

Stealth Rescission: An Analysis of the Impact of the Secretary's July 2020 Memorandum on DACA

August 27, 2020

I. EXECUTIVE SUMMARY

On July 28, 2020, the U.S. Department of Homeland Security (DHS) released a memorandum detailing several significant changes to Deferred Action for Childhood Arrivals, or DACA. This memorandum reduced renewals to one-year and expressly prohibited the adjudication of initial requests and advance parole requests. These changes, however, have significant implications on continued existence and administration of DACA, likely leading to a functional end for most applicants. In effect, the memorandum serves to double the workload of DACA adjudication at U.S. Citizenship and Immigration Services (USCIS), double the price of applying, and increase gaps between DACA grants by compounding wait times at USCIS. On August 24, 2020, USCIS issued its implementation plan of the DHS guidance, most notably severely restricting the application window for DACA renewals. Through these changes, DHS has hamstrung DACA to the point of functionally ending the policy. This policy change is particularly concerning in light of the Supreme Court ruling on June 18, 2020 that declared the administration's termination of DACA unconstitutional and ordered a return to the pre-termination standards.

II. BACKGROUND

DACA is a case-by-case, temporary relief from deportation that allows recipients to live and work legally in the United States as long as the deferment is in effect. DACA is temporary, and it does not provide a path to legal status or citizenship. In September 2017, the Trump Administration announced the termination of the DACA program.¹ However, the Supreme Court ruled on June 18, 2020 that the termination was unconstitutional as it violated the Administrative Procedure Act.² Later confirmed by a federal court in Maryland, DACA must thus be reset to the conditions of September 2017, meaning DHS must begin accepting renewals, initial DACA applications, and applications for advance parole.³ After continuing to refuse to process initial applications or advance parole, DHS issued a memo on July 28, 2020 stating that it would reject all initial requests for DACA, employment authorization, and advance parole and limit the status period for DACA grants after the memo to one year rather than two.⁴ Acting Secretary Chad Wolf stated that this memo will remain in effect while the department “considers policy and future action” regarding DACA.

¹ Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. Times (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

² Department of Homeland Security v. Regents of University of California, ___ U.S. ___, No. 18-587, slip op. (June 18, 2020).

³ Joel Rose, *Federal Court Orders Trump Administration To Accept New DACA Applications*, NPR (July 17, 2020), <https://www.npr.org/2020/07/17/892413311/federal-court-orders-trump-administration-to-accept-new-daca-applications>.

⁴ Memorandum from Chad F. Wolf, Acting Secretary, U.S. Citizenship and Immigration Services to Mark Morgan, Senior Official Performing the Duties of Commissioner, Matthew Albence, Senior Official Performing the Duties of Director, Joseph Edlow, Deputy Director of Policy, U.S. Citizenship and Immigration Services on Reconsideration of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (July 28, 2020), available at https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.

III. ADJUDICATION DELAYS

The DHS memo will likely exacerbate existing delays and turn a two year grant with no gap into a one-year grant with regular lapses. The overall processing times for USCIS have been steadily increasing for years, culminating in a backlog of over 2.3 million cases.⁵ USCIS froze all DACA renewal applications for nearly a month after the DHS memorandum, delaying over 20,000 renewals.⁶ The overall delays have triggered congressional oversight hearings as recently as last summer,⁷ and the COVID-19 crisis has only compounded the problem. In addition to office closures that have not been fully reversed,⁸ USCIS is currently facing a historic budget crisis and has begun to furlough adjudicators, further exacerbating the backlog and making it substantially more difficult for all immigrants, including DACA recipients, to apply in a timely manner.⁹ USCIS narrowly avoided furloughing nearly 70 percent of its staff in late August at “severe operational cost that will increase backlogs and wait times across the board, with no guarantee [to] avoid future furloughs.”¹⁰ Applicants also face a variety of COVID-19–related barriers, including difficulty in paying filing fees, limited to no access to legal service providers required for renewal, and the virus itself.

The DHS memo does not look to help matters. USCIS recently announced that it will reject applications for DACA renewal submitted over 150 days (or five months) before the current grant expires, a departure from previous processing requirements and not included in the original DHS guidance.¹¹ In fact, USCIS currently estimates processing times for DACA applications and renewals to be anywhere from 8-11 months at certain service centers.¹² By cutting the DACA grant period in half, the new memo essentially doubles the USCIS workload for DACA renewals by requiring recipients to apply for renewal twice as often, which will likely push even the lowest estimated wait period to over a year. Under these conditions, applicants could apply for renewal on day one of their one-year DACA grant period and still encounter gaps between grants due to increased wait times. As it is, applicants will be required to apply no earlier than five months before their grant expires, nearly guaranteeing a gap in status. Even a temporary lack of status can lead to the loss of work authorization and the accrual of unlawful presence for those who have held DACA since before they turned eighteen.

