April 13, 2015

By: Tulsi Patel and Jose Figueroa

DACA and DAPA: What You Need to Know

The Center for Immigrants’ Rights

- Under the supervision of Professor Shoba Sivaprasad Wadhia, clinical students participate in a range of activities including working with national and local organizational clients in order to reach the goals of those clients, individual case work, and conducting community education events.

Disclaimer

- This presentation does NOT serve as legal advice and serves as an general overall outlook of DACA/DAPA.
- This is not a substitute for consulting the Immigration & Nationality Act (INA), the regulations, and the case law.
Agenda

I. 2012 Deferred Action for Childhood Arrivals (DACA)
II. 2014 Expanded DACA
III. 2014 Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)
IV. Department of Homeland Security Priorities Memo
VI. Professional Responsibility

What is Deferred Action?

- A form of prosecutorial discretion
- Temporary
- Does not provide lawful status
- Examples:
  - DACA
  - DAPA

Benefits of Deferred Action

- Ability to apply for work authorization.
- Receive a social security number.
- Receive healthcare.
- Get a driver’s license (in some states).
- Reestablishing trust in the community between police officers and undocumented immigrants.
- The ability to not live in fear.

I. DACA

Deferred Action Timeline

- June 15, 2012: DACA announced
- Nov. 20, 2014: Expanded DACA & DAPA announced
- Feb. 16, 2015: Judge Hanen Injunction

2012 DACA Requirements

- Under 31 years old as of June 15, 2012;
- Came to the United States before 16th birthday;
- Continuous residence since June 15, 2007, up to present;
- Physical presence in the US on June 15, 2012 and on date of application;
- No lawful status on June 15, 2012;
- Currently in school or graduated; and
- Not convicted of a:
  - felony
  - significant misdemeanor, or
  - 3+ other misdemeanors

Continuous Residence vs. Physical Presence

- **Continuous residence** refers to the ability to prove that one has continuously been in the United States and that any departure was brief, casual, and innocent.
- **Physical presence** refers to the ability to show that one was actually here on June 15, 2012 and on the date of the application for DACA.


2012 DACA: What is a “significant misdemeanor”?

- A misdemeanor as defined by federal law (for which the max. term of imprisonment is 1 year or less but more than 5 days) and that meets certain criteria.


2012 DACA: When is “continuous residence” broken?

- Unauthorized travel outside of the U.S. after August 15, 2012 will interrupt continuous residence.
- What departure is “brief, casual, and innocent?”

### Travel Dates

<table>
<thead>
<tr>
<th>Type of Travel</th>
<th>Does it affect continuous residence?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief, casual, innocent</td>
<td>No.</td>
</tr>
<tr>
<td>Extended time</td>
<td>Yes.</td>
</tr>
<tr>
<td>Any type of travel</td>
<td>Yes.</td>
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<tr>
<td>Any type of travel</td>
<td>Yes.</td>
</tr>
<tr>
<td>Any type of travel</td>
<td>It depends on whether granted advance parole.</td>
</tr>
</tbody>
</table>


### 2012 DACA Hypothetical

- Fes was born in Argentina on January 1, 1991.
- Parents brought to US in 2000, when he was 9 years old.
- 1 day trip to Mexico when he was 13 years old.
- Convicted of open lewdness, a misdemeanor.
- Is he 2012 DACA eligible?

### President Obama’s Executive Action - November 20, 2014
Deferred Action Timeline

- June 15, 2012: DACA announced
- Nov. 20, 2014: Expanded DACA & DAPA announced
- Feb. 16, 2015: Judge Hanen injunction

II. EXPANDED DACA

2014 Expanded DACA

- Under 31 years old on or before June 15, 2012;
- Came to the United States before 16th birthday;
- Continuous residence since June 15, 2007, up to present;
- Physical presence in the U.S. on June 15, 2012 and on date of application;
- No lawful status on June 15, 2012;
- Currently in school or graduated;
- Not convicted of:
  - A felony;
  - A significant misdemeanor, or
  - 3 or more other misdemeanors

2014 Expanded DACA

- All previous requirements remain intact except for:
  - Lived continuously in the U.S. since January 1, 2010;
  - There is no age cap.

