

Frequently Asked Questions:

DAPA, Expanded DACA, and the Court Injunction

The U.S. Citizenship and Immigration Service (USCIS) had planned to begin accepting applications for the expanded Deferred Action for Childhood Arrivals (DACA) program on February 18, 2015. Unfortunately, DHS has temporarily delayed the launch of expanded DACA due to a federal court decision halting its implementation. The court's injunction also temporarily blocked implementation of the new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program that was slated to begin this May.

While the federal government has asked the Fifth Circuit of Appeals to stay the district court's temporary injunction, we do not yet know how long we will have to wait for a final decision. The Department of Justice, legal scholars, and immigration experts believe that the federal government had the legal authority to expand DACA and create DAPA through executive action, and anticipate that the courts will ultimately uphold the legality of both programs. In the meantime, what does this mean for people gearing up to apply for expanded DACA and DAPA?

What is the lawsuit about?

The lawsuit, *State of Texas, et al v. United States*, was filed in December 2014 by 26 states and challenged two aspects of the immigration initiatives that President Obama announced on November 20, 2014. Specifically, the states alleged that the expanded DACA and DAPA programs were created in violation of the law and will cause economic injury to the states that must finance the education, protection, and issuance of driver's licenses to future recipients of deferred action under these programs.

What was the federal court's decision?

On February 16, 2015, the federal district court in Brownsville, Texas issued a preliminary injunction temporarily blocking the expansion of DACA and the implementation of DAPA. The ruling did not find that these programs may be unconstitutional. Rather, the judge's narrow holding found that the federal government might have violated procedural requirements under the Administrative Procedure Act by not using formal rulemaking procedures in creating these initiatives.

How did the Department of Homeland Security respond to the injunction?

On February 17, 2015, Department of Homeland Security (DHS) Secretary Jeh Johnson issued a [statement](#) expressing his disagreement with the temporary injunction and confirming the Department of Justice's intention to challenge the decision. In the meantime, in order to comply with the injunction, DHS announced that it would not begin accepting applications for expanded DACA on February 18, as originally planned. DHS also indicated that it would temporarily suspend plans to accept DAPA requests until a court confirms that these programs are within the legal authority of the federal government.

Resource updated 3/31/15.

Does the injunction impact all executive actions on immigration announced by the President on November 20, 2014?

No, the injunction only impacts DAPA and expanded DACA. It does not block any other changes to immigration policies announced by the President last November and laid out through various [DHS memoranda](#). For example, plans to expand the use of provisional waivers of unlawful presence and the existing “parole in place” program for individuals with family members in the U.S. Armed Forces, issue guidance clarifying advance parole, and replace Secure Communities with the Prioritized Enforcement Program are unaffected by the court case. Likewise, the lawsuit does not impact the new immigration enforcement priorities that went into effect on January 5, 2015.

How soon can we expect a court to reverse the injunction and permit DHS to launch expanded DACA and resume preparations for DAPA?

This depends. The litigation is currently proceeding on different levels. First, the original lawsuit challenging expanded DACA and DAPA continues in the district court in Texas. It could take months, even years, for a final decision to be reached. In the meantime, the Department of Justice (DOJ) has requested that the higher court – the Fifth Circuit Court of Appeals – halt the injunction and allow expanded DACA and DAPA to go forward while the underlying lawsuit proceeds. An oral argument on DOJ’s request for an emergency stay (reversal) of the injunction is scheduled for April 17. If the 5th Circuit decides to lift the injunction, DHS could immediately begin implementing both programs while the lower court case continues. This could occur as soon as this May. However, if either side appeals to the Supreme Court, it could take until sometime next year for expanded DACA and DAPA implementation to begin.

How does the injunction impact clients who want to apply for DACA?

The temporary injunction does not affect the original DACA program that was created in 2012. Anyone who meets the program’s criteria established in 2012 may continue to apply – both first-time applicants as well as DACA recipients who seek to renew their deferred action and employment authorization. However, clients who were hoping to apply for DACA under the expanded criteria announced on November 20, 2014 are not yet eligible to apply. USCIS has stated its intention to begin accepting applications for expanded DACA as soon as the courts issue a favorable decision allowing for the program’s implementation. Continue to check CLINIC’s [website](#) and the USCIS [website](#) for updates.

