ALERT

U.S. District Court in D.C. Orders That the DACA Termination Memo Be Vacated — but Not for at Least 90 Days

APRIL 25, 2018

On April 24, 2018, Judge John Bates of the U.S. District Court for the District of Columbia issued a final judgment that (a) grants, in part, summary judgment in favor of Deferred Action for Childhood Arrivals (DACA) recipients and organizations that sued to reverse the Trump administration's termination of the DACA program and (b) orders that the memorandum terminating the program be vacated.[1] The order was issued in *NAACP v. Trump* and *Princeton v. Trump*, two related cases.

The judge's decision would reinstate the status quo as it was before September 5, 2017, when the original DACA program was in place and U.S. Immigration and Citizenship Services (USCIS) was accepting first-time applications for DACA (rather than only DACA renewal applications). But, critically, **the court also "stayed"** (or paused) **its own order for 90 days** to allow the government to come up with a better explanation than the one it presented to the court for why it ended DACA.

This means that people who are otherwise DACA-eligible ***still* may *not* submit a first-time application for DACA**. If the judge's order vacating the DACA-rescission memo *does* go into effect, it will not become effective until 90 days after the judge issued the order, i.e., not until July 23, 2018. In the meantime, the government may either appeal Judge Bates's decision or issue a new DACA-rescission memo, either of which *could* have the effect of canceling the judge's decision to vacate the original DACA-rescission memo. The result could be that USCIS would not be required to resume accepting DACA applications from first-time applicants.

However, due to the nationwide injunctions issued by the U.S. District Courts for the Northern District of California and the Eastern District of New York earlier this year, **USCIS still is required to accept, and is currently processing, DACA renewal applications** from people who have previously received deferred action and a work permit through DACA, while litigation in those courts works through the normal appeals process. For more information on how to apply for DACA renewal, see NILC's Frequently Asked Questions: USCIS Is Accepting DACA Renewal Applications.[2]

Background

After the Trump administration terminated the DACA program, several sets of DACA recipients, community organizations, state and local governments, universities, and

[1] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2325-70.

[2] www.nilc.org/issues/daca/faq-uscis-accepting-daca-renewal-applications/.

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employers filed lawsuits in different parts of the country arguing that the termination was unlawful.

Regents of the University of California v. Nielsen. In January, plaintiffs in *Regents of the University of California v. Nielsen*, in the U.S. District Court for the Northern District of California, obtained a preliminary injunction requiring USCIS to accept DACA applications from anyone who had previously had DACA. The court found a substantial likelihood that the termination of DACA was arbitrary and capricious, in violation the Administrative Procedure Act (APA). The federal government has appealed this ruling to the U.S. Court of Appeals for the Ninth Circuit. The parties have completed their briefing, and the case is scheduled for oral argument before the Ninth Circuit on May 15, 2018, in Pasadena, California.

Batalla Vidal v. Nielsen. In February, the U.S. District Court for the Eastern District of New York granted a second preliminary injunction requiring USCIS to accept DACA applications from anyone who had previously had DACA. That injunction was issued in *Batalla Vidal v. Nielsen* — a lawsuit brought by a brave group of DACA recipients represented by NILC, Make the Road New York, and the Jerome N. Frank Legal Services Organization at Yale Law School — as well as a separate lawsuit brought by 16 states. The court in New York likewise found a substantial likelihood that the termination of DACA was arbitrary and capricious. The federal government has appealed this ruling to the U.S. Court of Appeals for the Second Circuit. The parties have completed their briefing and are waiting for oral argument to be scheduled.

CASA de Maryland v. Trump. On March 5, 2018, the U.S. District Court for the District of Maryland issued an opinion in *CASA de Maryland v. Trump* dismissing most of the plaintiffs' claims in that case, including the claim that the DACA termination was unlawful. However, the court did grant a nationwide preliminary injunction to DACA recipients on their claim regarding the sharing and usage of the information DACA recipients have provided to the government when applying for DACA. The court ordered the U.S. Department of Homeland Security (DHS) to follow its original 2012 guidance about not sharing or using DACA recipients' private information for enforcement purposes against them or their family members unless certain circumstances exist, such as that the person poses a national security threat or has committed certain crimes. The *CASA de Maryland* court order prohibits DHS from rescinding, modifying, or superseding this guidance for the time being. In addition, under the order, if DHS wants to use any DACA recipient's information against them for enforcement purposes, DHS is required to make this request to the court directly and have the court do a confidential review of the request.