Source: http://www.uscis.gov/immigrationaction#daca
2014 DACA Hypothetical

- Brought to the United States when he was 17.
- Arrested for a DUI.
- Wants to apply for expanded DACA.

III. 2014 DAPA

- The DHS interpretation of certain guidelines and terminology from 2012 DACA may not necessarily be the same for 2014 DAPA.

2012 DACA ≠ 2014 Expanded DAPA

- The DHS interpretation of certain guidelines and terminology from 2012 DACA may not necessarily be the same for 2014 DAPA.
DAPA Requirements

- A Parent of an American or Lawful Permanent Resident as of Nov. 20th, 2014;
- Lived in the US continuously since January 1, 2010; and
- Not an enforcement priority for removal under Nov. 20th Policies for the apprehension, detention, and removal of undocumented immigrants memorandum.
- Presents no other factors that would make the grant of deferred action inappropriate

Source: http://www.uscis.gov/immigrationaction#daca
**Priority 1 (threats to national security, border security, and public safety) Aliens:**

- Engaged in or suspected of terrorism or espionage; or who otherwise pose a danger to national security
- Apprehended at the border or ports of entry
- Convicted of an offense classified as a felony in the convicting jurisdiction
- Convicted of an “aggravated felony”


**Felony in the convicting jurisdiction**

![Picture by: patheos.com](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutor_discretion.pdf)

**What is an “aggravated felony”?**

“Aggravated felony” represents a wide range of offenses that can be based on conduct or the sentence.

**Conduct**
- Fraud where victim loss is $10,000 or more
- Drug trafficking
- Firearm offenses
- Crime of violence and term of imprisonment of at least 1 year

**Sentence**
- Commercial bribery (with 1 year of imprisonment)
- Theft (1 yr. imprisonment)

Source: INA § 101(a)(43)
Priority 2 (misdemeanants and new immigration violators) Aliens:

- Convicted of 3+ misdemeanor offenses
- Convicted of a “significant misdemeanor”
- Apprehended for entry or reentry, on or after January 1, 2014

What is a “significant misdemeanor”?:

- An offense of domestic violence;
- Sexual abuse or exploitation;
- Burglary;
- Unlawful possession or use of a firearm;
- Drug distribution or trafficking;
- Driving under the influence;
- An offense for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence).

Enforcement Priorities Cont.

- Priority 3 (other immigration violations)
  - Aliens who have been issued a final order of removal on or after January 1, 2014.
Deferred Action Timeline

June 15, 2012
DACA announced

Nov. 20, 2014
Expanded DACA & DAPA announced

Feb. 16, 2015
Judge Hanen Injunction

V. TEXAS V. UNITED STATES

Richard Clemente
Texas v. United States

- 26 states filed a suit asserting that President Obama overstepped his legal authority in his November 20, 2014 Executive Actions.
- The District Court granted a preliminary injunction of the programs halting expanded DACA and DAPA (not 2012 DACA).
- DOJ filed an appeal and a stay on the injunction to the 5th circuit.


Beth Werlin: Director of Policy at American Immigration Council on Texas v. United States

Texas v. US: Recent Developments

- Argument on appeal of stay request in Fifth Circuit Court set for April 17, 2015
- April 6th: Amicus Briefs filed to Fifth Circuit
  - Mayors of NYC and LA submitted amicus brief in support of Executive Actions
  - Immigration Law Professors submitted amicus brief supporting legality of Executive Actions
VI. PROFESSIONAL RESPONSIBILITY

Notario Fraud

- Make sure to advise clients to be aware of notario fraud.
- Advise clients to find a licensed attorney to submit their deferred action application.

Professional Responsibility and DACA/DAPA

- Ethical Areas to Consider:
  - Communication
    - Rule 1.4
  - Competence
    - Rule 1.1
  - Advertising
    - Rule 7.1

Source: http://www.aila.org/practice/ethics/ethics-resources/ethical-considerations-executive-action
What You Should Know About the Texas Decision on Immigration

On February 16, 2015, Texas District Judge Andrew Hanen granted a preliminary injunction against the implementation of President Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and expansion of Deferred Action for Childhood Arrivals (DACA) programs. In the case, 26 states filed a complaint against the government, claiming that President Obama overstepped his constitutional authority in his November 20, 2014 Executive Action. Judge Hanen, in his decision, held that (1) the plaintiffs had standing to sue; and (2) because the federal government violated the Administrative Procedure Act by failing to comply with rulemaking requirements, the Department of Homeland Security (DHS) did not have authority to implement the programs.iii

What is Deferred Action?

“Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion... An individual who receive[s] deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.”iv

What Does this Decision Mean?

The DAPA and expanded DACA programs are temporarily halted. The expanded DACA program was scheduled to begin accepting applications on February 18, 2015. Due to the injunction, DHS did not open applications for expanded DACA as planned. DHS intends to begin accepting applications for DAPA on May 19, 2015. Noncitizens who qualify for the programs should continue to prepare their applications and gather the necessary documentation to support their application. Also, it is important to remember that the decision does not affect the original DACA program.

What Happens Next?

There are currently three tracks following the injunction.v

First, the Department of Justice has filed an appealvi of the decision to the Fifth Circuit Court of Appeals. DOJ filed its brief on March 30 and the states will file their brief on May 4. The court has not set a date for oral argument.

Second, the plaintiffs moved for early discoveryvii due to what they perceive as misrepresentations on the part of the federal government. On March 3, the government disclosed to the Court that on November 24, 2014, USCIS had begun granting three-year periods of deferred action to DACA applicants applying under the original (not expanded) DACA program. The plaintiffs claim that this admission means that the federal government previously misrepresented to the Court that it was not implementing the expanded DACA provisions because, according to the states, the three-year (as opposed to two-year) deferral period is part of the November 20, 2014 memorandum expanding the DACA program. The court conducted a hearing to address the plaintiffs’ motion on March 19, 2015.
Third, the federal government has filed an emergency motion to stay the order, so that it could move forward in implementing the DAPA and extended DACA programs while the case is pending. Initially, the government filed the motion with the District Court for the Southern District of Texas on February 23, 2015, which is the court that granted the preliminary injunction. However, Judge Hanen made it clear that he is not inclined to rush this decision. Therefore, the government filed an emergency stay motion with the Fifth Circuit Court of Appeals on March 12, 2015. The plaintiffs opposed and the Court has taken the unusual step of setting a hearing to consider oral arguments on the motion for an emergency stay. That hearing will be held April 17, 2015. Each side will have one hour to make its arguments.

Responses to the Hanen Injunction

As stated by the Press Secretary of the White House, "[t]he Supreme Court and Congress have made clear that the federal government can set priorities in enforcing our immigration laws—which is exactly what the President did when he announced commonsense policies to help fix our broken immigration system. Those policies are consistent with the laws passed by Congress and decisions of the Supreme Court, as well as five decades of precedent by presidents of both parties who have used their authority to set priorities in enforcing our immigration laws.

"The Department of Justice, legal scholars, immigration experts, and the district court in Washington, D.C. have determined that the President’s actions are well within his legal authority. Top law enforcement officials, along with state and local leaders across the country, have emphasized that these policies will also benefit the economy and help keep communities safe. The district court’s decision wrongly prevents these lawful, commonsense policies from taking effect and the Department of Justice has indicated that it will appeal that decision."\n
American Immigration Lawyers Association (AILA): "Throughout his findings of APA violations, the judge ignores the fact of an existing rule that covers DACA and DAPA;” “AILA is confident the federal government will ultimately prevail and that DAPA and expanded DACA will be fully implemented."

National Immigration Law Center (NILC): "Today's decision brings the court far outside the legal mainstream and away from public opinion, which supports the step President Obama took toward finally beginning to fix our dysfunctional immigration system."

American Immigration Counsel (AIC): "The new deferred action initiatives, which include Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and expansion of Deferred Action for Childhood Arrivals (DACA), are based on the well-established authority of Presidents and other executive branch officers to allocate and prioritize finite enforcement resources."

In addition to the support of these various national organizations, 104 immigration law professors and scholars have expressed their support of the federal government in a letter discussing the flaws of Hanen’s decision. As the letter states, “We believe that Judge Hanen’s opinion is deeply flawed and that DAPA and the expansion of DACA are well within the legal authority of the federal executive.”

