

 **December 8, 2020**

**Topics:** [Education Abroad](#), [International Students and Scholars](#), [Regulatory Information](#)

**Sub Topics:**

[International Students and Schools](#), [U.S. Immigration Systems](#), [Data, Status, and Concepts](#), [Visas](#), [Travel](#), [Entry](#)

## Current Status of DACA

On December 4, 2020, the U.S. District Court for the Eastern District of New York ruled that Chad Wolf "was without lawful authority to serve as Acting Secretary of DHS," and that as such, "the [Wolf Memorandum](#) is VACATED. In light of the vacatur, all parties agree that the DACA program is currently governed by its terms as they existed prior to the [attempted rescission of September 2017](#)." The case is *Batalla Vidal, et al. v. Nielsen, et al.*, Case # 1:16-cv-04756. [Read the judge's December 4, 2020 order](#).

Also, "in addition to vacating the Wolf Memorandum, the court orders the following relief:

DHS is DIRECTED to post a public notice, within 3 calendar days of this Order, to be displayed prominently on its website and on the websites of all other relevant agencies, that it is accepting first-time requests for consideration of deferred action under DACA, renewal requests, and advance parole requests, based on the terms of the DACA program prior to September 5, 2017, and in accordance with this court's Memorandum & Order of November 14, 2020. The notice must also make clear that deferred action and employment authorization documents ("EADs") granted for only one year are extended to two years, in line with the pre-Wolf Memorandum policy. The Government shall provide a copy of the notice to class counsel and to State Plaintiffs, and post it to the docket within 3 calendar days of this Order."

On December 7, 2020, [DHS posted the following news update](#):

"On December 4, 2020, Judge Garaufis required the Department of Homeland Security (DHS) to take certain actions to implement his November 14 opinion. As a result, effective December 7, 2020, U.S. Citizenship and Immigration Services (USCIS) is:

Accepting first-time requests for consideration of deferred action under Deferred Action for Childhood Arrivals (DACA) based on the terms of the DACA policy in effect prior to September 5, 2017, and in accordance with the Court's December 4, 2020, order;

Accepting DACA renewal requests based on the terms of the DACA policy in effect prior to September 5, 2017, and in accordance with the Court's December 4, 2020,

order;

Accepting applications for advance parole documents based on the terms of the DACA policy prior to September 5, 2017, and in accordance with the Court's December 4, 2020, order;

Extending one-year grants of deferred action under DACA to two years; and

Extending one-year employment authorization documents under DACA to two years.

USCIS will take appropriate steps to provide evidence of the one-year extensions of deferred action and employment authorization documents under DACA to individuals who were issued documentation on or after July 28, 2020, with a one-year validity period under the Wolf Memorandum.

DHS will comply with Judge Garaufis' order while it remains in effect, but DHS may seek relief from the order."

NAFSA encourages members to advise DACA students to seek the counsel of an experienced immigration lawyer or [recognized/accredited organization or representative](#) regarding their DACA eligibility and filings. For students at schools that do not maintain a list of immigration lawyers, the American Immigration Lawyers Association (AILA) web tool at [www.aialawyer.org](http://www.aialawyer.org) can be a good place to look for an immigration lawyer."

## Background on DACA prior to December 4, 2020

On September 5, 2017, the Trump administration rescinded DACA, providing a six-month period to "wind down" the program.

A [September 5, 2017 memo](#) by DHS Acting Secretary Elaine C. Duke officially rescinded the [June 15, 2012, memorandum](#) that created the DACA program.

Due to federal court orders on [Jan. 9, 2018](#) and [Feb. 13, 2018](#), USCIS resumed accepting requests to renew a grant of deferred action under DACA.

On June 18, 2020, the U.S. Supreme Court (SCOTUS) [released its opinion](#) in the *Department of Homeland Security et al. v. Regents of the University of California et al.* case, holding that [the 2017 memo](#) by the Department of Homeland Security (DHS) that rescinded DACA was "arbitrary and capricious" under the Administrative Procedure Act and remanding the issue back to DHS for the agency to consider anew the "conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients."

[Read the SCOTUS decision](#)

[Read NAFSA's Statement](#): NAFSA Celebrates Supreme Court Decision Protecting DACA; Calls on Congress to Pass the Dream Act

On July 28, 2020, a [DHS memorandum issued by Chad Wolf](#) issued by Chad Wolf rescinded the September 5, 2017 Duke memo, but instituted the following restrictions as Chad Wolf continued

his full "de novo" reconsideration of the DACA policy as directed by the U.S. Supreme Court's June 18, 2020 decision:

Reject all initial DACA requests and associated applications for Employment Authorization Documents, and refund all associated fees, without prejudice to re-filing such requests should DHS determine to begin accepting initial requests again in the future.

Adjudicate all pending and future properly submitted DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries.

