

Executive Action Expanding Deferred Action for Childhood Arrivals (DACA) Frequently Asked Questions

April 1, 2015

On November 20, 2014, President Obama announced executive actions to change immigration policy. One of these reforms will expand the existing DACA program, first established on June 15, 2012 to provide deferred action and work permits to people who arrived in the U.S. as children and meet certain other requirements. Other reforms fall into three main categories: (i) changes to immigration enforcement policy; (ii) expanding deferred action to certain parents of U.S. citizens and lawful permanent residents; and (iii) changes to our legal immigration system. This FAQ focuses exclusively on changes to the existing DACA program described in a Memorandum by DHS Secretary Jeh Johnson entitled Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (“Deferred Action Memo”).

NOTE: On February 16, 2015, a federal district court issued a temporary injunction in Texas v. United States preventing the federal government from implementing any aspect of DAPA and extended DACA. The implementation of DAPA and extended DACA has been postponed and neither initiative will begin until the injunction is lifted. For now, we encourage potential DAPA and extended DACA applicants to continue to collect their paperwork and prepare to apply. Please note that the court’s order does not impact the legality of the original DACA program announced in 2012 and U.S. Citizenship and Immigration Service (USCIS) is still accepting original and renewal applications. DACA work permits, however, will no longer be issued for 3 years and USCIS has resumed issuing 2 year employment authorization documents.

The Department of Justice (DOJ) requested an emergency stay of the injunction on March 12, 2015. Oral argument is scheduled for April 17. If a stay is granted, USCIS could immediately resume expanded DACA implementation.

In addition, the DOJ appealed the preliminary injunction to the United States Fifth Circuit Court of Appeals. The Fifth Circuit has set an expedited briefing schedule for the full appeal, which extends into May 2015. A final decision by the appellate court may take weeks or months after the briefing is completed and would likely be appealed to the Supreme Court.

1. How does the President’s executive action on immigration change the current DACA program?

The current DACA program was established on June 15, 2012 and provides deferred action and work permits for a two year period. To be eligible, a person must meet the following criteria:

- Entered the U.S. prior to age 16;
- Was under the age of 31 as of June 15, 2012;
- Had no lawful status on June 15, 2012;
- Graduated from high school; obtained a GED; or currently enrolled in school;
- Had continuous residence in the U.S. from June 15, 2007 to the present;

- Was physically present in the U.S. on June 15, 2012 and at the time of making the request;
- and has not been convicted of a felony, misdemeanor, or three or more other misdemeanors; and is not considered a threat to public safety or national security.

The Deferred Action Memo made three changes to the existing DACA program:

Eliminates the Age Cap

The current DACA program limits eligibility to people who were under the age of 31 as of June 15, 2012. Going forward, this age restriction will no longer apply. People who arrived in the United States before age 16 may qualify for DACA, even if they were over 31 as of June 2012. However, to apply for DACA with United States Citizenship and Immigration Services (USCIS), a person must be at least 15 years old, unless she is currently in removal proceedings or has a final removal or voluntary departure order. The Deferred Action Memo does not change this requirement.

Adjusts the date-of-entry requirement

Current DACA guidelines require an applicant to prove continuous residence in the United States from June 15, 2007 to the present. The new guidelines advance the continuous residence start date to January 1, 2010.

Extends deferred action and work authorization from two years to three years

Grants of deferred action and work permits will be for a three-year period, instead of two years. This change became effective on November 24, 2014 for people who are approved for first-time DACA and DACA renewals on or after that date.

2. When will USCIS begin accepting applications under the new guidelines?

At this time, people cannot apply for DACA under the new criteria announced in the new Deferred Action Memo. It is uncertain when USCIS will begin accepting applications due to the pending litigation described above. When expanded DACA is implemented, USCIS will likely change the existing application form (Form I-821D) to reflect changes in the guidelines. As with the current program, applicants will be required to pay a \$465 application fee and undergo biometrics. Visit www.uscis.gov and <http://www.adminrelief.org/> for updated information.

3. If my client is eligible under the current guidelines, may she apply for initial DACA or renew her DACA now?

Yes. USCIS continues to accept initial and renewal DACA applications under the guidelines issued before November 20, 2014. If your client qualifies for DACA under the original criteria, she may apply now.

4. My client is applying now for initial or renewal DACA. If she is approved, how long will her deferred action and work authorization be granted for?

The executive action extends the deferred action grant from two years to three. Note that this change is not effective due to the pending litigation described above. Current applicants for initial or renewal requests will continue to receive work authorization for a two-year period.

5. My client already renewed her DACA before the President's November 20, 2014 announcement. How can she get a new work permit valid for 3-years?

Due to the temporary injunction described above, DACA recipients are no longer able to obtain a work permit valid for three-years. In the meantime, three-year work permits issued under the previous guidelines continue to be valid through the expiration date indicated on the card.