Along these same lines, 109 immigration law professors have signed an amicus brief in support of the government's appeal to the Fifth Circuit. The brief outlines the legality of implementing these programs. It states “Deferred action, as applied to both individual noncitizens and classes of noncitizens, is a well established form of enforcement discretion that has been recognized by Congress, formal agency regulations, and the Courts."

Also, an amicus brief has been filed on behalf of the mayors of New York, Los Angeles, and 71 other cities and counties. The brief discusses the ways in which the Executive Action would benefit the public interest. It states “The Executive Action is a practical and much-needed exercise of enforcement
discretion that will allow those who qualify under expended DACA and DAPA to participate more fully and safely in their cities, counties, and communities.\(^viii\)

*Current as of April 5, 2015.\(^iv\)*

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1 In order to qualify for DAPA, the applicant must: have, as of November 20, 2014, a son or daughter who is a U.S. citizen or lawful permanent resident; have resided in the United States since January 1, 2010; are physically present in the United States on November 20, 2014, and at the time of filing the application; not have a lawful immigration status on November 20, 2014, are not an enforcement priority, and; have no other factors that make the grant of deferred action inappropriate. Memorandum from Jeh Charles Johnson, Secretary, on Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (November 20, 2014) (available at: http://www.dhs.gov/sites/default/files/publications/14_1210_memo_deferred_action.pdf).

2 In order to qualify for the expanded DACA program, the applicant must: have entered the United States before the age of sixteen; have lived in the United States since January 1, 2010; either be in school or have graduated from high school; have not been convicted of certain crimes. Memorandum from Jeh Charles Johnson (November 20, 2014); see also The Obama Administration’s DAPA and Expended DACA Programs, National Immigration Law Center (January 23, 2015), http://www.nilc.org/dapa&daca.html.


6 “In a civil case, parties may appeal a court decision by sending it to a higher court for review. An appeal is “usually based on arguments that there were errors in the trial’s procedure or errors in the judge’s interpretation of the law.” The higher court then will decide either to affirm the trial court’s decision or to reverse and remand the decision. (How Courts Work, American Bar Association, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals.html.)

7 Although parties are not typically permitted to seek discovery until the parties have conferred, a court may grant a motion seeking early discovery in consideration of factors, including, but not limited to, good cause, prejudice to the responding party, and potential harm resulting from a denial of the motion. (Peter Meier and Elizabeth Dorsi, Using Expedited Discovery With Preliminary Injunction Motions, American Bar Association (March 3, 2014), http://apps.americanbar.org/litigation/committees/businessstt/articles/winter2014-0227-using-expedited-discovery-with-preliminary-injunction-motions.html.

8 “Federal Rule of Civil Procedure 62 permits the trial court, in its discretion, to suspend an injunction during the pendency of an appeal. Courts typically consider four factors in evaluating a request for a stay pending appeal: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant will be irreparably harmed if the stay is not granted; (3) whether issuance of a stay will substantially harm the other parties; and (4) whether granting the stay serves the public interest.” (Def.'s Emergency Expedited Mot. to Stay the Ct.'s Feb. 16, 2015 Order Pending Appeal and Supporting Mem. (February 23, 2015).


See www.pennstatelaw.psu.edu/lawproflturlawsuit.

Id.


Id.

A special thank you from the Center For Immigrants’ Rights to Beth Werlin, Director of Policy at the American Immigration Council, for reviewing this document.
November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

SUBJECT: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.
The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS—are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process—from the earliest investigative stage to enforcing final orders of removal—subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, March 2, 2011; John Morton, Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens, June 17, 2011; Peter Vincent, Case-by-Case Review of Incoming and Certain Pending Cases, November 17, 2011; Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems, December 21, 2012; National Fugitive Operations Program: Priorities, Goals, and Expectations, December 8, 2009.
A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element
was the alien's immigration status, provided the offenses arise out of three separate incidents:

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; \(^1\) sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal \(^2\) on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

\(^1\) In evaluating whether the offense is a significant misdemeanor involving "domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. See generally John Morton, Procedural Discretion: Certain Victims, Witnesses, and Plaintiffs, June 17, 2011.

