



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)ⁱ and expansion of Deferred Action for Childhood Arrivals (DACA)ⁱⁱ 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 plaintiff's 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 and the DAPA program was scheduled to begin accepting applications on May 19, 2015. Due to the injunction, DHS did not open applications for expanded DACA or DAPA as planned. Nevertheless, 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 **appeal**^{vi} of the decision to the Fifth Circuit Court of Appeals. DOJ filed its brief on March 30, 2015. The oral arguments were held at the Fifth Circuit Court on Friday, July 10, 2015 and lasted over two hours.^{vii} The parties argues over various issued, such as the ability for deferred action recipients to apply for employment authorization, whether or not the states have standing to sue the federal government over immigration regulation, and whether or not the Executive's actions can be described as a change in law.^{viii} The court has not yet reached a decision.

Second, the plaintiffs moved for **early discovery**^{ix} 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. On April 7, 2015, Judge Hanen sided with the plaintiffs and partially granted the Motion for Early Discovery.^x He gave the government until April 21, 2015 to provide the required documents. The government submitted the required documents on April 30, 2015.

Third, the federal government filed an **emergency motion to stay the order**,^{xi} 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. On April 7, 2015, Judge Hanen denied the government's Motion to Stay.^{xii} The government also filed an emergency stay motion with the Fifth Circuit Court of Appeals on March 12, 2015. The plaintiffs opposed and the Court took the unusual step of setting a hearing to consider oral arguments on the motion for an emergency stay. That hearing was held on April 17, 2015 in front of a three-judge panel. The hearing lasted roughly two and a half hours. On May 26, 2015, the Fifth Circuit denied the motion to stay in a two-judge majority decision.^{xiii} The Court based this decision on the opinion that "[a] stay would enable DAPA beneficiaries to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits."^{xiv} The dissenting judge, Judge Higginson, on the other hand, wrote an opinion in support of the government stating that the emergency stay should have been granted.^{xv} The Department of Justice has announced that it will not file the emergency stay with the Supreme Court, but will instead focus on the appeal on the merits of the injunction.^{xvi}

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."^{xvii}

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."^{xviii}

National Immigration Law Center (NILC): "Today's decision brought 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."^{xix}

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."^{xx}

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.^{xxi} 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.”^{xxii}

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.”^{xxiii}

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.^{xxiv} It states “The Executive Action is a practical and much-needed exercise of enforcement discretion that will allow those who qualify under expanded DACA and DAPA to participate more fully and safely in their cities, counties, and communities.”^{xxv}

*Current as of August 1, 2015.^{xxvi}

ⁱ 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 before 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_1120_memo_deferred_action.pdf).

ⁱⁱ 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 Expanded DACA Programs, National Immigration Law Center (January 23, 2015), <http://www.nilc.org/dapa&daca.html>.

ⁱⁱⁱ *State of Texas v. United States of America*, 2015 U.S. Dist. LEXIS 18551. (S.D. Tex. Feb. 16, 2015).

^{iv} Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions, U.S. Citizenship and Immigration Services (October 23, 2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

^v AILA Quicktake #121: The Latest on Executive Action Litigation (March 12, 2015), <http://aila.org/publications/videos/quicktakes/quicktake-121-latest-on-imm-action-litigation>.

^{vi} 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.)

^{vii} Oral Argument, *State of Texas, et al. v. USA, et al* (July 10, 2015) (No. 15-40238), available at: http://www.ca5.uscourts.gov/OralArgRecordings/15/15-40238_7-10-2015.mp3.

^{viii} Shoba Sivaprasad Wadhia, *Immigration argument at the fifth circuit*, The Hill (July 14, 2015), <http://thehill.com/blogs/congress-blog/judicial/247862-immigration-argument-at-the-fifth-circuit>; Molly Hennessy-Fiske, *Appeals court scrutinizes Obama immigration action as activists rally outside*, Los Angeles Times (July 10, 2015), <http://www.latimes.com/nation/la-na-immigration-obama-daca-20150710-story.html#page=1>.

^{ix} 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/businesstorts/articles/winter2014-0227-using-expedited-discovery-with-preliminary-injunction-motions.html>).

^x Hanen ordered the government to provide the following: “(i) any and all drafts of the March 3, 2015 Advisory, including all corresponding metadata and all other tangible items that indicate when each draft of the document was written and/or edited or revised; and (ii) a list of each person who knew about this Advisory, or about the DHS activity discussed therein, and each person who reviewed or approved its wording or filing, as well as the date and time when each person was apprised of this document and/or its contents, or of the DHS activity that is the subject matter thereof. No documents, electronic mails, texts, communications, or tangible items (including without limitation all computer records, hard drives, and servers) of any kind that deal with the Advisory or the subject matters discussed in the Advisory, whether or not owned by the Government, are to be destroyed or erased.” (*See* Order (April 7, 2015) (available at: <http://aila.org/File/Related/14122946t.pdf>)).

^{xi} “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 the granting of the stay serves the public interest.” (Defs.’ Emergency Expedited Mot. to Stay the Ct.’s Feb. 16, 2015 Order Pending Appeal and Supporting Mem. (February 23, 2015).

^{xii} Mem. Op. and Order (April 7, 2015) (available at: <http://aila.org/File/Related/14122946u.pdf>).

^{xiii} *See* Appeal from the United States District Court for the Southern District of Texas (May 26, 2015) (available at: <http://aila.org/File/Related/14122946y.pdf>).

^{xiv} *Id.* at page 40.

^{xv} *Id.* at page 43; *See also*, *Fifth Circuit Court of Appeals Decision on the Emergency Stay Pending Appeal*, National Immigration Law Center (May 27, 2015), <http://www.nilc.org/texasvusstaydecision.html>.

^{xvi} Jordan Fabian, *Obama holds off an immigration appeal to the Supreme Court*, *The Hill* (May 27, 2015), <http://thehill.com/homenews/administration/243253-justice-dept-wont-look-for-immigration-ruling>.

^{xvii} *Statement by the Press Secretary on State of Texas v. United States of America*, The White House: Office of the Press Secretary (February 17, 2015), <http://www.whitehouse.gov/the-press-office/2015/02/17/statement-press-secretary-state-texas-v-united-states-america>.

^{xviii} *AILA Talking Points on Temporary Injunction Against DAPA and Expanded DACA*, American Immigration Lawyers Association (February 17, 2015), <http://www.aila.org>.

^{xix} *Texas v. U.S.: Federal District Court’s Decision*, National Immigration Law Center (February 16, 2015), <http://nilc.org/nr021615.html>.

^{xx} *Texas Decision at Odds with Legal Precedent, History and Facts on Immigration Enforcement*, American Immigration Council (February 17, 2015), <http://www.americanimmigrationcouncil.org/newsroom/release/texas-decision-odds-legal-precedent-history-and-facts-immigration-enforcement>.

^{xxi} *See* www.pennstatelaw.psu.edu/lawprofltrlawsuit.

^{xxii} *Id.*

^{xxiii} *Br. of Immigration Law Professors as Amici Curiae in Supp. of Reversal* (April 6, 2015) (available at: <http://www.aila.org/File/Related/14122946p.pdf>).

^{xxiv} *Br. for Amici Curiae the Mayors of New York and Los Angeles, Seventy-One Additional Mayors, Cities, County Officials, Counties, Villages, and Boroughs, the United States Conference of Mayors, and the National League of Cities in Supp. of Appellants* (April 6, 2015) (available at: <http://www.aila.org/File/Related/14122946o.pdf>).

^{xxv} *Id.*

^{xxvi} 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.