



The  
 Dickinson  
 School of Law

**To:** Interested Parties  
**From:** Shoba Sivaprasad Wadhia & Doyinsola Aribio  
**Date:** March 23, 2015

**Re:** Advocacy with the Federal Public Defender and U.S. Attorney on use of prosecutorial discretion for immigrants.

On November 20, 2014, President Obama announced two new programs that may offer temporary relief for certain undocumented immigrants. Deferred Action for Parents of Americans and Lawful Permanent Residents, otherwise known as DAPA<sup>1</sup> would offer protection from deportation for parents of U.S. citizen or lawful permanent resident children who meet additional criteria.<sup>2</sup>

In regards to the DAPA program, a plain reading of the accompanying memo indicates that convictions for state and local offenses, in which immigration status is an essential element of the crime, will not bar DAPA eligibility; however, without more clarification, it appears that federal felony convictions where immigration status is an essential element will bar DAPA eligibility.

To address the ambiguity that arises for individuals who are convicted of federal offenses where immigration status is an essential element, (i.e. Reentry under 8 USC 1326) the Center for Immigrants' Rights has been exploring reaching out to the U.S. Attorney in our district to engage in conversation about favorable use of prosecutorial discretion towards certain immigrant populations who have strong and compelling equities in the United States, including but not limited to DAPA eligibility.

To do so, the Center first reached out to the federal public defender in our district. After internal discussions, we decided that it would be strategic to seek advice and suggested course of dealings from an entity that has regular dealings with the U.S. Attorney. Attached is a copy of the letter the Center wrote to the federal public defender.<sup>3</sup>

We hope that this will be a resource for those of you contemplating similar conversations with your U.S. Attorney.<sup>4</sup>

<sup>1</sup>The program was formerly titled Deferred Action for Parental Accountability

<sup>2</sup> See Memorandum from Jeh Johnson, Secretary of U.S. Department of Homeland Security, 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 to Acting Director, U.S. Immigration and Customs Enforcement; Commissioner, U.S. Customs and Border Protection; Director, U.S. Citizenship and Immigration Services; Acting Assistant Secretary for Policy (Nov. 20, 2014) *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf); The other program announced was an expansion to the DACA (Deferred Action for Childhood Arrivals) program, formerly launched in 2012. The expanded DACA program adjusts the date of entry requirement from June 15, 2007 to January 1, 2010. Additionally the age cap is removed for DACA applicants

<sup>3</sup> The attached copy has been redacted for privacy reasons.

<sup>4</sup> Please note that after communicating with the federal public defender, a similar letter was written to the U.S. Attorney's office.



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Office of the Federal Public Defender

Dear Mr. \_\_\_\_\_,

My name is XX. Due to your position as Federal Public Defender for the \_\_\_\_\_ and the experience you have gained working across from the United States Attorney's Office ("USAO"), we believe that you would be a great resource for advice, suggestions and tips as to how we should move forward with the following.

As you may know, illegal re-entry, a felony under 8 USC 1326, is one of the most prosecuted crimes in the United States. According to the Pew Research Center, the total number of offenders sentenced in federal courts for violating federal crimes has more than doubled since 1992, rising from 36,564 cases to 75,867.<sup>5</sup>

Similarly, according to the Bureau of Justice Statistics, in 2012, immigration offenses were overwhelmingly the largest percentage of arrests.<sup>6</sup> Immigration offenses comprised 49.9% of all arrests and bookings in 2012.<sup>7</sup>

On November 20, 2014, President Barack Obama announced a program called Deferred Action for Parental Accountability (DAPA). To be eligible for DAPA, individuals must have a U.S. Citizen or Lawful Permanent Resident child, lived in the U.S. for the last five years and no lawful immigration status.<sup>8</sup> Additionally, DAPA applicants must demonstrate they are not an enforcement priority under the Removal Priorities memo.<sup>9</sup> One requirement that arises from the Removal Priorities memo is that applicants must prove they have not been convicted of a

<sup>5</sup> Michael T. Light, Mark H. Lopez, Ana Gonzalez-Barrera, "The Rise of Federal Immigration Crimes", The Pew Research Center (Mar. 28, 2014). Illegal reentry convictions accounted for nearly 48 percent of that growth, increasing from 690 cases in 1992 to 19,463 in 2012.

<sup>6</sup> Mark Motivans, "Federal Justice Statistics, 2011-2012", Bureau of Justice Statistics (Jan. 2015).

<sup>7</sup> *Id.*

<sup>8</sup> Memorandum from Jeh Johnson, Secretary of U.S. Department of Homeland Security, 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 to Acting Director, U.S. Immigration and Customs Enforcement; Commissioner, U.S. Customs and Border Protection; Director, U.S. Citizenship and Immigration Services; Acting Assistant Secretary for Policy (Nov. 20, 2014) *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf)

<sup>9</sup> *Id.*; Memorandum from Jeh Johnson, Secretary of U.S. Department of Homeland Security, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants to Acting Director, U.S. Immigration and Customs Enforcement; Commissioner, U.S. Customs and Border Protection; Director, U.S. Citizenship and Immigration Services; Acting Assistant Secretary for Policy (Nov. 20, 2014) *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

felony.<sup>10</sup> However, a plain reading of the memo indicates that while a state and local felony conviction, in which immigration status is an essential element of the crime, will not bar DAPA eligibility, federal felony convictions, where immigration status is an essential element will bar DAPA eligibility. While there is some ambiguity on the issue, it is presumable that individuals who are convicted of illegal re-entry are barred from DAPA.

As the Department of Homeland Security contemplates which felonies will be exempt from the DAPA bar, if any, the Center is attempting to find alternate solutions for this ambiguity. One strategy we are considering is to reach out to the USAO for the \_\_\_\_\_ to persuade the office to adopt a policy that would limit criminal prosecution of individuals for illegal reentry who appear to be prima facie DAPA eligible.

According to a recent study by Human Rights Watch, the three reasons individuals facing reentry charges enter the United States is to “seek work, to reunite with family, often after many years of residence in the United States, or to flee violence or sometimes persecution abroad”.<sup>11</sup> We believe that if the USAO were to consider this policy, as described above, it would be in line with President Barack Obama’s recent promises to deport “felons, not families.”<sup>12</sup>

We hope to speak with you, and to learn tips and strategies that will allow us to move forward as we pursue communications with the USAO.

Please respond to this email indicating whether you would be willing to speak with us by phone or email about this project. We can be reached at \_\_\_\_\_.

Thank you very much for your time and consideration. We look forward to hearing from you.

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<sup>10</sup> Memorandum from Jeh Johnson, Secretary of U.S. Department of Homeland Security, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants to Acting Director, U.S. Immigration and Customs Enforcement; Commissioner, U.S. Customs and Border Protection; Director, U.S. Citizenship and Immigration Services; Acting Assistant Secretary for Policy (Nov. 20, 2014) *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

<sup>11</sup> Human Rights Watch, *Turning Migrants into Criminals*, May 2013, available at [http://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf)

<sup>12</sup> Address by President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) *available at* <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>