\(^2\) For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.
B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the
integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.
AGGRAVATED FELONIES:
An Overview

"Aggravated felony" is a term of art used to describe a category of offenses carrying particularly harsh immigration consequences for non-citizens convicted of such crimes. Regardless of their immigration status, non-citizens who have been convicted of an "aggravated felony" are prohibited from receiving most forms of relief that would spare them from deportation, including asylum, and from being readmitted to the United States at any time in the future.

Yet despite what the ominous-sounding name may suggest, an "aggravated felony" need not be "aggravated" or a "felony" to qualify as such a crime. Instead, an "aggravated felony" is simply an offense that Congress sees fit to label as such, and today includes many nonviolent and seemingly minor offenses.

This fact sheet provides an overview of "aggravated felonies" under federal immigration law and the immigration consequences of being convicted of an "aggravated felony."³

What Makes a Crime an "Aggravated Felony"?

An offense need not be "aggravated" or a "felony" in the place where the crime was committed to be considered an "aggravated felony" for purposes of federal immigration law. Instead, an "aggravated felony" is any crime that Congress decides to label as such. As two prominent immigration judges recently noted, numerous "non-violent, fairly trivial misdemeanors are considered aggravated felonies under our immigration laws."²

As initially enacted in 1988, the term "aggravated felony" referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices.³ Congress has since expanded the definition of "aggravated felony" on numerous occasions,⁴ but has never removed a crime from the list. Today, the definition of "aggravated felony" covers more than thirty types of offenses, including simple battery,⁵ theft,⁶ filing a false tax return,⁷ and failing to appear in court.⁸ Even offenses that sound serious, such as "sexual abuse of a minor," can encompass conduct that some states classify as misdemeanors or do not criminalize at all, such as consensual intercourse between a 17-year-old and a 16-year-old.⁹

What if the Conviction Occurred before the Crime was Labeled an "Aggravated Felony"?

In most federal courts, a conviction for any offense listed as an "aggravated felony" is grounds for deportation, even if the crime was not considered an "aggravated felony" at the time of conviction.¹⁰ In other words, whenever Congress adds a new offense to the list of "aggravated felonies" in the Immigration and Nationality Act (INA), lawfully present immigrants who have previously been convicted of such crimes become immediately deportable. As a result, any addition to the list of "aggravated felonies" will apply to prior convictions unless Congress affirmatively states that it will only apply to future convictions.
Are "Aggravated Felonies" the Only Crimes for Which an Immigrant Can be Deported?

No. An "aggravated felony" is one—but not the only—basis to deport immigrants convicted of a criminal offense. Removal proceedings may also be initiated against immigrants convicted of one or more crimes involving "moral turpitude," a broad category of offenses that includes, but is not limited to, most crimes that qualify as an "aggravated felony." Immigrants convicted of crimes involving moral turpitude are subject to deportation, but do not face the additional consequences associated with a conviction for an "aggravated felony." The immigration laws also permit deportation for convictions of various standalone offenses.

Thus, whether a noncitizen is subject to deportation for a crime is not determined by whether the crime is labeled an "aggravated felony." Instead, the primary impact of the "aggravated felony" classification relates to the increased immigration penalties attached to the label, including the inability to apply for most forms of relief from removal.

What are the Potential Consequences of Being Convicted of an "Aggravated Felony"?

Deportation without a Removal Hearing

Certain non-citizens convicted of an "aggravated felony" are provided fewer legal protections than other immigrants. For example, any immigrant convicted of an "aggravated felony" who is not a lawful permanent resident (LPR) may be administratively deported from the United States without a formal hearing before an Immigration Judge. Immigrants placed in such proceedings are not eligible for asylum or any other form of discretionary relief. Immigrants found deportable in this manner may not appeal to the Board of Immigration Appeals (BIA) and can be physically removed two weeks after entry of the order.

Mandatory Unreviewable Detention Following Release from Criminal Custody

Federal immigration authorities are required to detain any immigrant convicted of an "aggravated felony" upon his or her release from criminal custody. To obtain bond from an immigration judge, LPRs who are detained following an "aggravated felony" conviction must demonstrate with substantial likelihood that the crime in question does not qualify as an "aggravated felony."

