

# Mobility: immigration alert

November 2022

## United States

### Deferred Action for Childhood Arrivals Final Rule now in effect

#### Executive summary

On 3 November 2022, the Department of Homeland Security (DHS) announced that its Final Rule to preserve and fortify the Deferred Action for Childhood Arrivals (DACA) program had been implemented effective 31 October 2022. Implementation of the Final Rule signifies the codification of existing policies with limited changes while the program remains the subject of ongoing litigation.

The Final Rule affirms that:

- ▶ Current DACA recipients' deferred action, employment authorization, and advance parole will continue to be recognized as valid.
- ▶ DACA is not a form of lawful status, but DACA recipients are considered "lawfully present" for certain U.S. immigration purposes.
- ▶ Non-citizens who meet eligibility criteria, clear all national security and public safety vetting, and are found to merit a favorable exercise of discretion may be granted deferred action and obtain renewable two-year work authorization. However, DHS remains currently barred from granting deferred action to any new DACA recipients.

#### Background and analysis

Since 15 August 2012, DACA has existed by virtue of a DHS memorandum and permitted more than 800,000 foreign nationals to continue residing in the U.S. in spite of having remained in the country beyond their period of authorized stay or having initially entered the country

without inspection. However, DACA has also been the subject of ongoing federal litigation challenging the legal validity of the program.

This litigation resulted in a decision issued by the U.S. District Court for the Southern District of Texas on 16 July 2021 concluding that the DACA program was unlawful due in part to its failure to abide by rulemaking requirements outlined in the *Administrative Procedure Act* (APA). A permanent injunction was temporarily stayed as it relates to DACA recipients who were granted approval or had renewal applications pending on or before 16 July 2021. The District Court's decision was subsequently appealed to the U.S. Court of Appeals for the Fifth Circuit which, in a decision issued on 5 October 2022, partially upheld the District Court's finding that the DACA policy was unlawful.

In the interim, on 24 August 2022, DHS announced the new Final Rule for DACA that went into effect on 31 October 2022. The purpose of the Final Rule is to ensure that the DACA program, as it exists today, complies with APA requirements. The District Court must now rule on the legality of the program based in response to DHS's announcement and enactment of the current Final Rule. A decision from the District Court remains pending.

#### What this means

The Final Rule as published does not result in any substantive changes to DHS's current administration of the DACA program. The same guidelines for the program established in 2012 remain in place.



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However, enactment of the DACA regulation based on the Final Rule will ensure that the protection afforded by DACA cannot be terminated without issuance of a formal Notice of Intent to Terminate. The NOIT will allow a DACA recipient the opportunity respond with additional documentation or evidence so as to avoid unjustified terminations. Most importantly, the DACA Final Rule provides a direct response to ongoing litigation challenging the legality of the program in relation to its lack of compliance with the APA.

While litigation remains ongoing, it is encouraging that initial applications for DACA approval and renewals of DACA continue to be filed with DHS for adjudication even though applications seeking first-time DACA approval will remain unadjudicated and pending with the DHS until pending litigation is resolved.

Although the DACA program remains unchanged by the enactment of the Final Rule, U.S. employers supporting DACA recipients should continue to monitor developments on the DACA policy and to consider alternative U.S. immigration options that may be available should changes result to the DACA program that could impact continued employment eligibility for DACA recipient employees.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

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EYG no. 009948-22Gbl

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