

Immigration Alert

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U.S. Supreme Court Rules that Trump Administration's Rescission of DACA Was Unlawful

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Key points:

- The U.S. Supreme Court held that the Trump administration did not properly terminate the DACA program under the APA.
- The DACA program is restored to its full form, as it existed prior to the rescission in 2017.
- Current DACA recipients continue to be protected from deportation, their employment authorization continues to be valid and they can apply to renew their employment authorization.
- New DACA applicants will be able to apply for deportation protection and employment authorization as soon as the DHS implements the Supreme Court decision.

On June 18, 2020, the Supreme Court **held** that the Trump administration's 2017 rescission of the Deferred Action for Childhood Arrivals (DACA) program was unlawful.

The DACA program was originally adopted in 2012 and 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). As we described in a prior **alert**, the Trump administration attempted to rescind the program in September 2017, and a series of lawsuits followed. Several federal district courts enjoined the Trump administration's decision from going into effect, which meant that the program continued for DACA recipients who were already approved for employment authorization, and they could file to extend it. Three separate Courts of Appeal sided with the challengers, the Trump administration appealed all three cases to the Supreme Court and the Court consolidated them into one. In a 5-4 decision written by Chief Justice John Roberts, the Court held that the Trump administration's rescission was arbitrary and capricious under the Administrative Procedure Act (APA). The decision restores the program to its full form, as it existed prior to September 2017.

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Background

President Obama announced the DACA policy on June 15, 2012, and the Department of Homeland Security (DHS) established the program on the same day in a memorandum. Since the DHS began accepting DACA applications, about 700,000 qualifying individuals have been granted DACA status. In order to qualify for DACA, an applicant was required to show, among other requirements, that he or she (i) came to the United States under the age of 16; (ii) resided in the country continuously since June 15, 2007; (iii) was under the age of 31 on June 15, 2012; (iv) fulfilled certain educational or military requirements; and (v) had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors. In November 2014, the DHS expanded the DACA program to allow for three-year work permits and a higher maximum age of recipients at the time of application. It also introduced the Deferred Action for Parents of Americans (DAPA) program that would have conferred similar benefits to parents of U.S. citizens and permanent residents. The DACA expansion and the DAPA program were enjoined by the courts after Texas and other states challenged the President's executive authority. The Fifth Circuit Court of Appeals held the November 2014 memorandum to be unconstitutional. The Supreme Court split 4-4 and upheld the Fifth Circuit's decision without an opinion.

2017 DHS Memorandum

On June 29, 2017, attorneys general of Texas and nine other states sent a letter to then-Attorney General Jeff Sessions stating that they would challenge the DACA program in federal court unless the DHS agreed to "phase out" the program by rescinding the 2012 DACA memorandum and halting approval of any new or renewal DACA applications. On September 4, 2017, Attorney General Sessions sent a letter to the DHS Acting Secretary Elaine Duke stating that DACA was an "unconstitutional exercise of authority by the Executive Branch" and that legal challenges to the program would "likely" result in DACA being deemed unlawful. The next day, he announced the rescission of the program.

The same day as the Attorney General's announcement, Acting Secretary Duke announced the rescission of the program in a memorandum citing the Attorney General's determination that the DACA program was unconstitutional. The DHS memorandum outlined the process for winding down the DACA program. In sum, the DHS determined that it would no longer accept new applications for DACA and would allow DACA relief to expire for most recipients (except that individuals whose benefits were to expire within six months of the memorandum could apply for a two-year renewal).

Supreme Court's Decision that Rescission of DACA Was Arbitrary and Capricious

Following the decision by the DHS to rescind the DACA program, several lawsuits were filed challenging the rescission. The issues litigated in these suits were varied and included whether the rescission was reviewable under the APA, whether the DHS had adequately explained its decision, and whether the rescission violated the equal protection guarantee of the Fifth Amendment of the Constitution. Akin Gump submitted an amicus [brief](#) in one of the cases on behalf of the American Historical Association, the Organization of American Historians, the Fred T. Korematsu Center for Law and Equality, and 42 leading individual historians in support of a legal challenge to the

federal government's decision to rescind the DACA program. After three Circuit Courts of Appeal upheld the challenges, the cases made their way to the Supreme Court.

As a threshold matter, the Court held that the decision to rescind DACA was reviewable by the APA because the original DACA memorandum established a new program, which included eligibility for employment authorization. Because the agency did more than merely withhold from initiating removal proceedings against DACA recipients, the Court found that its decision was subject to the APA and reviewable by the Court.

Reviewing the case on the merits, the Court determined that the DHS's decision to rescind DACA was arbitrary and capricious for two separate and independently sufficient reasons. First, in its September 5, 2017, memorandum, the DHS failed to adequately explain the grounds for its decision and did not address forbearance from removal—one of the two components of the DACA policy. Instead, the DHS relied on the legal conclusions of then-Attorney General Sessions as justification for rescission of both the forbearance from removal and the provision of benefits (primarily, employment authorization), when in reality, the Attorney General's legal conclusions only addressed the provision of benefits and not the forbearance from removal.

The Court addressed DHS Secretary Kirstjen Nielsen's subsequent attempt to provide "a fuller explanation" of the DHS's reasoning, nine months after the original rescission and after three separate district courts found the September 5, 2017 memorandum to be deficient. The Court refused to consider what it called a "*post hoc* rationalization" by Secretary Nielsen and held that the complete justification had to have been provided in Acting Secretary Duke's memorandum.

Second, the Court held that, even if the DHS had not failed to explain the grounds for its decision, it would have been arbitrary and capricious because the DHS failed to address the existence and strength of "legitimate reliance" on the DACA program. The Court stated that, since 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. The DHS had to at least address this reliance in its rescission memorandum for its decision to be proper under the APA.

What Does the Supreme Court Decision Mean?

- Employers: 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.
- Current DACA recipients: previously issued Employment Authorization Documents (EAD) will remain valid for their full validity period. The DHS did not terminate deferred action or revoke EADs solely on the basis of the DACA program rescission.
- Pending DACA renewals: currently pending applications for renewal of EADs will be adjudicated as before.
- New DACA applicants: the DHS will begin accepting new DACA applications as soon as it implements the Supreme Court's decision. As of the publication of this alert, the DHS has not made an announcement allowing for filing of new DACA

applications, and its application [website](#) has not been updated. We expect an announcement to be made and the website to be updated within days.

- Travel document applications: DACA recipients are normally eligible for a travel document, officially referred to as Advance Parole. After September 5, 2017, no new DACA Advance Parole applications were approved. The DHS will begin accepting new Advance Parole applications as soon as it implements the Court's decision.

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