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DACA in 2018: Renewals Continue, but the Legality of the Program is Still up in the Air

Marianna C. Januario^[1]

Deferred Action for Childhood Arrivals (DACA), has been a prominent feature in the news for the past several years. DACA was created by President Obama's executive order in June 2012.^[2] Since his presidential campaign Trump has been threatening to end the DACA program, and in September 2017, the program was terminated.^[3] However, things are not that simple.

First, it is important to understand what the DACA program actually is. There seems to be confusion as to what DACA is and what rights it affords its recipients. In its most simple terms, DACA is not a legal status.^[4] DACA is



Contact Us

620 S. Limestone
40508 Lexington, Kentucky

editors@kentuckylawjournal.org

(859) 257-1678



merely an agreement between the applicant and the U.S. government that indicates the applicant is illegally in the U.S., and the U.S. government is going to defer deporting them.[5] There are several requirements that must be met in order to request DACA, such as his/her age and date of arrival, length of residency, completion of schooling, and limits on criminal records (including no felonies or significant misdemeanors).[6] DACA must be renewed every two years and the applicant must prove they still qualify for the program.[7] One of the main criticisms of DACA has been that it encourages minors to illegally enter the US.[8] However, no arrivals after June 15, 2007 are eligible for the program.[9] The main benefit of DACA is receipt of a social security number and authorization to legally work[10].

Now, back to the termination of DACA. The September 2017 termination plan was to stop accepting new DACA applications immediately, but allow those with current DACA permits which were set to expire before March 5, 2018 to apply for renewal if they did so before October 5, 2017.[11] The DACA program was set to expire completely by March 5, 2020.[12] After the termination was announced, multiple lawsuits challenged the Trump administration's actions. Two federal courts, the Eastern District Court of New York (February 13, 2018) and the Northern District Court of California (January 9, 2018), issued preliminary injunctions against the government's termination of DACA and required U.S. Citizenship and Immigration Services (USCIS) to resume accepting DACA renewals.[13] In addition, the U.S. District Court for the District of Columbia has issued two separate orders striking down the termination of DACA and requiring its renewal.[14] However, the D.C. Court has partially stayed its order, postponing the day by which USCIS would have to begin accepting new, as well as renewal, applications for DACA.[15] Due to this litigation, USCIS is currently accepting applications for DACA renewals, but is still not accepting applications for new DACA permits.[16]

Currently, the most important case to arise under DACA has been *Texas v. Nielsen*, in which Texas along with Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia filed suit against the federal government in the U.S. District Court for the Southern District of Texas challenging the original 2012 DACA program.[17] This case was brought in May 2018 and raises the same legal claims of 2015's *Texas v. United States*[18], and claims that DACA is illegal as a violation of substantive and procedural requirements of the Administrative Procedure Act and the Take Care Clause of the U.S. Constitution.[19] Plaintiffs had already threatened to sue the federal government if DACA was not terminated by September 5, 2017.[20] This case was filed in retaliation to the injunctions ordered by the New York, California, and D.C. courts earlier this year, which plaintiffs argue could indefinitely extend DACA.[21] The plaintiffs also filed a motion for

preliminary injunction to prevent USCIS from accepting any DACA applications during the pendency of the lawsuit.[22] On August 31, 2018, Judge Hanen issued an order denying the request for preliminary injunctive relief.[23] This is not an adjudication on the claims plaintiffs filed against DACA. Judge Hanen’s reasons for denying the injunctive relief are twofold: (1) there has been an almost four-year delay between the decision in *Texas v. United States*, and the filing of this suit;[24] and (2) there is already a great reliance on the program and to try to un-do DACA with only an injunctive order would be a “great risk to many” and “does not make sense nor serve the best interests of this country.”[25] Ultimately, given the delay in bringing suit against DACA, the interests of the defendants and the public outweigh those of the plaintiffs.[26]

This is not to say that Judge Hanen will uphold DACA. In fact, in his order, the judge states that a true DACA program can only be created by Congress.[27] In *Texas*, the Court did not rule on the legality of DACA;[28] the Courts in that case sustained the legal challenges to the DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) Program and other expansions to the DACA program.[29] However, Judge Hanen also points out that “DACA and DAPA are basically identical, and there is no legal ground for ‘striking DAPA that wouldn’t apply to DACA’ (and certainly no legal ground for striking Expanded DACA that does not apply to DACA itself).”[30] Based on Judge Hanen’s comments in this order, it is very possible that in the near future DACA will be officially terminated. If that happens, the only way to resurrect DACA would be through Congressional action, and in today’s political climate, it does not seem likely that any immigration reform would successfully make its way through Congress.

[1] Staff Editor, *Kentucky Law Journal*, Volume 107; J.D. Candidate, The University of Kentucky College of Law (2020); B.A., Smith College (2017).

[2] *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> (last visited Oct. 3, 2018) [hereinafter DACA].

[3] Adam Edelman, *Trump Ends DACA Program, No New Applications Accepted*, NBC NEWS (Sept. 5, 2017), <https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686>.

[4] DACA, *supra* note 2.

[5] *Id.*

[6] *Id.*

[7] Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. DEP'T OF HOMELAND SEC. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; *Renew Your DACA*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/renew-your-daca> (last visited Oct. 3, 2018).

[8] Linda Qiu, *Why Common Critiques of DACA Are Misleading*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/us/politics/why-common-critiques-of-daca-are-misleading.html>.

[9] DACA, *supra* note 2.

[10] *Id.*

[11] Edelman, *supra* note 3.

[12] *Id.*

[13] *Status of Current DACA Litigation*, NAT'L IMMIGR. L. CTR. 1, <https://www.nilc.org/wp-content/uploads/2018/02/Status-of-Current-DACA-Litigation-2018.pdf> (last updated Sept. 6, 2018); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018); *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

[14] *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.C. Cir. 2018); Memorandum Opinion, *Trustees of Princeton Univ. v. United States*, 1:17-CV-02325 (D.C. Cir. Apr. 29, 2018).

[15] *Status of Current DACA Litigation*, *supra* note 13, at 1.

[16] DACA, *supra* note 2.

[17] See Memorandum Opinion and Order at 1, *Texas v. Nielsen*, No. 1:18-CV-00068 (S.D. Tex. Aug. 31, 2018).

[18] See generally *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (This case was appealed to the 5th Circuit and Supreme Court as *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) then, *United States v. Texas*, 136 S. Ct. 2271 (2016). Both Courts upheld the decision of the Southern District Court of Texas.).

[19] Memorandum Opinion & Order, *supra* note 17, at 1.

[20] *Status of Current DACA Litigation*, *supra* note 13, at 6.

[21] *Id.*

[22] *Id.*

[23] Memorandum Opinion & Order, *supra* note 17, at 117.

[24] *Id.* at 115.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 117.

[28] *Id.* at 115.

[29] *Id.* at 116.

[30] *Id.* at 115.

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