Context for the DACA Rescission**

The Trump administration says that the decision to rescind DACA was based on court decisions in pending litigation and Attorney General Sessions’ legal determination regarding the policy. The referenced court decisions relate to litigation brought by twenty-six states to challenge a November 2014 DHS memorandum that expanded DACA and created a new policy referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). As a result of that litigation, DAPA and the expanded DACA did not take effect.<sup>11</sup>

In a June 2017 letter to Attorney General Sessions, several state attorneys general asserted that DACA was unlawful for the same reasons raised in the DAPA litigation, and they threatened to challenge DACA if DHS did not rescind the 2012 memorandum that established DACA.<sup>12</sup> On September 4, 2017, Attorney General Sessions wrote to Acting Secretary Duke to convey his determination that DACA is unconstitutional and to advise that DHS should rescind the June 2012 memorandum through an “orderly and efficient wind-down process” in light of administrative complexities associated with termination.<sup>13</sup>

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<sup>10</sup> Effective September 5, 2017, USCIS will administratively close—without approving—all pending applications for advance parole (Form I-131). USCIS will refund all associated application fees.

<sup>11</sup> In June 2017, then-Secretary of Homeland Security John Kelly formally rescinded DAPA and the expansion of DACA but left in place the June 2012 memorandum that created the DACA program.

<sup>12</sup> [Letter from K. Paxton to J. Sessions](#), June 29, 2017.

<sup>13</sup> [Letter from J. Sessions to E. Duke](#), Sept. 4, 2017.

## Congressional Action

In remarks announcing the Trump administration's decision, Attorney General Sessions suggested that Congress will have an opportunity in the coming months to pass legislation concerning DACA recipients before March 5, 2018, when the first DACA recipients could lose their DACA benefits.<sup>14</sup>

Currently, there are several pieces of legislation that have been introduced. This includes the Dream Act<sup>15</sup> which has been endorsed by the higher education associations and would put pieces of DACA into statute and allow for a path to legal permanent residency and possible citizenship for eligible recipients. There may be other bills which would provide relief to DACA grantees, who are often included within the group referred to as Dreamers, which could receive consideration during the legislative process.

Because of the short six-month window for action, Congress must act quickly. There is concern that legislation to protect Dreamers could be incorporated into partisan legislation, for example by providing funding for a border wall or capping other immigration programs. There have been media reports indicating that some members of Congress would like to address DACA alongside the Reforming American Immigration for Strong Employment (RAISE) Act.<sup>16</sup> The RAISE Act would seek to reduce legal immigration to the United States by 50 percent by decreasing the number of grants of lawful permanent resident status issued and imposing a cap on annual refugee admissions.

The higher education community is advocating that Congress pass bipartisan legislation, as soon as possible, that permanently protects Dreamers, without tying it to other legislation that may act as a political poison pill. Communicating to congressional delegations the importance of passing bipartisan legislation to permanently protect Dreamers is critical.

## Additional Information

### **Use of information for immigration enforcement:**

The DHS FAQs indicate that USCIS will not proactively provide to Immigration and Customs Enforcement (ICE), CBP, or other law enforcement entities information that DACA applicants provided in DACA applications, unless the DACA applicant poses a risk to national security or public safety or meets criteria for initiation of a deportation proceeding under existing guidelines.<sup>17</sup> Similarly, the FAQs indicate that USCIS will not proactively refer DACA grantees

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<sup>14</sup> [Transcript of Jeff Sessions' Remarks on Ending the DACA Program](#), Time, September 5, 2017.

<sup>15</sup> Dream Act of 2017 (115<sup>th</sup> Congress, [S. 1615](#) and [H.R. 3440](#)).

<sup>16</sup> [S. 1720](#) (115<sup>th</sup> Congress).

<sup>17</sup> [Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals \(DACA\)](#), DHS, Sept. 5, 2017 at Q8/A8.

whose DACA benefits expire to ICE for immigration enforcement purposes, unless the DACA grantee meets criteria for initiation of a deportation proceeding under existing guidelines.<sup>18</sup> This policy on how to prioritize deportation cases, which is not law, is subject to change, and DHS has not committed to withholding information if requested.

### **More DHS details regarding the DACA Rescission:**

For more detailed information from DHS accompanying its [DACA Rescission Memorandum](#), see DHS's [Fact Sheet](#), [Frequently Asked Questions \(FAQs\)](#), [Press Release](#), and [Secretary Duke's Statement](#).<sup>19</sup>

## **Conclusion**

Colleges and universities can assist their impacted community members by providing information and resources, including by ensuring that DACA grantees whose benefits will expire between September 5 and March 5, 2018, are aware that they may apply to renew those benefits for a two-year period if they submit a **renewal request on or before October 5, 2017**. To request a renewal, eligible DACA grantees will be required to provide updated information, including their mailing address.<sup>20</sup>

It is imperative that Congress be encouraged to act. If congressional or other administrative action does not alter the policy set forth in the DACA Rescission Memorandum, colleges and universities should be prepared to counsel DACA grantees whose benefits, including work authorization, will expire on a rolling basis over the two-year period beginning March 5, 2018.

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<sup>18</sup> *Id.* at Q7/A7 (citing [Revised Guidance for the Referral of Cases and Issuance of Notices to Appear \(NTAs\) in Cases Involving Inadmissible and Removable Aliens](#), USCIS, Nov. 7, 2011).

<sup>19</sup> See generally [Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals \(DACA\)](#), DHS, Sept. 5, 2017; [Fact Sheet: Rescission Of Deferred Action For Childhood Arrival \(DACA\)](#), DHS, Sept. 5, 2017; [Press Release: "Rescission Of Deferred Action For Childhood Arrivals."](#) DHS, Sept. 5, 2017; and [Statement from Acting Secretary Duke on the Rescission Of Deferred Action For Childhood Arrivals \(DACA\)](#), Sept. 5, 2017.

<sup>20</sup> See generally [I-821D, Consideration of Deferred Action for Childhood Arrivals](#).