



Practice Alert: Advising Clients on the Future of DACA (Revised 11/17/16)

As part of his immigration platform, President-elect Donald Trump pledged to end the [Deferred Action for Childhood Arrivals \(DACA\) initiative](#) which was announced on June 15, 2012 by DHS Secretary Janet Napolitano. Though [statements on Trump's campaign website clearly indicate an intention to end DACA](#), much remains to be seen. We do not know how or when DACA might end. It is possible that USCIS could stop accepting or approving all DACA applications. 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 for individuals who currently have it. If the new Administration were to revoke DACA, the individual's employment authorization would also be revoked.

Trump could take action on DACA immediately or soon after the inauguration, weeks or months later, or not at all if he softens or changes his views. As of June 30, 2016, USCIS has approved close to 750,000 DACA applications and more than 525,000 DACA renewals since the agency began accepting DACA applications in 2012.¹ The political power of the DACA population and immigration advocates should not be underestimated, and the Trump Administration will likely balance the above options against the political repercussions it would face by targeting a compelling population that generates sympathy with the public. Moreover, during the past several years 75 percent of Americans have supported a legalization plan for the undocumented that includes permanent legal status.

Given the uncertainty surrounding the DACA initiative, 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:

¹ https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performance_data_fy2016_qtr3.pdf

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). 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. On the other hand, the submission of a new initial application at this time would require the individual to disclose their personal information to DHS and could increase their exposure to any potential enforcement actions the new administration decides to take.

Cost and Processing Times

According to USCIS, initial DACA applications are taking more than 9 months to adjudicate. Thus, if a client decides to file an initial DACA application today, it will not be processed before President-elect Trump takes office on Friday, January 20, 2017. Renewal applications are being processed more quickly, so applications submitted soon may have a chance of being adjudicated before Trump takes any actions to roll back DACA. But the bottom line is that there is no guarantee that any application will be processed timely which means there is a chance that an application fee will be wasted if DACA is rescinded before an application has been processed.

Travel on Advance Parole

As always, DACA recipients should not travel outside the U.S. if they do not have a current, valid advance parole travel document. For DACA recipients who have not yet applied for advance parole, processing times for Form I-131, Application for Travel Document indicate that

an application submitted today will likely not be approved before January 20, 2017. DACA recipients with advance parole should complete their travel and return to the United States as soon as practicable, but certainly before January 20, 2017. Note that CBP is responsible for inspecting and paroling individuals with valid advance parole documents, and maintains the position that advance parole does not guarantee admission to the United States. 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.

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 individuals may consider still filing to renew existing DACA benefits. 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 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*](#).