

# DACA, the Supreme Court and immigration changes



The Supreme Court has ruled on Deferred Action for Childhood Arrivals (DACA) as the term winds down. Meanwhile, the Trump administration has rolled out other immigration changes including limits to work visas, signaling strict enforcement. Employers now need to make sure they're following the rules lest they lose access to foreign workers. They'll also want to make sure they don't retain DACA workers with expired permits or terminate those with valid ones.

## **DACA's future**

When the Obama administration issued an executive order protecting some young adults from deportation, about 700,000 received a temporary reprieve. These individuals had entered the United States illegally with their parents as children – sometimes as infants. For many, this meant that they had no memory of their country of origin and grew up feeling American.

The DACA executive order allowed them to apply for residency/work permits. There were conditions. For one, applicants could have no significant criminal history. They also could not have left the country and again enter illegally. Those who met the conditions were issued renewable permits protecting them from deportation and allowing them to legally work. Of the estimated 700,000 eligible childhood arrivals, 643,430 held current permits as of March 31, 2020.

That all changed when the Trump administration revoked the executive order, citing it as an overreach of presidential power. If you employ or want to hire a (DACA) certificate holders, you should be on high alert. Once the Trump administration revoked the order, the American Civil Liberties Union and others sued and won deportation reprieves. The Trump administration then appealed to the U.S. Supreme Court. It accepted the case and held oral arguments in early November 2019. On June 18, 2020, it decided the case, giving those with valid permits a brief reprieve.

Here's how the case came down. The [vote was 5-4](#), with Chief Justice John Roberts penning the opinion. He was joined by Justices Stephen Breyer, Elena Kagan, Ruth Bader Ginsburg, and Sonia Sotomayor. They sidestepped whether the Obama executive order was legal and left that question for another day. Instead, they concluded that the way the Trump administration ended the program didn't follow the rules on revoking executive orders.

The decision essentially kicks the can down the road, sending it back to the Department of Homeland Security (DHS). That agency will now have to decide - at the White House's direction - whether to again revoke the original order. If so, they will have to follow the Administrative Procedures Act (APA) and provide a rationale for the decision. That rationale must meet the standard of not being arbitrary and capricious.

## **DACA actions to take now**

For now and likely until after the 2020 presidential election, DACA permits will remain valid unless a holder allows it to expire. DHS, as it was required to do during the litigation, continuously processes renewal applications.

Employers should take stock of how many DACA holders they have and when their certificates expire. As part of onboarding, employers are required to obtain copies of DACA permits before allowing new or returning employees to work. Check the I-9 information the workers provided.

Your DACA workers should keep [renewing their work permits](#). Estimates are that between October 1, 2019, and June 30 of 2020, about 232,000 DACA permits expire based on the issue date. They cannot apply for renewal until 150 days before the current certificate expires but should do so as soon as possible. Employers should keep careful track of expiration dates. It may help to provide reminders. That's especially true for employees who may just now be returning to work after pandemic shutdowns. Some employers are going one step further and either hiring immigration attorneys to help or footing the DHS fees.

## **Other immigration changes**

Meanwhile, there are other important immigration changes affecting employers and their workers. On June 22, 2020, the White House issued [an order](#) temporarily suspending new visas. The order effectively bars hundreds of thousands of foreigners from seeking employment in the United States. Some estimates run as high as 525,000 foreign workers being denied entry. For employers utilizing H-1B visas, this means that skilled professionals may not be available to fill critical reopening positions. Here are some of the new restrictions, which will remain in effect until at least the end of 2020.

- Computer programmers, doctors, and nurses, and other high-skill workers that employers typically obtain H-1B visas for cannot come.
- H-2B visas for seasonal workers in the hospitality industry will also be blocked, though agricultural workers in "the food supply chain" are not.
- L visas - which companies mainly use for intracompany executive-level transfers are also blocked. In 2019, there were almost 77,000 such visas for executives issued. The order blocks them and their family members from entry.
- Employment-based green card visas are also suspended. While the other visas are not technically immigration visas, employment-based green cards are. Included in the category were so-called genius

visas for those with extraordinary abilities in sports, business, science, and the arts. Green cards also covered skilled workers and professionals.

- The order also affects asylum seekers. Until now, those who had asylum petitions pending were issued work permits. Now, they will have to wait a full year before being permitted to work.

The Trump administration has also explained that they want to revamp entirely the H-1B visa program when the order expires. Under the proposal, visa priority will be based on employee pay. Before the current order, those visas were issued on a first-come, first-served basis until the quota was met.

### **Immigration action to take now**

The immigration changes do not impact visa holders already in the United States and working. Employers who know they will need highly skilled workers in the coming months will have to cast their net wider. This may mean having to raise wages in order to attract workers willing to switch employers or relocate. Other tactics may include offering more positions as exclusively telecommuting jobs.