

Biden Policy Gives Employers New Ways To Help Dreamers

By **Jennifer Kim** (July 18, 2024)

On June 18, the Biden administration announced a two-part administrative action that provides an opportunity for certain undocumented immigrants to transition to permanent residence or an employer-sponsored immigration status, securing a more stable future for those who qualify.[1]



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The first prong of the policy announcement will allow certain undocumented spouses of U.S. citizens to remain in the U.S. with their family during the legal permanent residence application process.

The second prong directs the U.S. Department of State to streamline the visa issuance process for Deferred Action for Childhood Arrivals beneficiaries and others, who have earned a higher degree at an accredited U.S. institution and who have an offer of employment from a U.S. employer in a field related to their degree.

In both instances, applicants must already qualify for the status they seek, but the policy potentially minimizes significant logistical barriers that have so far prevented many applicants from gaining a more secure immigration status.[2] The second policy in particular ensures that U.S. employers can retain DACA employees whose contributions benefit those companies and flow to local communities and the U.S.

The DACA program was established by executive action in 2012 by the Obama administration.[3] It was designed to protect from deportation young people, commonly referred to as Dreamers, who had been brought to the U.S. by their parents as minors.

Intended to serve as a stop-gap measure until Congress could pass a legislative solution, it provides temporary deportation protection and work authorization, with the possibility for renewal every two years. To date, a bipartisan immigration solution has failed to materialize and, in the years since it was first enacted, the program has faced an array of legal challenges.[4]

Contrasting White House Approaches

Notably, the Trump administration outwardly opposed DACA and announced that it would rescind the program as soon as it was up for renewal. A series of lawsuits aimed at stopping the rescission were joined, and ultimately, *Department of Homeland Security v. Regents of the University of California* was heard by the U.S. Supreme Court.[5] While the court allowed DACA to remain in place, its 2020 decision reiterated that the Trump administration and any future administrations may end the DACA program so long as they follow the proper procedures for doing so.

The Trump administration then went on to amend its procedural approach with the aim of unraveling the DACA program for good. Again, more legal challenges were raised, which led to a 2021 ruling by the U.S. District Court for the Southern District of Texas in *State of Texas v. U.S.* holding that the DACA program was unlawful and granting a permanent injunction, preventing U.S. Citizenship and Immigration Services from approving any new DACA applications.[6]

The injunction was temporarily stayed, which allowed current DACA holders already reliant on the program to extend their protection, but no new DACA applications have been processed since 2021. At its peak, DACA provided more than 800,000 eligible participants with work authorization, access to higher education and deferred deportation, but the number has fallen to just over 500,000 as a result of that decision.[7]

In contrast, the Biden administration has been outwardly supportive of the DACA program, and continues to appeal the Texas decision while calling on Congress to codify DACA to protect Dreamers. However, the future of the DACA program has never been more uncertain, particularly with the Texas case likely to end up in front of the Supreme Court and the possibility of a second Trump presidency starting in 2025.

Therefore, the new Biden policy presents an opportunity for U.S. employers to aid DACA beneficiaries in the transition to a more secure, employer-sponsored immigration status amid these uncertainties.

D-3 Waiver Process

Many DACA recipients have been living in the U.S. for most of their lives, and DACA protections have afforded them opportunities to attend college, build careers and contribute to their communities. However, prior to this policy announcement, even if DACA recipients were qualified for an employer-sponsored immigration status, many were unable or unwilling to make the transition due to the significant financial, operational and personal risk involved in making that change.

To benefit from an approved employer-sponsored petition, most DACA recipients must leave the country, apply for and be granted a visa along with a waiver under the Immigration and Nationality Act, Section 212(d)(3), commonly called a "D-3 waiver," before they can reenter the country in their new status.

Because DACA provides deportation protection but not legal status, a D-3 waiver is required in order to overcome any applicable inadmissibility grounds and is often required due to the manner in which a recipient was initially brought into the country.

The D-3 waiver is an entirely discretionary process and can take six months or more for processing.[8] There is no guarantee that it will be approved and if it's not, an applicant is barred from reentering the U.S., potentially for up to 10 years. Because there is no way to apply for a waiver before departure and the U.S. Department of Homeland Security is afforded significant discretion, the process is entirely unpredictable and creates risks many employers and employees have been unwilling to take.

