IMMIGRATION

Employers and the DACA Wind Down Decision on September 5

by Kathleen Campbell Walker

On September 5, 2017, the Department of Homeland Security (DHS) issued the unfortunate Memo to rescind the Deferred Action for Childhood Arrivals (DACA) program (Memo). DHS Acting Secretary, Elaine C. Duke, noted that although the Supreme Court's decision in U.S. v. Texas on June 23, 2016 did not impact the original DACA program launched in 2012, the Fifth Circuit indicated that DACA was not implemented in compliance with the Administrative Procedures Act (APA) even though not subject to the lawsuit under consideration at the time.

As to the timing of the Memo's issuance, Acting Secretary Duke made reference to the letter sent by Texas on June 29, 2017 along with nine other state attorneys general[1] to U.S. Attorney General Sessions alleging that the DACA program was created without proper statutory authority by the Obama administration and thus was an unconstitutional exercise of authority by the Executive Branch. In this letter, the signators set a deadline of September 5, 2017 for DHS to rescind the DACA program or face potentially imminent litigation. Attorney General Sessions in his comments stated on September 5 that:

> *In other words, the executive branch, through DACA, deliberately sought to achieve what the legislative branch specifically refused to authorize on multiple occasions. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.*
>
> *The effect of this unilateral executive amnesty, among other things, contributed to a surge of unaccompanied minors on the southern border that yielded terrible humanitarian consequences. It also denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens.*

Thus, Attorney General Sessions advised DHS in a letter to consider winding-down the DACA program versus dealing with the "costs and burdens that will be imposed on DHS associated with rescinding this policy."

What does this mean to employers with DACA beneficiaries?

DACA beneficiaries with work authorization documents (EAD) WILL CONTINUE to be eligible to work in the U.S., until the card expires, unless terminated or revoked. Please remember that the DACA code for an EAD is C33. This code category was excluded from automatic work authorization renewal based on a timely filed extension of work authorization under the January 17, 2017 regulation changes.

So, first – employers **should not be** terminating DACA EAD beneficiaries with valid work authorization documents. If an employer wants to assess a possible impact on its workforce due to the "wind down" of DACA in the future and the employer maintains copies of work authorization documents presented in the Form I-9 identity and work eligibility process, they can see which EADs reflect the "C33" code. Please remember that other documents can also, of course, be used to properly establish work eligibility and identity.

What will happen to DACA employees when their work authorization expires?

According the DHS FAQs published on September 5:

Information provided to USCIS in DACA requests will not be proactively provided to Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

So, bottom line the DACA employee is at risk of removal without any other available remedy. Of course, life as well as legal changes occur and many DACA employees may have transitioned or will transition to other forms of work eligibility through other immigration alternatives. Bottom line, **do not** jump to conclusions and follow the normal protocol to reverify work eligibility in the Form I-9 context upon the expiration of the EAD and remind employees of that expiration date early.

What happens to individuals who have pending INITIAL requests for DACA?

U.S. Citizenship and Immigration Services (USCIS) will adjudicate (on an individual, case-by-case basis) all properly filed DACA initial requests and associated applications for EADs that have been accepted as of **September 5, 2017**.

What happens to DACA beneficiaries who have pending DACA renewal requests?

USCIS will adjudicate (on an individual, case-by-case basis) properly filed pending DACA renewal requests and associated applications for EADs from current beneficiaries that have been accepted as of September 5, 2017, and from current beneficiaries whose benefits *will expire* between **September 5, 2017 and March 5, 2018** that have been accepted as of October 5, 2017. **USCIS will reject all requests to renew DACA and associated applications for EADs filed after October 5, 2017**. Generally, you should not file for a renewal EAD more than 180 days before your original EAD expires. USCIS has recommended that those applying for DACA EAD renewal do so between 150 to 120 days before expiration of the current DACA approval notice and EAD. The approval period *has been* for 2 years.

Question? - So, with the winding down period, to gain some additional

time, will the limitation on early filings **be eliminated** to allow more DACA beneficiaries to request renewal of work authorization for two years, assuming the time frame will not be shortened for work authorization? **The new rule only allows DACA beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018 to apply for renewal – so basically the point is not relevant as to the deadline for early filing.**

What happens to DACA beneficiaries who have pending requests for advance parole to travel outside of the United States?

As of September 5, 2017, USCIS will no longer process requests to travel outside of the U.S. for DACA beneficiaries and those cases pending review will be administratively closed and the filing fees refunded. As of August 20, 2017, there were 106,341 requests pending (34,487 initial requests and 71,854 renewals).

For those with approved requests authorizing travel, due to the shifting situation on the processing of admission for those paroled – any DACA beneficiary considering such travel should seek legal counsel first.

What can employers do who want to support their DACA employees?

Vigorously support the efforts for a realistic legislative fix! Senators Graham and Durbin have introduced a bi-partisan DREAM Act bill. It is S.1615 and its co-sponsors include Senators Flake, Schumer, Murkowski, Cortez Masto, Feinstein, and Harris. This bill would create a conditional permanent resident status valid for up to eight years and would allow an approved beneficiary a path to full legal permanent resident status, if in compliance with several requirements including the ability to read, write and speak English as well as passing government background checks and continuing to demonstrate good moral character among other requirements.

For background, the basic DACA program requirements were:

- Were under the age of 31 as of June 15, 2012;
- Came to the U.S. before reaching their 16th birthday;
- Continuously resided in the U.S. since June 15, 2007, up to the present time;
- Were physically present in the U.S. on June 15, 2012, and at the time of making their request for consideration of deferred action with USCIS;
- Had no lawful status on June 15, 2012;
- Are currently in school, have graduated, or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.; and
- Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

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[1] Texas was joined on the letter by the attorneys general of Alabama, Arkansas, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, Idaho, West Virginia, and Idaho Governor C.L. Otter.

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