EMPLOYMENT SERVICES ALERT

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Changes to DACA and Employers

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In line with the Trump administration's enforcement of immigration laws, significant changes to the Deferred Action for Childhood Arrivals ("DACA") program were announced by the Department of Homeland Security ("DHS") on September 5, 2017. This announcement followed Attorney General Jeff Sessions' letter to DHS Secretary Elaine Duke on September 4, 2017, advising DHS to rescind the June 15, 2012 memorandum establishing DACA. Effective immediately, DHS rescinded the memorandum and initiated the wind-down of the program, providing a limited, six-month window during which it will consider certain requests for DACA, as well as applications for work authorization, under specific constraints.

What is DACA?

On June 15, 2012, then-Secretary of DHS, Janet Napolitano, issued a memorandum titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," permitting certain individuals who met several guidelines to request consideration of deferred action on removal for a period of two years, subject to renewal, and eligibility for work authorization. Under this memorandum, an individual was permitted to request DACA if he/she:

- Was under the age of 31 as of June 15, 2012;
- Came to the United States before reaching his/her 16th birthday;
- Continuously resided in the United States since June 15, 2007, up to the present time;
- Was physically present in the United States on June 15, 2012, and at the time of making his/her request for consideration of deferred action with United States Customs and Immigration Services ("USCIS");
- Had no lawful status on June 15, 2012;
- Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development ("GED") certificate, or is an honorably discharged veteran of the Coast Guard or the Armed Forces of the United States; and
- Has not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

History of DACA and DAPA

On November 20, 2014, DHS issued a second memorandum, which expanded the parameters of DACA and created a new policy titled "Deferred Action for Parents of Americans and Lawful Permanent Residents" ("DAPA"). Beyond a call for the expansion of DACA, DAPA directed the USCIS "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to certain individuals who have "a son or daughter who is a United States' citizen or lawful permanent resident." Prior to its implementation, U.S. District Judge Andrew Hanen preliminarily enjoined the policy nationwide. The Fifth Circuit Court of Appeals affirmed, concluding that DAPA conflicted with the discretion authorized by Congress, was inconsistent with the Immigration and Nationality Act, and violated the Administrative Procedure Act. The Supreme Court also affirmed the Fifth Circuit's ruling and denied DHS's

request for a rehearing. Following the 2016 presidential election, both parties agreed to stay litigation to allow the future administration to review the pending issues.

DACA and DAPA under the Trump Administration

Fast forward to January 25, 2017, when President Trump issued an Executive Order entitled "Enhancing Public Safety in the Interior of the United States," directing federal agencies to "ensure the faithful execution of the immigration laws … against all removable aliens." While then-Secretary of DHS John Kelly announced that DHS would no longer exempt classes or categories of removable aliens from potential enforcement, he did make an exception for qualified individuals requesting DACA and DAPA deferment. After some consideration, Kelly issued a memorandum on June 15, 2017 rescinding DAPA and the expansion of DACA, but left in place the June 15, 2012 memorandum establishing the original DACA program.

Following intense pressure from a number of states to rescind the June 15, 2012 DACA memorandum, Attorney General Sessions sent a letter to DHS, asserting that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter went on to state that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings, as well as the Attorney General's September 4, 2017 letter, DHS announced that the June 15, 2012 DACA program should be terminated and rescinded the June 15, 2012 memorandum effective immediately. In accordance with Attorney General Sessions' recommendation to phase out the program, DHS:

- Will adjudicate—on an individual, case-by-case basis—properly filed, pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by DHS as of September 5, 2017.
- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after September 5, 2017.
- Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted by the Department 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 by the Department as of October 5, 2017.
- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.
- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in the September 5, 2017 memorandum for the remaining duration of their validity periods.
- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, Customs and Border

Protection will—of course—retain the authority it has always had and has exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, USCIS will—of course—retain the authority to revoke or terminate an advance parole document at any time.

- Will administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program, and will refund all associated fees.
- Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

There is no question that these immediate directives will have a large impact on thousands of individuals, including employers and their employees. Fast-moving developments with respect to potential Congressional action on this issue make it even more imperative that employers stay informed in order to ensure compliance with current laws. For additional information on the recent changes to DACA or assistance in the review of your company's employment authorization documents, please contact any of the listed Roetzel attorneys.

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