⁵ AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration, American Immigration Lawyers Association, AILA Doc. No. 19012834 (Jan. 30, 2019), *available at* <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-uscis-processing-delays>.

⁶ Michelle Hackman, DHS Resumes DACA Renewals After a Nearly Monthlong Pause, Wall Street Journal (Aug. 24, 2020), <https://www.wsj.com/articles/dhs-resumes-daca-renewals-after-a-nearly-monthlong-pause-11598292042>.

⁷ Hearing, Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services, House Committee on the Judiciary (July 16, 2019), *available at* <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2273>.

⁸ U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec. (Aug. 6, 2020), <https://www.uscis.gov/about-us/uscis-response-to-covid-19>.

⁹ Electronic Letter from U.S. Dep’t of Homeland Sec. to Stakeholders on Ombudsman’s Alert: Card Production Delays at USCIS (July 21, 2020), *available at* <https://www.aila.org/infonet/cis-ombudsman-provides-update-on-card-production>.

¹⁰ U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec., USCIS Averts Furlough of Nearly 70% of Workforce (Aug. 25, 2020), <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>.

¹¹ U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec., USCIS Implements DHS Guidance on DACA (Aug. 24, 2020) <https://www.uscis.gov/news/alerts/uscis-implements-dhs-guidance-on-daca>.

¹² U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec., Check Case Processing Times, accessed Aug. 27, 2020, <https://egov.uscis.gov/processing-times/> (Select “I-821D - Consideration of Deferred Action for Childhood Arrivals” in the form selection box).

IV. INCREASED COST

By requiring DACA recipients to apply and pay the fee for renewal twice as often, DHS effectively doubles the cost of applying for DACA. While the memo states that USCIS should explore ways to reduce cost, it is made clear that this is not a priority. In the Acting Secretary's words, "[E]ven if renewal fees cannot be reduced, shortening the renewal period is still warranted by my strong desire to limit the scope of the policy during this interim period despite any additional fees incurred by DACA beneficiaries as a result."¹³ To file for renewal, DACA recipients must pay a total of \$495 in fees (up from \$465 in 2016) in addition to any legal fees, documentation fees, and mailing and printing costs.¹⁴ Unlike many other USCIS application forms, DACA recipients cannot apply for a fee waiver under form I-912, *Request for a Fee Waiver* to assist with these costs.¹⁵ Low income DACA recipients must meet narrower criteria than the usual fee waiver and receive the exemption *before* they submit their application, adding time to an already delayed process. DACA recipients were thus less likely to qualify for or even attempt to utilize the fee exemption process before DHS increased both the price and the potential processing time. The now yearly fees with a low chance for exemption will likely translate into fewer eligible applicants applying for relief.

According to the nonpartisan Migration Policy Institute, the filing fee for DACA applications has long been a barrier to renewals,¹⁶ a finding supported by recent surveys. Almost half of DACA recipients surveyed had to receive financial help from family or other sources to afford application fees.¹⁷ Thirty-six percent of applicants reported delaying their application for an average of three months in order to raise funds.¹⁸ The renewal fee (at that point still \$465) was specifically cited as "a financial hardship on themselves or their families."¹⁹ Ivy Teng Lei is a DACA recipient from China who used the entirety of her savings to pay for her application. "For many of the undocumented youths," she said, "paying for [college] is already a struggle, let alone a burdensome fee that can be used to pay for their rent, food and books."²⁰

V. THREAT TO EDUCATION

The memo will also risk DACA recipients' education and careers. The functional end of DACA affects DACA-eligible people in higher education as well as graduates beginning their careers.

¹³ Memorandum from Chad F. Wolf on Reconsideration of the June 15, 2012, Memorandum (June 28, 2020).

¹⁴ 81 Fed. Reg. 73,292 (Oct. 24, 2016),

<https://www.federalregister.gov/documents/2016/10/24/2016-25328/us-citizenship-and-immigration-services-fee-schedule>; U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec., Instructions for Form I-765, Application for Employment Authorization (May 31, 2019), available at <https://www.uscis.gov/i-765>.

