



Immigration Update

by Alicia Triche

Who is a Dreamer? The Criteria, History, and Legal Authority of “Deferred Action for Childhood Arrivals”

Perhaps because the law cannot capture, let alone freeze, the ways that immigrants think about what it means to come to America, immigrants have crossed the line between us and them. Over the course of American history, families like ours have started as “them” and ended up...as “us,” even if that process has taken time, sometimes, even generations.

—Hiroshi Motomura¹

On June 15, 2012, President Obama made an historic announcement. Undocumented students and recent graduates would, if they met certain criteria, soon become eligible to formally request a reprieve from deportation, accompanied by employment authorization and the all important photo ID it provides. These students, commonly known as “dreamers,” had long been the subject of congressional and media attention.² The executive announcement was the first real progress after a long-standing effort to obtain status for dreamers by a variety of parties, including members of Congress, popular activists and law professors.³

U.S. Citizenship and Immigration Services (USCIS) is now tasked with administering dreamer applications. Between Aug. 15, 2012, the day the program commenced, and March 14, 2013, USCIS reports receiving 469,530 applications—3,261 per day on average.⁴ In that time, 453,589 applications have been granted, with 15,941 denied.⁵ This column will outline the criteria for granting deferred action, the legal authority behind that decision, and the colorful history behind the evolution of ‘dreamer status.’⁶

The official title of the program is ‘Deferred Action for Childhood Arrivals’ (DACA).⁷ The process for application consists of a series of forms mailed to USCIS, a \$465 fee, and a background check conducted through a fingerprinting appointment (known as biometrics).⁸ The criteria for DACA is relatively straightforward. An eligible applicant:

1. Was under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching their 16th birthday;
3. Has continuously resided in the United States since June 15, 2007, up to the present time;

4. Was physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with USCIS;
5. Entered without inspection before June 15, 2012, or had lawful immigration status that expired as of June 15, 2012;
6. Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a General Education Development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and;
7. Has not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.⁹

Significant misdemeanors include DUIs, all violent offenses, and any conviction carrying a prison sentence of 90 days or more—but not minor traffic offenses such as driving without a license, even where they constitute a crime.¹⁰ Applicants who are in removal proceedings, or even who have outstanding removal orders, may be considered for DACA; but, importantly, anyone who has left the United States since Aug. 15, 2012 is not eligible to apply.¹¹

Technically, DACA—being a form of deferred action—is not a legal status, but rather an “administrative choice ... to ‘freeze’ the case.”¹² ‘It grants no other benefit, although it can include work authorization, and does not ... extend to family beneficiaries or even immediate relatives.’¹³ Still, for those eligible, it has been tremendously important. Hours after Obama’s announcement, 100 students rallied at the White House, including 24 year old Rhodes College graduate Diana Villa, who has now been granted DACA herself. At the time, Villa stated “I feel absolutely ecstatic ... Obviously, it’s not anything to replace an actual bill, a Dream Act, but it’s definitely something that will encourage DREAMers to continue pursuing a college degree or join the military ...”¹⁴

In “the predictable thermodynamics of immigration policies, however, there [will always be] an equal and opposite reaction against employing such discretion.”¹⁵ Not all agree that DACA is a positive, or even legal, development. On Aug. 23, 2012, ICE agents

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in U.S. District Court for the Northern District of Texas filed suit against the administration over the DACA program, claiming President Obama lacks authority to institute it under federal law, and also alleging that the program requires them to violate the law by refusing to remove certain apprehended aliens.¹⁶ The case is *Crane v. Napolitano*, and on Jan. 24, 2013, it survived summary judgment via an order by Judge Reed O’Conner.¹⁷

