DACA LEGAL SERVICES TOOLKIT

Practice Advisory 4 of 7

How Individualized Deferred Action Status Could Provide Protection for DACA Recipients

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A Note from the Executive Director

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved significant victories in numerous major class action cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of immigrants and other disadvantaged communities**.**

This practice advisory is part of a *DACA Legal Services Tool Kit* produced by the Center for Human Rights and Constitutional Law including seven practice advisories addressing deportation defense, educational and other government services, employment rights, employment and family-based visa eligibility, individual deferred action status applications, and a potential legislative fix for DACA recipients.

As the Trump administration threatens to end the Deferred Action for Childhood Arrival (DACA) program, immigration advocates must figure out how to protect the estimated 800,000 DACA recipients from removal. This practice advisory will discuss one possible strategy – applying for deferred action status.

Manuals prepared by the Center are routinely reviewed for improvements and updates to reflect current policies and practices. This manual was researched and written by Staff Attorney Natalie Webb. Please feel free to email me at pschey@centerforhumanrights.org to suggest corrections, updates or edits to this practice advisory.

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I. Deferred Action Status

Deferred action status is an immigration status that could potentially bring temporary, critical relief for many DACA recipients who are in danger of losing their legal right to remain in the United States. Deferred action status provides protection from deportation for a set period of time and authorizes recipients to work lawfully in the United States. It is a discretionary status and therefore has no set criteria or prerequisite for application, however it has been most successful for immigrants with significant medical conditions or immigrants with close family members who have significant medical conditions.

a. What is Deferred Action Status?

A grant of deferred action status represents the Department of Homeland Security (DHS) decision not to seek an immigrant's removal for a prescribed period of time. As the Supreme Court held in Reno v. Am.-Arab Anti-Discrim. Comm.:

> To ameliorate a harsh and unjust outcome, [DHS] may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated.
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> 525 U.S. 471, 484 (1999) (citing C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03[2][h] (1998)

Deferred action status is one of a number of forms of discretionary relief — in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure — that immigration officials have used over the years to temporarily prevent the removal of undocumented immigrants[1].

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[1] Parole is available to immigrants by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole

b. Legislative Authority

The laws created by Congress in the Immigration and Nationality Act (INA) do not directly grant anyone deferred action status. However, Congress has passed

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gives immigrants the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, see id. § 1255(a), and may eventually qualify them for Federal means-tested benefits, see id. §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. Id. § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an immigrant agreed to voluntarily depart the United States, without imposing a time limit for the immigrant's departure. See 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); cf. 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary relief formulated administratively under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85-599 EPW, Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. See U.S. Citizenship and Immigration Services Fee Schedule, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based 'extended voluntary departure,' and there no longer are aliens in the United States benefiting from such a designation," but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). See generally Andorra Bruno et al., Cong. Research Serv., Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5–10 (July 13, 2012) ("CRS Immigration Report").

laws that do reference the administrative practice of deferred action status. For example, in 8 U.S.C. § 1227(d)(2) - entitled Deportable Aliens – the law states: "The denial of a request for an administrative stay of removal under this subsection *shall not preclude* the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any provision of the immigration laws of the United States." (emphasis added).

Additionally, though not in the context of substantive legislation, Congress has addressed DHS's discretionary authority through its appropriations. In appropriating funds for DHS's enforcement activities - which are only sufficient to permit the removal of a fraction of the undocumented immigrants currently in the country - Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113 - 76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Despite the above, no federal statute explicitly authorizes deferred action status or discusses its requirements.

c. Regulative authority

8 C.F.R. § 247a.12(c)(14) states that certain immigrants may be granted employment authorization, including an immigrant "who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment." This important regulation both recognizes the existence of deferred action and authorizes recipients to work in the United States[2]. However, except for the above reference, the criteria and requirements for deferred action status are not explicitly written into regulation.

d. Agency Policy & DHS Discretion

The most useful resource and information regarding the criteria for deferred action status comes from DHS, and its predecessor INS, policy. The former INS's Operations Instructions ("OIs") provided for deferred action in cases where

[2] See also Oversight Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law before the U.S. House of Representative Committee on the Judiciary (October 12, 2011), pg. 4. ("DHS Regulations, however, do permit deferred action recipients to be granted employment authorization upon establishing an economic necessity to work").

