

Fifth Circuit Invalidates DACA: What the Decision Means for DACA Recipients and Their Employers

October 6, 2022

Key Points

- Fifth Circuit Court of Appeals ruled that the DACA program violates the Administrative Procedure Act.
- Court remanded the case to the District Court in light of the newly published DACA regulation.
- Current DACA recipients continue to be protected from deportation, and their employment authorization continues to be valid.
- Court allowed for DACA renewals to continue to be accepted, but no new DACA applications are allowed.
- Decision is likely to be challenged in the U.S. Supreme Court, but most likely after the District Court rules on the remanded case.

On October 5, 2022, a three-judge panel for the 5th Circuit Court of Appeals handed down a **decision** regarding the legality of the Deferred Action for Childhood Arrivals (DACA) program. The Court upheld the District Court's decision that the DACA program is unlawful, but stayed its ruling and remanded the case back to the District Court in light of the government's recent publication of a regulation codifying DACA. This means that current DACA recipients are protected from deportation and can continue working and renewing their work permits. However, the stay does not apply to new DACA applications, which are still not allowed.

Background

The DACA program was originally adopted in a 2012 memorandum by the Department of Homeland Security (DHS) that provided deferred action (protection from deportation—or “removal”—from the United States) and two-year employment authorization to certain undocumented immigrants who had been brought to the country as minors (i.e., younger than 16 years old). In September 2017, the Trump administration attempted to rescind the program, which resulted in the case about the legality of the program to be heard by the U.S. Supreme Court. In June 2020, in a 5-4 decision written by Chief Justice John Roberts, the Court held that the Trump

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administration's rescission was arbitrary and capricious under the Administrative Procedure Act (APA), remanded the case, and the program was restored to its full form.

Concurrently, a group of Republican state attorneys general filed a challenge to the DACA program in the Southern District of Texas, arguing that the program violated federal law, was promulgated without proper rulemaking procedures, and imposed costs on the states. The lawsuit sought a complete end to the program. On July 16, 2021, Judge Andrew Hanen issued a ruling, holding DACA to be unlawful, granting a permanent injunction vacating the original 2012 memorandum, and preventing U.S. Citizenship and Immigration Services (USCIS) from approving new applications. Specifically, Judge Hanen held that DHS was required to go through notice and comment rulemaking under the APA and identified substantive flaws with the program.

However, noting DACA recipients' reliance on the program, Judge Hanen temporarily stayed the injunction "as to individuals who obtained DACA on or before July 16, 2021." The Biden-Harris administration appealed this decision to the U.S. Court of Appeals for the 5th Circuit, which has now upheld Judge Hanen's decision.

What Are the Next Steps?

In its decision, the 5th Circuit affirmed that the DACA memorandum—and the program created by it—are unlawful. However, it remanded the case back to Judge Hanen because of the recent action by the administration: on August 30, 2022, DHS issued a **final regulation** codifying the DACA program, with the goal of providing more certainty for DACA recipients. The final rule becomes effective on Monday, October 31, 2022. The regulation had previously gone through a notice and comment process—the process that was never applied to the DHS memorandum. However, it is unclear whether this rule would overcome Judge Hanen's substantive concerns with the DACA program.

The Biden-Harris administration can seek further review by the full 5th Circuit, i.e., an *en banc* review of the Court's decision. However, it may first wait for Judge Hanen to rule on the recently published final rule. If he were to strike down the program despite the new regulatory action, the Biden-Harris administration will likely appeal that decision to the 5th Circuit. Any future decision from the 5th Circuit will likely will be challenged and the case is widely expected to end up at the U.S. Supreme Court again.

What Is the Impact on DACA Recipients?

The Court's decision continues the status quo, which means that DACA recipients who are currently protected against deportation and are allowed to work can continue to enjoy those protections. However, Judge Hanen may still strike down the program, but it may not mean an immediate end of DACA benefits for the current recipients. In his original decision he noted the reliance interests DACA recipients have on the policy's protection as a consideration in determining the "wind down" period of the policy, if the program is struck down.

What Does This Decision Mean for Employers of DACA Recipients?

- Current DACA recipients can continue to be employed and can accept new employment, but must comply with all applicable I-9 regulations and must provide

renewed employment authorization to their employer when the current authorization expires.

- Employment Authorization Documents (EADs) will remain valid for their full validity period. DHS is not required to revoke current EADs because the Court stayed the part of its decision that held that DACA was unlawful.
- EADs continue being eligible for renewal, which means that a current employee does not need to be terminated when their EAD expires as long as they timely apply for and obtain a renewal of their EAD.

Conclusion

The 5th Circuit's decision continues the status quo and remands the case back to the District Court. It remains to be seen if the recent regulatory action by the Biden-Harris administration will be sufficient for the program to be upheld by the District Court. If it is struck down again, further appeals—potentially all the way to the Supreme Court—are expected. That is, of course, unless Congress steps in and passes legislation enacting the DACA program, or a similar set of protections for so-called “Dreamers,” into law.

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