6. Has the physical presence requirement changed?

The Deferred Action Memo does not directly address whether there will be a change to the current requirement that an individual was physically present in the United States on June 15, 2012. The original physical presence requirement reflects the date the DACA program was first announced. No guidance has been issued indicating that the physical presence date will change to reflect the date of the recent Deferred Action Memo - November 20, 2014.

7. Does the recent executive action change the existing criminal bars to DACA?

No, the criminal bars to DACA remain the same. Guidance defining felonies, significant misdemeanors, and three or more non-significant misdemeanors (as they apply to DACA) are not changed by the executive action.

8. My client may qualify for both DACA and DAPA. What factors should we consider in determining which program to apply for?

Some people may qualify for both DACA and DAPA. DAPA is a new deferred action program that benefits certain parents of U.S. Citizens or Lawful Permanent Residents who have continuously resided in the United States since January 1, 2010. Guidelines for DAPA eligibility are set forth in the Deferred Action Memo. Unlike DACA, DAPA does not include an education requirement. Additionally, individuals may benefit from DAPA regardless of their age at the time they entered the U.S. If your client qualifies for DACA under the original guidelines, she can apply now, rather than wait until May 19, 2015, which is the approximate date that USCIS will begin accepting applications for DAPA.

The ineligibility bars to DAPA are broader than those that apply to DACA, and cover both criminal offenses and immigration violations. Thus, individuals with certain immigration or criminal histories may be eligible for DACA but may be disqualified from DAPA. Visit www.uscis.gov and <http://www.adminrelief.org/> for more information on the DAPA program and the new DHS priorities for immigration enforcement.

9. Will parents of DACA grantees obtain any immigration benefits under the new policy?

The new deferred action programs do not provide immigration relief to the parents of DACA recipients. Only parents of U.S. citizens and lawful permanent residents may qualify for Deferred Action for Parental Accountability (DAPA).

10. How will these changes impact a DACA recipient's ability to travel on advance parole?

In *Matter of Arrabally and Yerrabelly* 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals issued a precedent decision holding that travel abroad with advance parole is not considered a departure for purposes of the "three and ten year bars," under INA Section 212(a)(9)(B)(i). This case arose in the context of adjustment of status applications, and the USCIS Administrative Appeals Office (AAO) has since applied this analysis in several cases involving travel on advance parole by Temporary Protected Status (TPS) holders. In practice, USCIS has also applied this analysis to DACA recipients returning to the U.S. under advance parole, although currently there is no formal guidance regarding this issue.

In a memorandum entitled *Directive to Provide Consistency Regarding Advance Parole* ("Advance Parole Memo"), Secretary Johnson states that new written guidance will be issued clarifying that the *Arrabally* decision will apply in all cases where a person leaves the United States under a grant of advance parole. The Advance Parole Memo does not make changes to the requirements that DACA recipients must meet in order to qualify for advance parole. Traveling outside of the United States can present other risks beyond the unlawful presence bars. DACA grantees should be screened for other grounds of inadmissibility, and should consult with an attorney before leaving the United States.

11. My client will be eligible for DACA once the new forms are released. Are there things I can advise him to do in the meantime to prepare?

Applicants will be required to pay a \$465 application fee. Advise clients to begin saving money now. Clients can begin gathering documents to prove their identity and demonstrate they satisfy the education, date of entry, and continuous residence requirements. Clients who have had prior encounters with law enforcement and/or immigration authorities should obtain their criminal records and information regarding their immigration history. Advise clients not to travel abroad before they have obtained deferred action and advance parole.

12. What if I have a client in immigration proceedings or in detention who meets the requirements for expanded DACA?

People who meet the new DACA guidelines may qualify for the program, even if they are in removal proceedings or are subject to a final order of removal. The Deferred Action Memo directs Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to immediately identify people who meet the DACA criteria and refer them to USCIS for a deferred action determination. This policy will apply to those who are currently in custody and those who are newly encountered. ICE is also instructed to review pending removal cases and seek administrative closure or termination in cases where the person meets DACA eligibility guidelines. People may then request DACA through USCIS.

Under the current DACA procedures, people who are currently in immigration detention should identify themselves to their deportation officer, Jail Liaison, or local ICE Field Office Director. For more information, visit ICE's website at www.ice.gov/daca.

13. My client is eligible for expanded DACA but is worried that she will be referred to ICE if her application is denied or if the DACA ends. What should I tell her?

The information in a DACA request, including information about family members and guardians, will not be shared with ICE and CBP for the purpose of deportation unless the DACA applicant meets the criteria in November 2011 USCIS policy guidance governing the issuance of Notices to Appear (NTA). According to the criteria, USCIS will refer an applicant to ICE in cases involving certain criminal offenses, a statement of findings substantiating fraud, or a threat to public safety or national security.

Many people fought hard for the creation of the DACA and DAPA programs. Organizations and community members will continue to advocate for the extension of the DACA program. Should DACA be terminated at some point, remind your client that people who are granted DACA are by definition "low priorities" for deportation.