New Policy Means New Efficiencies

The new policy will provide considerably more efficiency and predictability to the process, allowing U.S. businesses to retain Dreamers who fill critical workforce needs. While the specifics have yet to be released, the State Department has stated it will release updated guidance in the Foreign Affairs Manual regarding the implementation in the coming weeks.[9]

It is anticipated that the updates will clarify when consular officers should recommend that the DHS grant a waiver of ineligibility and will encourage expedited review of waiver requests in certain instances. While the new policy does not remove all risk from the

process, by providing visibility and consistency to the waiver process, it will enable individuals and their employers to make more calculated decisions regarding their individual risk and open up an opportunity for more Dreamers to achieve a long-term, stable immigration status.

Next Steps for Employers

Employers that wish to support their DACA-recipient employees through this transition should take steps now to proactively determine which employer-sponsored visa options might be available. Because the new policy applies to those DACA recipients and Dreamers who have graduated from a U.S. college and have a high-skilled job offer, the H-1B, O-1, E-2, L-1, TN, or E-3 nonimmigrant visas may be potential options.

One of the most common work-sponsored options is the H-1B visa; however, the number of recipients is limited to 85,000 visas per year, subjecting applications to a highly competitive annual lottery process.

If an employee already holds a valid H-1B approval notice, they may be able to start the process of applying for an H-1B visa abroad as soon as the details of the new policy's implementation are published.

Alternatively, applicants that do not already have a valid H-1B approval must be entered into the lottery in April 2025. If selected, the earliest effective date would be October 2025.

Some employers are exempt from the H-1B visa limitation, including universities, nonprofits affiliated with universities, and nonprofit research or government organizations. Therefore, DACA beneficiaries who are employed at one of these exempt institutions may be eligible to apply for an H-1B visa without waiting for the lottery, providing a much swifter transition into H-1B status.

The O-1 visa category for individuals with extraordinary abilities has a high standard for approval, but it is not subject to a lottery and may be a potential option for beneficiaries who are employed in the sciences, education, arts or certain business professions.

Other options may include the E-2 visa, which is limited to nationals of certain countries, including Columbia, Mexico, Honduras and the Philippines, among others; the L-1 visa, if a DACA beneficiary is open to working at a related entity abroad for one year; or even the TN visa for Mexican and Canadian nationals, if the individual is able to establish ties to their home country.

Every applicant's immigration history and qualifications differ. A thorough assessment of each individual's options is necessary and recommended so that employers and employees have a clear path forward once the additional guidance is released.

Even if an employer-sponsored option is available, DACA recipients should continue submitting timely renewal requests to reduce the risk of gaps in the deportation protection or employment authorization that DACA affords.

The newly announced policy opened a door that has so far been closed to many DACA recipients. Given how politically charged the DACA program has been and will continue to be, there is no guarantee as to how long that door will be open. Employers and their employees should take proactive steps now so they can capitalize on this unique opportunity and maintain their critical DACA employees.

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[1] White House FACT SHEET: President Biden Announces New Actions to Keep Families Together. June 18, 2024. <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/18/fact-sheet-president-biden-announces-new-actions-to-keep-families-together/>.

[2] Background Press Call by Senior Administration Officials on New Actions to Address Our Broken Immigration System. June 17, 2024. <https://www.whitehouse.gov/briefing-room/press-briefings/2024/06/17/background-press-call-by-senior-administration-officials-on-new-actions-to-address-our-broken-immigration-system/>.

[3] <https://obamawhitehouse.archives.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered>.

[4] Status of Current and Prior DACA litigation: <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions>.

[5] Dep't of Homeland Sec. v. Regents of Univ. of Cal., No.18-587,591U.S.____ (2020).

[6] State of Texas, et al., v. U.S. of America, et al., 1:18-CV-00068, (S.D. Texas July 16, 2021) ("Texas II").

[7] https://www.uscis.gov/sites/default/files/document/reports/active_daca_recipients_fy2024_q2.xlsx.

[8] See INA 212(d)(3); Part A, Waiver Policies and Procedures, Chapter 5, Discretion [9 USCIS-PM A.5]; and Matter of Hranka (PDF), 16 I&N Dec. 491 (BIA 1978). For details on eligibility and discretionary factors.

[9] <https://travel.state.gov/content/travel/en/News/visas-news/easing-the-nonimmigrant-visa-process-for-u-s--college-graduates-.html>.