Ineligibility for Asylum

Any immigrant convicted of an "aggravated felony" is ineligible for asylum. Asylum is a form of immigration relief available to immigrants who suffered or have a well-founded fear of persecution in their country of nationality or last habitual residence. Immigrants convicted of an "aggravated felony" may also be ineligible for "withholding of removal," a similar form of relief for noncitizens whose life or freedom would be threatened in the country of deportation.

Ineligibility for Cancellation of Removal

Any immigrant convicted of an "aggravated felony" is ineligible for cancellation of removal ("cancellation"). Cancellation is a form of relief allowing immigration judges to permit otherwise deportable immigrants to remain in the United States. The bar to cancellation for
immigrants convicted of an “aggravated felony” applies regardless of whether their removal would cause “exceptional and extremely unusual hardship” to an immediate family member who is a U.S. citizen or LPR.23

Ineligibility for Certain Waivers of Inadmissibility

Certain LPRs may not obtain a waiver of inadmissibility under Section 212(h) of the INA if they were convicted of an “aggravated felony.”24 A waiver of inadmissibility is a means of excusing immigrants for past misconduct that makes them ineligible for admission to the United States. Waivers under Section 212(h) are available to prospective LPRs whose removal from the United States would cause “extreme hardship” to a qualifying U.S. citizen or LPR.

Ineligibility for Voluntary Departure

An immigrant convicted of an “aggravated felony” is ineligible for voluntary departure.25 Voluntary departure is a discretionary form of relief allowing otherwise deportable immigrants to leave the country at their own expense in place of formal deportation under an order of removal.

Permanent Inadmissibility Following Departure from the United States

An immigrant removed from the United States after being convicted of an “aggravated felony” (or who leaves while an order of removal is outstanding) is permanently inadmissible.26 To lawfully reenter the United States, such an immigrant must receive a special waiver from the Department of Homeland Security (which is very rare), in addition to meeting all other grounds of admissibility.

Enhanced Penalties for Illegally Reentering the United States

An immigrant who is removed from the United States following a conviction for an “aggravated felony,” and who subsequently reenters the country illegally, may be imprisoned for up to 20 years rather than two years.27

Conclusion

In the words of the Supreme Court, immigrants convicted of an “aggravated felony” face the “harshest deportation consequences.”28 As Congress ponders proposals to include even more crimes under the definition of “aggravated felony,” it must consider the extremely severe consequences that will result. The immigration laws include numerous provisions to ensure that criminals are not allowed to remain in the United States, yet also recognize that exceptions should be made in particularly compelling cases, especially when an immigrant’s removal will create hardship for U.S. citizens. Once a crime is labeled an “aggravated felony,” however, deportation is all but assured and individualized determinations are rarely possible to make.

Endnotes

1 The Immigration Policy Center wishes to thank Dan Kesselbrener of the National Immigration Project of the National Lawyers Guild for his assistance in preparing this fact sheet.
5 INA § 101(a)(43)(F).
6 INA § 101(a)(43)(G).
9 United States v. Castro-Guevarra, 575 F.3d 530 (5th Cir. 2009).
10 INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). In removal proceedings arising in the U.S. Court of Appeals for the Ninth Circuit, however, an "aggravated felony" conviction is grounds for removal only if the conviction occurred after November 19, 1988. Ledezma-Galicia v. Holder, 636 F.3d 1059 (9th Cir. 2011).
14 INA § 238, 8 U.S.C. § 1228.
24 INA § 212(h), 8 U.S.C. § 1182(h).
March 13, 2015

We write as scholars and teachers of immigration law who have reviewed the executive actions announced by the President on November 20, 2014; the opinion in *Arpaio v. Obama*¹, Civ. Action # 14-01966 (BAH) (D.D.C. Dec. 23, 2014); and the opinion of Judge Hanen in *Texas v. United States*, Civ. Action B-14-254 (S.D. Tex. Feb. 16, 2015), preliminarily enjoining two of the executive actions: expansion of the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs. We believe that Judge Hanen’s opinion is deeply flawed and that DAPA and the expansion of DACA are well within the legal authority of the federal executive.

Comprehensive analyses of the legal authority for DAPA and expanded DACA can be found in the government’s briefs in the Texas litigation; in Professor Legomsky’s written testimonies before the Senate and House Judiciary Committees;² and in numerous articles and other writings.³ This letter does not seek to duplicate those existing analyses. Rather, we write to provide background on prosecutorial discretion and deferred action and to highlight a few key points.