Limit the period of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum (and thereby limit the period of any associated work authorization) to one year.

Refrain from terminating any grants of previously issued deferred action or revoking any Employment Authorization Documents based solely on the directives in this memorandum for the remaining duration of their validity periods.

Reject all pending and future Form I-131 applications for advance parole from beneficiaries of the DACA policy and refund all associated fees, absent exceptional circumstances.

Refrain from terminating any grants of previously approved advance parole based solely on the directives in this memorandum for the remaining duration of their validity periods. Exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

Continue to comply with the information-sharing policy as reflected in the DACA Frequently Asked Questions issued alongside the Napolitano Memorandum, and as set forth in USCIS's Form I-821D instructions. Nothing in this memorandum makes any change to that policy.

On August 24, 2020, USCIS announced [August 21, 2020 implementing guidance](#) titled *Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum, "Reconsideration of the June 15, 2020 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.'"* The [August 24, 2020 news alert](#) summarizes the August 21, 2020 implementing guidance as follows:

"Under USCIS' [implementing guidance](#), we will reject all initial DACA requests from aliens who have never previously received DACA and return all fees. The rejections will be without prejudice, meaning aliens will be able to reapply should USCIS begin accepting new requests in the future from aliens who never before received DACA. USCIS will continue to accept requests from aliens who had been granted DACA at any time in the past and will also accept requests for advance parole that are properly submitted to the address specified on the Direct Filing Addresses for Form I-131 webpage.

For approvable DACA renewal requests, USCIS will limit grants of deferred action and employment authorization under DACA to no more than one year, but will not rescind any currently valid two-year grants of DACA or associated employment authorization documents (EADs), unless USCIS terminates an alien's DACA for failure to continue to meet the DACA criteria (see 2012 Memorandum), including failure to warrant a favorable exercise of prosecutorial discretion. USCIS will replace two-year EADs that are lost, stolen or damaged with the same facial two-year validity period assuming the EAD replacement application is otherwise approvable.

USCIS will generally reject requests received more than 150 days before the current grant of DACA expires. DACA recipients should file their renewal request between 150 and 120 days before their current grant of DACA expires. USCIS will only grant advance parole for travel outside the United States to DACA recipients pursuant to the new guidance, which provides for a determination that parole of the alien is for urgent humanitarian reasons or significant public benefit in keeping with the governing statute. The agency will not rescind any previously granted advance parole documents unless there is another legal reason to do so. However, as has always been the case, parole into the United States is not guaranteed. In all cases, aliens are still subject to immigration inspection at a port-of-entry to determine whether they are eligible to come into the United States.

The determination whether to grant advance parole to an alien is entirely within the discretion of USCIS and must be made on a case-by-case basis. USCIS will review all the factors presented in individual cases before determining whether to approve advance parole for a DACA recipient based on the new guidance. Some examples of circumstances that may warrant approval include, but are not limited to, situations such as:

Travel to support the national security interests of the United States;

Travel to support U.S. federal law enforcement interests;

Travel to obtain life-sustaining medical treatment that is not otherwise available to the alien in the United States; or

Travel needed to support the immediate safety, wellbeing or care of an immediate relative, particularly minor children of the alien.

Even if a requestor establishes that their situation meets one of the examples above, USCIS may still deny the request for advance parole in discretion under the totality of the circumstances.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA."

On November 14, 2020, the U.S. District Court for the Eastern District of New York [granted the plaintiffs' motion for summary judgment](#) against DHS regarding the [July 28, 2020 memorandum](#) signed by Acting Secretary Chad F. Wolf. The court found that that "Mr. Wolf was not lawfully serving as Acting Secretary of Homeland Security under the HSA when he issued the Wolf Memorandum."

On December 4, 2020, Judge Garaufis ordered the Department of Homeland Security to take action to implement his November 14, 2020 decision, [and ordered DHS](#) to reinstate the DACA policy that was in effect on September 4, 2017.

## DACA Students and Study Abroad

Prior to the September 5, 2017 rescission of DACA, DHS had been approving applications for travel authorization called *advance parole*, which DACA students could use to travel abroad for "education, humanitarian and work purposes," including participating in study abroad programs. The [September 5, 2017 DACA rescission memo](#) impacted DACA advance parole in the following ways:

DHS stated it will "generally honor" previously approved DACA advance parole for the stated validity period, but noted that CBP retains its authority to determine the admissibility of anyone presenting themselves at a U.S. port of entry, and that USCIS retains the right to revoke or terminate an advance parole document at any time

USCIS will not approve any new Form I-131 applications for DACA advance parole received after September 5, 2017

Will administratively close all pending Form I-131 applications for DACA advance parole not approved before September 5, 2017, and refund the applicant's filing fee