Whether or not ICE’s challenge is upheld, it is true that, as a form of relief from removal, deferred action has a colorful and contentious history. It was originally known as nonpriority enforcement status,¹⁸ and, as Professor Michael Olivas narrates, it was originated by a different kind of dreamer.¹⁹ It was the legal troubles of the late former Beatle John Lennon that gave rise to the doctrine of what is now called deferred

action.²⁰ According to the story, Lennon overstayed his visa when wife Yoko’s child was kidnapped, and thereafter spent several years in a quest to be granted official reprieve from deportation.²¹ His quest was ultimately successful, and it also led to the unearthing the relevant official administrative practices—which (then) INS had attempted to keep secret.²²

In modern times, authority for deferred action is not based explicitly in regulation or statute, but in the President’s power to enforce immigration law.²³ I have argued that the federal government’s role as supervisor of removal is clear from the opening sections of the Immigration and Nationality Act,²⁴ which provides at 8 U.S.C. § 1103(a)(1) that “[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act,” and which also includes at section 1226(a) the discretionary choice to apprehend and detain aliens.²⁵ In 1999, without ruling on its validity, the Supreme Court described deferred action as a process through which “the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation ...”²⁶ It remains to be seen whether the challenge in the Northern District of Texas will ultimately be successful. Meanwhile, for some 450,000 grantees so far, the program has been a lifeline. ☉

Endnotes

¹Hiroshi Motomura, *AMERICANS IN WAITING* (2006) 4. Motomura is a professor at UCLA School of Law and the co-author of *IMMIGRATION CITIZENSHIP: PROCESS AND POLICY* (7th ed. 2012).

²See Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 12 *WM. & MARY BILL RTS. J.* 463, 471–73 (2012).

³*Id.*

⁴USCIS, *Deferred Action for Childhood Arrivals Process* available at www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-3-15.pdf (accessed Mar. 31, 2013).

⁵*Id.*

⁶Although popularly, the phrase ‘dreamer status’ is sometimes used, from the perspective of immigration law, deferred action is not an affirmative ‘status’, but instead an assurance that the government will refrain from removal for a certain period of time.



⁷See www.uscis.gov/childhoodarrivals (accessed Apr. 1, 2013). For an excellent practice advisory on DACA, see American Immigration Council, *Deferred Action for Childhood Arrivals* (Feb. 12, 2013) at www.americanimmigrationcouncil.org/practice-advisories/deferred-action-childhood-arrivals.

⁸www.uscis.gov/childhoodarrivals (n. 7) at ‘Frequently Asked Questions’. In theory, the filing fee can be waived on a showing of extreme financial hardship, but in practice this option is rarely used. *Id.* The fee for an employment authorization card can never be waived. *Id.*

⁹*Id.* at ‘Frequently Asked Questions’.

¹⁰*Id.*

¹¹*Id.*

¹²Olivas (n. 2) at 483 (citations omitted).

¹³*Id.* (citations omitted).

¹⁴Huffington Post, *Dream Act Supporters Rally at the White House* (Jun. 15, 2012) available at www.huffingtonpost.com/2012/06/15/dream-act-rally-supporters-white-house_n_1601486.html (accessed Apr. 1, 2013).

¹⁵Olivas (n. 2) at 474.

¹⁶*Crane, et al., v. Napolitano, et al.*, No. 3:12-cv-03247-O, N.D. TX, Dallas Div., Judge O’Connor, filed Aug. 23, 2012.

¹⁷The order is available at dl.dropbox.com/u/27924754/Crane%2041%201-24-13.pdf (accessed Apr. 1, 2013).

¹⁸See *gen.* T.A. Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *IMMIGRATION CITIZENSHIP: PROCESS AND POLICY* (7th ed. 2012) 780.

¹⁹Olivas (n. 2) at 475.

²⁰*Id.* at 475–76.

²¹*Id.*

²²*Id.* at 474–78.

²³See *gen.* T.A. Aleinikoff, David A. Martin, *et al.* (n. 18).

²⁴8 U.S.C. § 1101 *et seq.*

²⁵Alicia Triche, *Local Enforcement and Federal Preemption*, 11[24] *BENDER’S IMMIGR. BULL.* 1372, 1374 (Dec. 15, 2006).

²⁶*Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483–84 (1999) (citation omitted).