"adverse action would be unconscionable because of the existence of appealing humanitarian factors"[3] and made clear that deferred action status is "an act of administrative choice to give some cases lower priority and in no way an entitlement..."[4]. These Operation Instructions were withdrawn on June 24, 1997. However, the relief continues to be available to certain visa applicants and undocumented immigrants with significant medical conditions or close U.S. citizen or lawful resident relatives with significant medical conditions. The vast majority of cases in which deferred action is granted involve medical grounds.

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012). The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for immigrants, including parole, 8 U.S.C. §1182(d)(5)(A); asylum, id. §1158(b)(1)(A); and cancellation of removal, id. §1229b. In addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." Arizona, 13 S. Ct. at 2499. As the Court has explained, "[a]t each stage" of the removal process - "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders" - immigration officials have "discretion to abandon the endeavor." Am.-Arab Anti-Discrim. Comm., 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g)(alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations.

In their exercise of enforcement discretion, DHS has long employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of immigrants and to deprioritize their enforcement against others[5].

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[3] See (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii)(1975)
[4] Id.
[5] See, e.g., INS Operating Instructions §103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Aliens (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011);

Indeed, there are several agency memos from ICE that provide guidance for how
DHS Officers should utilize their prosecutorial discretion with regard to deferred action. In its April 2011 "Toolkit for Prosecutors," ICE explains that:

> Deferred Action (DA) is not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority. There is no statutory definition of DA, but federal regulations provide a description: "[D]eferred action [is] 'an act of administrative convenience to the government which gives some cases lower priority...'" There are two distinct types of DA requests: (i) those seeking DA based on sympathetic facts and a low enforcement priority, and (ii) those seeking DA based on his/her status as an important witness in an investigation or prosecution. Basically, DA means the government has decided that it is not in its interest to arrest, charge, prosecute or remove an individual at that time for a specific, articulable reason.

U.S. Immigration and Customs Enforcement, Protecting the Homeland: Toolkit for Prosecutors. April 2011. p. 4.

In his June 7, 2011 memorandum ICE Director, John Morton, further describes exercising prosecutorial discretion, such as deferred action, consistent with civil immigration enforcement priorities:

> One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the immigrants it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system...

Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, Re: Exercising Prosecutorial Discretion (Nov. 17, 2000).

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given immigrant, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the immigrant came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and condition~ in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;

• whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
• whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

• veterans and members of the U.S. armed forces;
• long - time lawful permanent residents;
• minors and elderly individuals;
• individuals present in the United States since childhood;
• pregnant or nursing women;
• victims of domestic violence; trafficking, or other serious crimes;
• individuals who suffer from a serious mental or physical disability; and
• individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

• individuals who pose a clear risk to national security;
• serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
• known gang members or other individuals who pose a clear danger to public safety; and

• individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.
June 7, 2011.

Deferred action as a form of prosecutorial discretion is thus an extremely well-established practice in US immigration law and procedure. However, given that the deferred action status program has never been formalized into agency regulations, and exists only as DHS's administrative discretion to give some cases lower priority, it is widely understood there is virtually no judicial review of decisions concerning deferred action status. See Reno v. American Arab Anti-Discrimination Comm., 525 U.S. 471 (1999)

e. Effects of Deferred Action

A grant of deferred action serves to effectively postpone the removal of an immigrant from the United States by establishing a period of time, usually one year, in which ICE will not pursue removal proceedings. Additionally, as summarized by the DOJ's Office of Legal Counsel:

> "Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); see 8 U.S.C. §1324a(h)(3) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be… employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]").
>
> Second, DHS has promulgated regulations and issued policy guidance providing that immigrants who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. §1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld,

Acting Associate Director, Domestic Operations Directorate, USCIS, Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act at 42." (May 6, 2009) ("USCIS Consolidation of Guidance")(noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); see 8 U.S.C. §1182(a)(9)(B)(ii) (providing that an immigrant is "unlawfully present" if, among other things, he "is present in the United States after the expiration of the period of stay authorized by the Attorney General").

f. Conclusion

While deferred action is not a long-term solution, in the absence of statutory and/or regulatory pathways, it serves to at least protect undocumented individuals from removal and enables them to support themselves through lawful employment until a better alternative is available. It is an immediate solution that could potentially provide critical protection to hundreds of thousands of DACA recipients while immigration advocates continue to fight for a more sustainable and long-term pathway to citizenship.

II. Appendix

Attached is an example of a successful application for deferred action status. The application was approved in 2010 and the applicant has been granted one year extensions of her deferred action status each year for the past seven years. She continues to remain in the United States with her family.