**Legal Authority for Immigration Prosecutorial Discretion:** Prosecutorial discretion in immigration law refers to the executive branch’s decisions about whether and to what extent to enforce the immigration laws against different persons.⁴ Indeed, Judge Hanen strongly defends the Secretary of Homeland Security’s authority to exercise prosecutorial discretion and set enforcement priorities, and he explicitly affirms related guidance announced by Secretary Johnson on November 20, 2014.⁵

Importantly, 8 U.S.C. § 1103(a) (§ 103(a) of the Immigration and Nationality Act (“INA” or the “Act”)) empowers the Department of Homeland Security (DHS) to make choices about

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¹ Dismissing (for lack of both standing and likelihood of success on the merits) a lawsuit challenging the legality of these executive actions.
⁵ See *State of Texas v. United States of America*, court opinion page 92 (S.D. Tex. Feb. 16, 2015) (“This court finds nothing unlawful about the Secretary’s priorities.”).
immigration enforcement. That section provides: "The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . ." Moreover, 6 U.S.C. § 202(5) charges the Secretary of DHS with "establishing national immigration enforcement policies and priorities," and DHS has increasingly carried out enforcement against targeted priorities using the funds appropriated by Congress. Congressional endorsement can also be found in 8 U.S.C. § 1252(g), which recognizes the executive branch’s legal authority to exercise prosecutorial discretion, specifically by barring judicial review of three particular types of prosecutorial discretion decisions: to commence removal proceedings, to adjudicate cases, and to execute removal orders. Indeed, Congress clearly understood that prosecutorial discretion is unavoidable in immigration enforcement. Prosecutorial discretion serves as a necessary tool for managing limited resources and, when exercised favorably, would operate to protect certain people from deportation on a temporary basis. Beyond the halls of Congress, the U.S. Supreme Court has also recognized the important role that discretion plays in the immigration system and explicitly noted "A principal feature of the removal system is the broad discretion exercised by immigration officials . . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all . . . ." These statutes and Supreme Court declarations are part of the multi-dimensional legal foundation for prosecutorial discretion programs like DAPA.

The specific role of deferred action: In the Texas decision, Judge Hanen declares that "The Government must concede that there is no specific law or statute that authorizes DAPA." However, the government need not concede anything here, because there is strong legal authority for deferred action in general, and for DAPA and DACA in particular as forms of deferred action. To explain why his reasoning is erroneous, it is crucial to understand that deferred action is a longstanding form of prosecutorial discretion. In its decision in Reno v. AADAC, the U.S. Supreme Court

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6 8 U.S.C. § 1103(c).
10 In Arpaio v. Obama, Judge Howell supports this assertion. She notes "the Secretary of DHS is specifically charged with ‘establishing national immigration enforcement policies and priorities,’ 6 U.S.C. § 202(5), to ensure that DHS’s limited resources are expended in pursuit of its highest priorities in national security, border security, and public safety" court opinion pages 4-5.
Court explicitly recognized "deferred action" as a form of prosecutorial discretion—namely, a choice to interrupt or abandon efforts of trying to deport someone by offering them temporary protection from deportation.\textsuperscript{14} Meanwhile, Judge Hanen suggests that deferred action in general and DAPA in particular fall outside the scope of prosecutorial discretion, because they go beyond "non-enforcement."\textsuperscript{15} His characterization of deferred action cannot be reconciled with either the long-established practices throughout the history of the deferred action program, or with the words of the U.S. Supreme Court.

To place deferred action in context, the immigration system has more than twenty different forms of prosecutorial discretion used by DHS. These forms include decisions to cancel, dismiss, or not bring charges against a noncitizen, as well as more positive acts, such as the decision to grant deferred action, parole, or a stay of removal.\textsuperscript{16} Regardless of the label, prosecutorial discretion always involves "non-enforcement." However, it is limited because it provides no formal legal status or pathway to a permanent status in the United States.