¹⁵ U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec., I-821D, Consideration of Deferred Action for Childhood Arrivals,

<https://www.uscis.gov/i-821d#:~:text=The%20fee%20to%20request%20consideration,%24495%2C%20and%20can%20be%20waived> (last updated Aug. 4, 2020); U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec., I-912, Request for Fee Waiver, last updated Aug. 4, 2020, <https://www.uscis.gov/i-912> ("You may not file Form I-912 if you are requesting consideration of Deferred Action for Childhood Arrivals (DACA). There are no fee waivers for DACA.").

¹⁶ Angelo Mathay & Margie McHugh, DACA at the Three-Year Mark: High Pace of Renewals, But Processing Difficulties Evident, Migr. Pol. Inst. 8-9 (Aug. 2015), available at <https://www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident>.

¹⁷ Tom K. Wong, Ph.D. & Carolina Valdivia, *In Their Own Words: A Nationwide Survey of Undocumented Millennials*, United We Dream 4 (May 20, 2014), available at https://docs.wixstatic.com/ugd/bfd9f2_4ac79f01ab9f4247b580aeb3afd3da95.pdf.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jana Kasperkevic, *The high cost of being a legal immigrant in the US: \$465*, The Guardian (Jan. 8, 2014), <https://www.theguardian.com/money/2014/jan/08/undocumented-dreamers-immigration-daca-cost-fee>.

There are approximately 216,000 DACA-eligible students currently enrolled in higher education.²¹ Many of these students come from families with high levels of poverty.²² Consequently, these students are unable to rely on their parents for financial assistance and furthermore feel obligated to support their families financially.²³ Some DACA recipients have become the “sole provider in [their] home[s] because of COVID-19,” as their family members have lost their jobs.²⁴ A March 2020 survey of nearly 1,700 TheDream.US scholars enrolled in higher education found that 80 percent of such students experienced income loss due to job loss or reduced hours.²⁵ Two-thirds of these students needed assistance with their rent or utilities, and half needed assistance with food.²⁶ Fifty-eight percent of students reported needing mental health support.²⁷ DACA allows these students to study and work legally to support their education and their families, and any interruption to the program would put them at risk academically and financially.

VI. CONCLUSION

In light of the above analysis, we recommend that DHS rescind the July 28, 2020 memorandum and resume accepting initial applications and applications for advance parole and restore the two-year grant period. We also recommend that USCIS eliminate its new policy to reject renewal applications submitted 150 days or more before the grant expiration, especially in light of the growing processing delays. However, as DHS, at least under this administration, is unlikely to make these changes, we encourage Congress to enact legislation, either in the forthcoming COVID 19 legislative package or this fall’s likely continuing resolution, that would automatically extend work permits and the underlying status for two years for DACA recipients (and all other work-authorized immigrants) as an interim measure until Congress enacts permanent relief.

²¹ Miriam Feldblum et al., *Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They?* New Am. Econ. & Presidents’ All. on Higher Educ. & Immigr. (Apr. 15, 2020), available at

<https://www.presidentsimmigrationalliance.org/2020/04/15/report-undocumented-students-in-higher-education-how-many-students-are-in-u-s-colleges-and-universities-and-who-are-they/>.

²² Hirokazu Yoshikawa et al., *Unauthorized Status and Youth Development in the United States: Consensus Statement of the Society for Research on Adolescence*, 27 *J. Research on Adolescence* 4 (2016).

²³ Veronica Terriquez, *Dreams Delayed: Barriers to Degree Completion Among Undocumented Community College Students*, 41 *J. Ethnic & Migration Studies* 1302, 1302-23 (2015).

²⁴ *E.g.*, Sophie Tatum, *DACA Recipient College Students Stuck in Political Limbo Without Emergency Cash Grants*, ABC News (May 14, 2020), <https://abcnews.go.com/Politics/daca-recipient-college-students-stuck-political-limbo-emergency/story?id=70554567>.

²⁵ *In Their Own Words: The Impact of Covid19 on DREAMers*, TheDream.US, 3-4 (Mar. 26, 2020), available at <https://www.thedream.us/wp-content/uploads/2020/04/TheDream.US-In-Their-Own-Words-Impact-of-Covid-19-on-DREAMers.pdf>.

²⁶ *Id.* at 10.

²⁷ *Id.* at 7-8.