



white paper

DEFERRED ACTION FOR CHILDHOOD ARRIVALS: A PRIMER FOR EMPLOYERS CONDUCTING EMPLOYMENT VERIFICATIONS

Even though ruled unlawful by a Federal Court,
DACA recipients retain the ability to work.



I. WHAT IS DACA?

The Deferred Action for Childhood Arrivals (DACA) program allows certain individuals brought to the United States as children and residing here without lawful status to remain in the United States and apply for work authorization, so long as certain requirements are met.¹ DACA has been the source of extensive litigation.

Most recently, the U.S. District Court for the Southern District of Texas held that the policy is illegal.² The Court entered an injunction prohibiting further administration of the policy, but stayed that order with respect to individuals who were granted DACA prior to July 16, 2021, including renewal requests.³ On September 28, 2021, the Department of Homeland Security published a Notice of Proposed Rulemaking which would formalize the DACA program.

As of September 30, 2020, there were approximately 641,000 active DACA recipients.⁴ From January 10, 2018 through September 30, 2020, approximately 930,000 DACA

applications had been filed, and approximately 869,000 were approved.⁵ Less than 10,000 had been denied.⁶ It is estimated that there are approximately 1.3 million DACA-eligible individuals in the United States. Based on the above statistics, the program has been extremely popular.

II. HOW DOES IT IMPACT EMPLOYERS?

The DACA program impacts employers in many ways and creates unique compliance issues that must be considered. A DACA recipient may apply for work authorization, and if approved, is able to legally work in the United States. That work authorization does expire and therefore the employee's work authorization must be reverified. Because many DACA recipients lacked work authorization, some may have worked under fictitious identities or used fraudulent documents to satisfy the Form I-9 employment eligibility requirements. As a result, employers may be confronted with situations where an employee may seek to regularize their employment records after receiving work authorization through DACA. If you participate in the E-Verify program a case must be created for a DACA recipient. Individuals who receive work authorization through the

¹ Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP), et al. (June 15, 2012), [dhs.gov/https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf](https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf).

² *Texas v. United States*, No. 1:18-cv-00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021) (memorandum and order).

³ *Id.* On September 17, 2021, the DHS appealed Judge Hanen's ruling. *Texas v. United States*, No. 1:18-cv-00068, *appeal docketed*, No. 21-40680 (Sept. 16, 2021).

⁴ USCIS, *Approximate Active DACA Recipients: As of September 30, 2020*, available at: https://www.uscis.gov/sites/default/files/document/data/DACA_Population_and_Receipts_since_Injunction_Jan_31_2018.pdf.

⁵ *Id.* at 3.

⁶ *Id.*

DACA program are subject to the anti-discrimination provisions of the Immigration and Nationality Act and anti-discrimination provisions of various state laws.

III. FORM I-9 ISSUES

A Form I-9 must be completed for any person who provides labor or services in the United States in return for wages or other remuneration after November 6, 1986.⁷ Section 1 of the Form I-9 must be completed at the time of hire, which means before the end of the first business day of work.⁸ Section 2 of the Form I-9 must be completed within three business days of hire and can be completed by an employee of the company, an agent of the company, or a third-party authorized representative.⁹ DACA recipients are no different in this regard.

a. Initial Verification

DACA beneficiaries who are granted work authorization are issued a Form I-766, Employment Authorization Document (EAD).¹⁰ This EAD has a category code of C-33. Employers are reminded that they must accept any document presented by the employee so long it is listed on the List of Acceptable Documents and appears to be genuine and relates to the employee.¹¹ The Department of Justice recently issued “Reminders for Employers on Hiring New Employees,”¹² which included:

- Employers generally should not ask job applicants or employees for their specific immigration status;
- DACA recipients do not have to tell employers their immigration status;
- When hiring a new employee, employers are required to verify the employee’s identity and authorization to work, not their immigration status;
- That employers must accept documentation that reasonably appears to be genuine and to relate to the employee, and cannot reject documents because of a future expiration date;
- Employers that treat employees differently based on citizenship, immigration status, or national origin are subject to penalties, including back pay.

In short, the process of identity and work authorization verification of a DACA beneficiary is nearly identical to any other initial verification and should be treated as such. Many times, the individual completing Section 2 of the Form I-9 will not even know that the employee is a DACA beneficiary.

⁷ Form M-274 at § 2.0; 8 C.F.R. § 274.2(b).

⁸ 8 C.F.R. § 274.2(b)(1)(i)(A)(i). See also *U.S. v. Curran Eng’g Co., Inc.*, 7 OCAHO no. 975, at 17 (1997).

⁹ 8 C.F.R. § 274.2(b)(1)(ii). See also *Curran Eng’g*, 7 OCAHO no. 975, at 17.

¹⁰ 85 Fed. Reg. at 53756.

¹¹ 8 C.F.R. § 274a.2(b)(1)(ii)(A).