How should I advise clients who already have DACA and want to renew?

Clients granted DACA under the program’s 2012 criteria may continue to renew their deferred action and employment authorization using [Form I-821D](#). Beginning November 20, 2014, USCIS began granting DACA and work permits to initial and renewal applicants in three-year increments. DACA recipients already granted three-year work permits may continue to use them. However, following the injunction, USCIS reverted to issuing two-year grants of deferred action and work authorization until a court overturns the decision.

What should I advise clients who want to apply for expanded DACA?

Clients who qualify for expanded DACA should continue to gather documents necessary to show they meet the DACA criteria and save money for the \$465 application fee. As soon as a court decision permits USCIS to launch the expanded DACA program, clients may apply. Remember that USCIS will be releasing a new Form I-821D that reflects the November 20, 2014 changes to DACA eligibility. While there will likely be a grace period during which the old I-821D will be accepted, you may want to hold off on completing the application form until USCIS releases the new one.

You may have heard that USCIS published revised Frequently Asked Questions and updated I-821D instructions on February 11, 2015 in anticipation of its plan to begin accepting applications for expanded DACA on February 18. Following issuance of the injunction, these two sets of guidance were removed from the USCIS website. For now, the [previous FAQs](#) and [instructions](#) remain in effect.

If you have a client in removal proceedings or detained, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) officers have been instructed since November 20, 2014 to review these cases to identify individuals who may be eligible for expanded DACA or DAPA, and exercise prosecutorial discretion, which may include seeking administrative closure or termination of proceedings. The [ICE Executive Action website](#), however, instructs individuals in proceedings to identify themselves as eligible for DACA or DAPA, so we recommend that you affirmatively contact an ICE officer or the trial counsel to request termination of proceedings or administrative closure. Also, remember that clients may still request deferred action, more generally, under the process that has existed before DACA was created by submitting a request to the relevant DHS agency.

What should I advise clients who want to apply for DAPA?

Clients who may be eligible for DAPA should continue to gather documents necessary to show they meet the DAPA criteria and save money for the \$465 application fee. The federal government anticipates that the court will ultimately uphold the legality of the DAPA program and DHS will continue to prepare for a timely implementation of DAPA as soon as that happens. Depending on how long it takes for the injunction to be overturned by the district court or a higher court, DAPA may or may not be able to launch in May of 2015 as originally planned. However, clients should be prepared to file their applications as soon as the time comes. As noted above, ICE and CBP officials have been instructed to identify individuals who are detained or in proceedings and appear to be eligible for DACA or DAPA, and to exercise prosecutorial discretion, including seeking administrative closure or termination of proceedings. The injunction did not affect which groups of individuals ICE, CBP, and USCIS considers to be priorities for enforcement under the November 20, 2014 DHS Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented Immigrants that has been in effect since January 5, 2015. Because DAPA eligibility is tied to not falling within an enforcement priority category, you need to be prepared to argue that your client is not included in one of these categories as part of requesting an exercise of prosecutorial discretion in your client's favor.

What specific actions can potential DAPA clients take now to get ready?

Remind clients who may qualify for DAPA that the injunction is only temporary and that they should use this time to prepare as thoroughly as possible. Advise clients to begin gathering the documentation they will likely need to prove eligibility for the program including: their identity; proof of parentage; the child's status as either a US citizen or lawful permanent resident; continuous residence from January 1, 2010 to the present; and physical presence in the U.S. on November 20, 2014. They may also want to begin making a list of all residence addresses since January 1, 2010 as well as all trips taken outside the U.S. since their initial entry. Ask clients for any records related to prior immigration violations including apprehensions at the border as well as records of any arrests, citations, jail time, detentions, and court proceedings. [Click here](#) for a customizable checklist of documents that you can provide to clients. If your client's immigration history or criminal record history is not clear, consider filing Freedom of Information Act (FOIA) requests or FBI record requests as early as possible so that you will have the information you need by time DAPA is implemented. Finally, remind clients not to leave the country without permission, not to seek advice from unauthorized practitioners, and to check back with you for updates on when DAPA implementation will resume.