DHS's [July 28, 2020 memorandum](#) directed DHS to "Reject all pending and future Form I-131 applications for advance parole from beneficiaries of the DACA policy and refund all associated fees, absent exceptional circumstances." USCIS's [August 21, 2020 policy guidance](#) then clarifies that advance parole for DACA recipients would be considered only on a discretionary, totality of the circumstances basis, under the standards of INA 212(d)(5), "which mandates a case-by-case assessment and a termination that parole of the alien is for urgent humanitarian reasons or significant public benefit." The [August 21, 2020 policy guidance](#) gave the following examples of circumstances that may warrant approval of advance parole for DACA recipients:

"Travel to support the national security interests of the United States including U.S. military interests;

Travel in furtherance of U.S. federal law enforcement interests;

Travel to obtain life-sustaining medical treatment that is not otherwise available to the alien in the United States;

Travel needed to support the immediate safety, well-being, or care of an *immediate* relative, particularly minor children of the alien."

The memo then stated that under this standard "in most instances, traveling abroad for educational purposes, employment related purposes, or to visit family members living abroad will not warrant advance parole," and that "travel for vacation is not a valid basis for advance parole" for DACA recipients.

The [December 4, 2020 decision](#) by Judge Garaufis of the U.S. District Court for the Eastern District of New York ordered DHS to full reinstitute DACA, including adjudications of applications for advance parole based on the terms of the DACA policy prior to September 5, 2017.

DACA advance parole adjudication reentry to the United States could never be guaranteed, even with advance parole authorization and the approval of a university or education abroad office. NAFSA strongly encourages advisers to recommend that DACA students seek the advice of an immigration attorney to weigh this risk before departing the United States on a study abroad program. DACA students with an approved grant of advance parole who are currently abroad or are considering traveling abroad should also consult with their immigration lawyer about returning to or departing the United States.

## Considering options for the future

What's in store for the future for DACA students? Since the outset of the DACA program, NAFSA has encouraged members to advise students interested in DACA benefits to seek the counsel of an experienced immigration lawyer. That advice is even more important now. An experienced immigration lawyer can help sift through possible scenarios, weigh risks, and evaluate the person's individual situation.

DACA students may also be concerned about whether the information they provided as part of their DACA applications will be used for enforcement purposes once their DACA benefits end. You may want to share the following [DHS FAQs](#) with students to discuss with their lawyer:

*Q7: Once an individual's DACA expires, will their case be referred to ICE for enforcement purposes?*

*A7: Information provided to USCIS in DACA requests will not be proactively provided 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' Notice to Appear guidance ([www.uscis.gov/NTA](http://www.uscis.gov/NTA)). 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.

*Q8: Will USCIS share the personal information of individuals whose pending requests are denied proactively with ICE for enforcement purposes?*

*A8: Generally, information provided in DACA requests will not be proactively provided to other law enforcement entities (including ICE and CBP) for the purpose of immigration enforcement proceedings unless the requestor poses a risk to national security of public safety, or meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria. 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.*

There are also efforts to pass a statute that would protect DACA recipients and DACA-eligible individuals. NAFSA is supporting passage of the Dream Act and similar bills. Get involved now by encouraging your representatives in Congress to vote in favor of the Dream Act.

## **Basic DACA Eligibility Criteria (for reference purposes)**

The information presented below has been collected to provide clear information to NAFSA members and other international education professionals regarding the DACA program. The information is not intended to constitute legal advice and should not be relied upon as such. Please note that while NAFSA aims to help student advisers become aware of how the DACA program works, individuals who wish to assess their eligibility or to renew DACA benefits should be counseled to consult an experienced immigration lawyer or [recognized/accredited organization or representative](#) for legal advice or for legal assistance in applying for any DACA benefit.

Under the program, starting August 15, 2012 qualified individuals became eligible to request DACA consideration if they:

- Were under the age of 31 as of June 15, 2012;
- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since June 15, 2007, up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of making their request for consideration of deferred action with USCIS;
- Entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012;

Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and  
Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.  
Are at least 15 years of age at the time of applying for DACA benefits (some exceptions apply)

DACA benefits are granted in increments of two years. Remember, though, that deferred action is a discretionary benefit for individuals who would otherwise be removable from the United States. USCIS will decide applications on a case-by-case basis. Although student advisers may wish to be generally aware of how the program works, individuals who wish to assess their eligibility for DACA-related benefits should be counseled to consult an experienced immigration lawyer or [recognized/accredited organization or representative](#) for legal advice or for legal assistance. Individuals should also be aware of immigration scams. USCIS urges individuals to visit [www.uscis.gov/avoidscams](http://www.uscis.gov/avoidscams) for tips on filing forms, reporting scams and finding accredited legal services. Advisers may also want to direct people to the American Immigration Lawyers Association's (AILA) [AILA Consumer Advisory: Deferred Action for Certain Young Immigrants: Don't Get Scammed!](#)



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