¹² U.S. Department of Justice, Immigrant and Employee Rights Section, *Reminders for DACA Recipients and Employers*, available at: <https://www.justice.gov/crt/reminders-daca-recipients-and-employers>.



b. Reverification

DACA beneficiaries are issued EADs that only grant work authorization for a finite period of time and as such a DACA beneficiary's work authorization must be timely reverified. Note that nothing in the Southern District of Texas decision compels employers to reverify or otherwise audit their Forms I-9 prior to an individual employee's expiration date.¹³

As a reminder, reverification is required when an employee's employment authorization or employment authorization documentation expires.¹⁴ This date can be found in Section 1 (alien authorized to work until) and Section 2 (expiration date for the employment authorization document). Employers should not reverify: U.S. citizens or noncitizen nationals, lawful permanent residents who presented a Form I-551, or any list B documents. An employee must present an unexpired List A or List C document showing authorization to work and reverification must be completed prior to the expiration of the prior grant of work authorization.¹⁵ Receipts for a lost, stolen, or damaged document are acceptable for reverification (but are

only valid for 90 days from the date the prior work authorization expired).¹⁶

c. False identity issues

When DACA was implemented, it was described as an attempt to bring aliens brought to the United States as children out of the shadows.¹⁷ Obtaining employment by using another's identity does not preclude an alien's eligibility for DACA. For many DACA beneficiaries, the EAD that comes with the program is the first legitimate work authorization they have ever had. Prior to receiving work authorization through DACA, an employee may have used an alias or fraudulent documents to fulfill the employment eligibility verification requirements. Many employers may be faced with a situation where a DACA beneficiary seeks to "legitimize" their employment situation by now using their real identity. This presents a multitude of problems for employers.¹⁸ Luckily, for employers, the USCIS Form I-9 handbook contemplates this very situation.

USCIS advises that when an employee seeks to use their true identity, the employer should complete a new Form I-9 with the original hire date in section 2 and attach the new Form I-9 to the

previously completed Form I-9 (the one that was completed using the fictitious identity).¹⁹ Employers should then include a written explanation of the situation that is signed and dated.²⁰ The written explanation should be attached to both Forms I-9.²¹ A new case should be created in E-Verify.²²

USCIS goes on to note that "[i]n cases where an employee has worked for you using a false identity but is currently authorized to work, Form I-9 rules do not require termination of employment" and that the INA may prohibit termination in these situations if it is found to be "based on citizenship status [or] national origin."²³

IV. E-VERIFY ISSUES

Employers are reminded that if they participate in the E-Verify program, they must consistently create a case in E-Verify for each new hire, regardless of the employee's citizenship, immigration status, or national origin.²⁴ Failure to comply can result in loss of E-Verify privileges and civil fines and penalties. Loss of E-Verify privileges can be disastrous for employers who are recipients of federal contracts or are located in a state that requires E-Verify use.

¹³ *Id.*

¹⁴ 8 C.F.R. § 274a.2(b)(1)(vii).

¹⁵ *Id.*

¹⁶ 8 C.F.R. § 274a.2(b)(1)(vi)(A).

¹⁷ Jim Acosta & Stephen Collinson, *Obama: You can come out of the shadows*, available at: <https://www.cnn.com/2014/11/20/politics/obama-immigration-speech/index.html>

¹⁸ Some, such as what to do if an employee reveals that he or she is in the process of "applying" for the DACA program, are outside the scope of this paper and employers are encouraged to consult competent immigration counsel on this issue.

¹⁹ Form M-274 at § 5.3.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ U.S. Department of Justice, Immigrant and Employee Rights Section, *Reminders for DACA Recipients and Employers*, available at: <https://www.justice.gov/crt/reminders-daca-recipients-and-employers>.

V. THE PROPOSED REGULATION

On September 28, 2021, the Department of Homeland Security published a Notice of Proposed Rulemaking which would formalize the DACA program.²⁵ While the proposed rule contains many of the same provisions outlined in the various DACA policy memos, it makes a few minor changes. First, it no longer requires an application for employment authorization (Form I-765) to be filed along with the application for DACA (Form I-821D). Second, the proposed regulation would create a specific section in the Code of Federal Regulations granting work authorization to DACA recipients.²⁶ Currently, work authorization for DACA recipients is granted under 8 C.F.R. § 274a.12(c)(14), the provision granting work authorization to individuals granted deferred action.²⁷ A new provision would mirror the current provision, but be specific to DACA recipients.²⁸ This would not change the authorization code on the Employment authorization document (EAD), which currently lists C-33 and not C-14.²⁹

This Notice of Proposed Rulemaking is not the final rule. After receiving comments on the draft rule, DHS must now review each comment and respond accordingly. The Final Rule will then be published in the Federal Register.

VI. CONCLUSION

DACA, whether in its current form or through the proposed regulation, is here to stay. Employers must familiarize themselves with the Form I-9 implications of DACA and the relevant anti-discrimination provisions that can be inadvertently triggered when verifying and reverifying employees with DACA status.

***BIG** offers expert Form I-9 completion regardless of immigration or DACA status. Our staff of Form I-9 professionals and support staff stand ready to guide you through the process and answer any questions that may arise.*



²⁵ [85 Fed. Reg. 53736-53816](#)

²⁶ *Id.* at 53756.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at n.180.