Judge Hanen also confuses deferred action with work authorization, which is based on an independent statute and governing regulations. He goes to great pains to distinguish prosecutorial discretion in immigration law through "nonenforcement" from deferred action because it comes with "other benefits" like work authorization. But the deferred action program has operated for decades in this way, and among other things, has provided qualifying grantees the opportunity to apply for work authorization upon a showing of economic necessity.\textsuperscript{17} INA § 274A (h) (3)


recognizes the executive branch’s authority to authorize employment for noncitizens who do not otherwise receive it automatically by virtue of their particular immigration status. This provision—along with the formal regulations that specifically make deferred action recipients eligible to apply for work permits—provide the necessary legal authority to provide work authorization to beneficiaries of DACA and DAPA.

Finally, Judge Hanen is mistaken to suggest that one cannot obtain the “benefit” of lawful presence or a work permit through programs outside the DACA or DAPA programs. As just a few examples, deferred action generally, parole and orders of supervision are all forms of prosecutorial discretion that provide the possibility of work authorization. Judge Hanen also appears troubled that DAPA “awards” some form of lawful presence, but deferred action promises nothing and can be terminated without cause or notice. Moreover, lawful presence for individuals in deferred action status is an already established concept. Congress has specifically provided that a noncitizen is lawfully present during any “period of stay authorized by” [DHS]. DHS in turn has exercised that authority with respect to deferred action recipients, though deferred action does not cease any prior periods of unlawful presence. Judge Hanen identifies the decision of DHS to classify DACA recipients as “lawfully present” to be “outside the realm of prosecutorial discretion,” but this is inaccurate. The source of his mistake is overlooking the difference between “lawful presence” and “lawful status.” The lawful presence awarded to deferred action recipients is a modest aspect of deferred action with its own statutory basis. The limited significance of unlawful presence is that it determines whether the person’s presence will trigger future inadmissibility when he or she departs. In contrast, lawful status, which neither DAPA nor DACA would grant, is associated with whether a person’s status is secure or final. Under governing statutes and regulations, the differences between lawful presence and lawful status are striking. The differences relate to a person’s future vulnerability to apprehension and deportation, ability to obtain certain benefits, and other rights, to name a few. Judge Hanen wrongly conflates the two.

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18 INA § 274A(h)(3); 8 U.S.C.A. § 1324a(h)(3).
24 See e.g., 8 USC § 1182(a)(9)(B)(i)(II).
25 See e.g., page 87 decision, FN 67 (“...The award of legal status and all that it entails is an impermissible refusal to follow the law”); page 95 decision, FN 76 (“This response clearly demonstrates that the DHS knew by DACA
Judge Hanen is critical of the procedures the Administration has put into place to operate the DAPA program. Importantly, many instruments to set prosecutorial discretion policy have been recognized as “general statements of policy” subject to the exceptions of the notice and comment requirement even where the criteria were outlined with care and where the related benefits were nearly identical. One of the earliest recitations of deferred action was in the form of a policy called the “Operations Instructions,” which stated in part, “When determining whether a case should be recommended for deferred action category, consideration should include the following: (1) advanced or tender age; (2) many years’ presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States – effect of expulsion; (5) criminal, immoral or subversive activities or affiliations....” Later, then Commissioner Doris Meissner identified deferred action as a viable form of prosecutorial discretion. Even after the Immigration and Naturalization Service (INS) was abolished and the Department of Homeland Security (DHS) was created, deferred action served as an instrumental form of prosecutorial discretion. The mere existence of guiding criteria has not meant, and does not with DAPA or DACA, mean that applications are “simply rubberstamped.”

We support the Administration’s decision to create a program for administering prosecutorial discretion that takes transparency seriously. But DACA and DAPA are no less discretionary just because they are transparent. We believe that creating sound procedures like a form, application fee and public information about how a person should go about making a request

(and now by DAPA) that by giving the recipients legal status, it was triggering obligations on the states as well as the federal government); In Arpaio v. Obama, Judge Howell addresses this concern. She states “Deferred action does not confer any immigration or citizenship status or establish any enforceable legal right to remain in the United States and, consequently, may be canceled at any time” (court opinion pages 5-6).


for DACA and DAPA are crucial, even if they represent general policy statements regarding the exercise of prosecutorial discretion. These features promote sound administrative law values that include consistent decision-making, efficient process, public transparency, and the political accountability of agency personnel in both leadership positions and in the field.\(^{39}\)

Sincerely,

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