What does the D.C. District Court's April 24 order in *NAACP v. Trump* and *Princeton v. Trump* do?

On April 24, 2018, Judge Bates of the U.S. District Court for the District of Columbia issued a decision in *NAACP v. Trump* and *Princeton v. Trump*.[3] The most salient part of Judge Bates's decision — the order vacating the DACA-rescission memo — does not go into effect for at least 90 days. This means that people who've had DACA in the past can still apply to renew it — and we strongly encourage them to do so if they can — but otherwise DACA-eligible people may not submit first-time applications at this time.

[3] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2325-70.

If the government does nothing in the next 90 days (by July 23, 2018) in response to Judge Bates's decision, then the memorandum that rescinded DACA will be vacated and the original 2012 DACA program will be fully reinstated. If this were to happen, USCIS would have to accept first-time applications for DACA. However, Judge Bates's decision invites the government to attempt to explain in more detail why it ended the DACA program, including possibly by issuing a new memo rescinding DACA, and suggests that doing so could prevent the full reinstatement of DACA. This means that we have to wait until July 23 to see what the government does in response to this decision, as that could change whether and how it goes into effect.

What does the D.C. District Court's order in *NAACP v. Trump* and *Princeton v. Trump* mean?

"Final order," not a preliminary injunction. Judge Bates's order is the first final judgment holding that the government's DACA termination violated the APA. The other courts that considered this question issued *preliminary injunctions*, which are temporary orders that remain in place only for the duration of the lawsuit and represent the court's holding that the plaintiffs are *likely to succeed* in their arguments that the DACA termination was unlawful. By granting *summary judgment* to the plaintiffs (DACA recipients, civil rights organizations, and universities), Judge Bates issued a final order that the termination of DACA violated the APA because it was not adequately explained.

The court's reasoning with respect to the APA. Judge Bates made clear in his order that he was not opining on whether the government's argument about why it ended DACA was *correct*; rather, he held only that the government did not *fully explain* that argument and, for that reason alone, the memorandum terminating DACA should be set aside because it violates the APA. This is different from, for example, the *Batalla Vidal* case, in which Judge Garaufis, in his preliminary injunction, *did* make a finding that, contrary to what the government has argued, the DACA program is lawful. The reasoning of Judge Bates's decision, in contrast, does *not* go so far as to say the government was wrong about its argument that DACA itself was not legal and the government faced "litigation risks" if it kept the program in place; instead, it holds only that the government did not sufficiently explain why or how it came to those conclusions.

Information-sharing claim. The plaintiffs (DACA recipients, civil rights organizations, and universities) had also requested a preliminary injunction barring the government from using the information DACA recipients provided about themselves and their families in their applications for other purposes, such as to detain or deport a DACA recipient or members their family. Not only did Judge Bates deny this request, but he dismissed the claim entirely. The judge decided that the threat of harm was not imminent, given the order in *CASA de Maryland* prohibiting the government from using this information (see the section on *CASA*, above). In addition, he found that the plaintiffs had not sufficiently pled their information-sharing claim in their complaint, so he dismissed that claim.

Other claims not addressed in this order. Finally, Judge Bates did *not* dismiss, but instead said he would decide at a later time, two of the plaintiffs' *constitutional* claims, including their claim that the DACA termination violated the Equal Protection Clause (because it was motivated by racial animus) and the Due Process Clause (because it did not provide a fair and sufficient process for terminating individuals' DACA and work permits).

The judge delayed judgment on these claims because, given his 90-day stay of his own order, he thought it possible that DHS might change its policies in a way that could remedy the plaintiffs' constitutional claims, obviating the need for the court to decide them.

What does this mean for Congress?

This complicated decision, now a part of the web comprised of it and other DACA-related court decisions, and the continued lack of relief for otherwise DACA-eligible people who've not been able to apply for the program, only magnify the urgent need for Congress to pass permanent relief for people who in the past were eligible for DACA. Although the injunctions issued by federal courts in New York and California provide some immediate relief for people who have had DACA in the past, they do not provide any permanent solution, and the order issued by the court in DC does not immediately provide relief for would-be first-time applicants. Dreamers need the real, certain, and permanent solution that can come only from legislation.