



# THE LEGAL BASIS FOR DACA AS EXPRESSED IN THE FINAL RULE

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On August 24, 2022, the Department of Homeland Security (DHS) issued a [final rule](#) aimed at “preserving and fortifying” the Deferred Action for Childhood Arrivals (DACA) program. The DACA program was initiated by a [2012 memo](#) from then-DHS secretary Janet Napolitano (“Napolitano Memo”) and has been subjected to numerous legal challenges since. Many of our previous blogs discuss the [DACA program](#). The Napolitano Memo stated that DHS would consider deferred action for individuals who met the following criteria pursuant to the DACA program: 1) came to the United States under the age of 16; 2) continuously resided in the United States for at least 5 years preceding June 15, 2012, and were present in the United States on that date; 3) are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; 4) have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety; and 5) were not above the age of 30 on June 15, 2012.

The new final rule takes effect on October 31, 2022, is expected to be published in the Federal Register on August 30, 2022. It retains the same criteria for DACA eligibility that were laid out in the Napolitano Memo and preserves the existing process for DACA recipients to request work authorization. The final rule also affirms USCIS’ longstanding policy that DACA recipient are considered “lawfully present”.

It is plain that the new final rule is aimed at insulating the DACA program from being invalidated by future litigation. In a July 16, 2021 [decision](#), Judge Hanen of

the U.S. District Court for the Southern District of Texas held that the DHS violated the Administrative Procedure Act (APA) as it was not established through notice and comment rulemaking.. Judge Hanen further reasoned that DHS did not have the inherent authority to enact the program, and held that DACA conflicts with sections of the INA that describe which individuals are removable and lay out a statutory scheme for work authorization. Because Congress had already clearly articulated rules surrounding removal, lawful presence, and work authorization, Judge Hanen held that DACA failed the first step of the Chevron test and violates the APA. Prosecutorial discretion, of which DACA is a variant, is an established doctrine that does not need to be codified. Promulgating a regulation may protect DACA from some legal challenges, but not all. If litigation asserts that the program is not authorized under the INA, the fact that it was established through notice and comment rulemaking will not provide a defense.

The final rule's definition of "lawful presence" is also a significant provision. The final rule points to 8 CFR § 1.3(a)(4)(vi), which defines "an alien who is lawfully present in the United States" as "an alien who belongs to one of the following classes of aliens permitted to remain in the United States because DHS has decided for humanitarian or other public policy reasons not to initiate removal proceedings or enforce departure" including "aliens currently in deferred action status". As this provision makes clear, all recipients of deferred action, not DACA recipients alone, are considered lawfully present for certain purposes. Lawful presence does not confer any immigration status in the United States, a distinction that has long been misunderstood. In a 2017 [decision](#) that upheld a challenge to DAPA by the state of Texas, the Fifth Circuit viewed a grant of deferred action as something akin to an immigration status. Judge Hanen in 2021, too, seemed to conflate lawful presence with a legal immigration status. Rather, lawful presence renders individuals who have been granted deferred action eligible for certain federal benefits and ensures that they do not accrue unlawful presence for inadmissibility purposes, which could render them subject to the 3- and 10- year bars. Moreover, since they are considered lawfully present, DACA recipients will be eligible for Social Security benefits, including a Social Security number itself when they apply for EADs, which assists individuals in filing taxes, obtaining identification cards, and obtaining employment. Most important, a clarification of lawful presence not being legal status could potentially nudge a court to uphold DACA rather than find it

unlawful.

It remains to be seen how DACA fares in the ongoing litigation, particularly in light of the current composition of the Supreme Court. While the U.S. Supreme Court [allowed DACA to survive](#) in *Department of Homeland Security v. Regents of the University of California* in 2020, the majority's [opinion](#) was based on the improper procedure used by the Trump administration in its attempt to rescind DACA in 2017 in violation of the APA. The Court in *Regents* did not reach the question of whether DACA itself was legal. The Supreme Court in *Regents* also faulted the then Trump administration for not factoring in reliance interests under *Encino Motorcars, LLC v. Navarro*, 579 U. S. \_\_\_ (2016) when rescinding DACA. Justice Roberts writing for the majority observed that DACA recipients have enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance on the DACA program. The consequences of the rescission would “radiate outward” to DACA recipients’ families, including their 200,000 US citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. Justice Roberts also cited a Brief for 143 Businesses as Amici Curiae, which estimated that hiring and training replacements would cost employers \$6.3 billion. In addition, excluding DACA recipients from the lawful labor force may result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years. Unfortunately, notwithstanding the benefits of the DACA program to the US, the reliance interest doctrine may not be relevant if the Court rules that DACA was not authorized under the INA.

In any case, the new final rule is a good step forward and will give the program firmer legal footing. Unless the Supreme Court rules that DACA is not authorized under the INA, the final rule would render it very difficult, if not impossible, for a future administration not friendly towards immigrants to rescind DACA. It is hoped that the judges in the Fifth Circuit, and if not the Fifth Circuit, the Supreme Court removes any ideological lens and is able to see DACA as being lawful and authorized under the INA. If prior rulings have indicated that the government can exercise prosecutorial discretion on a case by case basis, there is not much difference if the government exercises prosecutorial discretion in an orderly way through the DACA rule. The truth is that deferred action is neither recent nor revolutionary. Widows of US citizens have been granted this benefit. Battered immigrants have sought and obtained

refuge there. Never has the size of a vulnerable population been a valid reason to say no. A prior 2012 blog by Gary Endelman and Cyrus Mehta, [Yes He Can: A Reply to Professors Delahunty and Yoo](#), provided an impassioned defense of DACA. The arguments we made then are still relevant notwithstanding Judge Hanen's decision that found DACA to be unlawful. The court reviewing Judge Hanen's decision need look no further than the newly promulgated provision at 8 CFR §236.21(c)(1) which sums up why DACA is lawful:

*Deferred action is an exercise of the Secretary's broad authority to establish national immigration and enforcement priorities under 6 U.S.C. 205(5) and section 103 of the Act. It is a form of enforcement discretion not to pursue the removal of certain aliens for a limited period in the interest of ordering enforcement priorities in light of limitations on available resources, taking into account humanitarian considerations and administrative convenience. It furthers the administrability of the complex immigration system by permitting the Secretary to focus enforcement on high priority targets. This temporary forbearance from removal does not confer any right or entitlement to remain in or reenter the United States. A grant of deferred action under this section does not preclude DHS from commencing removal proceedings at any time or prohibit DHS or any other Federal agency from initiating any criminal or other enforcement action at any time.*

While it is hoped that the court will uphold DACA, DACA recipients [deserve better than the uncertainty of renewing DACA](#) along with work authorizations every two years, and urgently need Congress to regularize their status and place them on a pathway to citizenship.

*(This blog is for informational purposes and should not be viewed as a substitute for legal advice).*

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