28 May 2012

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

re: Executive authority to grant administrative relief
for DREAM Act beneficiaries

Dear Mr. President,

We write as law professors whose teaching and scholarship focus on matters of U.S. immigration and citizenship law. This letter addresses an issue that may arise as agencies and officials within the Executive Branch consider various administrative options in cases involving potential beneficiaries of the Development, Relief, and Education for Alien Minors (DREAM) Act.

In assessing the options that may be available to the Executive Branch, the threshold question is whether there is executive authority to grant administrative relief. This is the question addressed in this letter. Though your Administration has considered various forms of prosecutorial discretion for individual DREAM-eligible applicants, this letter highlights the administrative authority that is available to potential DREAM Act beneficiaries as a group. We offer no views on the policy dimensions of a decision to exercise or to not exercise this authority. We write only to explain that there is clear executive authority for several forms of administrative relief for DREAM Act beneficiaries: deferred action, parole–in–place, and deferred enforced departure.

Deferred action is a long–standing form of administrative relief, originally known as "nonpriority enforcement status."[1] It is one of many forms of prosecutorial discretion available to the Executive Branch. A grant of deferred action can have any of several effects, depending on the timing of the grant. It can prevent an individual from being placed in removal proceedings, suspend any proceedings that have commenced, or stay the enforcement of any existing removal order.[2] It also makes the recipient eligible to apply

[1] *See generally* T.A. Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 780 (7th ed. 2012); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 248-65 (2010).

[2] Practitioners have reported that, in recent months, some DHS officials have taken the position that deferred action is available only to individuals who are in removal proceedings. At the same time, these officials maintain that once a removal case has been administratively closed, deferred action is no longer available. This position is inconsistent with DHS's prior practice. *See* Citizenship and Immigration Services

for employment authorization.[3] General authority for deferred action exists under Immigration and Nationality Act (INA) § 103(a), 8 U.S.C. § 1103(a), which grants the Secretary of Homeland Security the authority to enforce the immigration laws. Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decisions to initiate or terminate enforcement proceedings fall squarely within the authority of the Executive.[4] In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971. Federal courts have acknowledged the existence of this executive power at least as far back as the mid–1970s.[5] More recently, this Administration granted deferred action in June 2009 to widows and children of U.S. citizens while legislation to grant them statutory relief was under consideration.[6]

Parole–in–place refers to a form of parole granted by the Executive Branch under the authority of INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). Under this provision, the Attorney General "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case–by–case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States."[7] Parole permits a noncitizen to remain lawfully in the United States, although parole does not constitute an "admission" under the INA. Individuals who have been paroled are eligible for work authorization.[8] Under this express authority, previous Presidents have granted parole to noncitizens who did not qualify for admission under existing immigration law. For example, President Jimmy Carter exercised parole authority

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Ombudsman, *Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process*, July 11, 2011, at 3-4; Citizenship and Immigration Services, *Fact Sheet: USCIS Provides Interim Deferred Action Relief for Surviving Spouses*, Aug. 31, 2009. It is also inconsistent with case law and with DHS's own regulations. As the Supreme Court has explained, through deferred action: "[T]he INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. . . . *A case may be selected for deferred action treatment at any stage of the administrative process.*" *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure §72.03[2][h] (1998)) (quotation marks removed) (emphasis added); *see also* 8 C.F.R. § 274a.12(c)(14) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority").

[3] *See* 8 C.F.R. § 274a.12(c)(14).

[4] *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

[5] *See, e.g., Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 757-58 (8th Cir. 1976); *David v. INS*, 548 F.2d 219, 223 & n.5 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979), *superseded by rule on other grounds*, as stated in *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985).

[6] *See* DHS Establishes Interim Relief for Widows of U.S. Citizens, June 9, 2009, *available at* http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm.

[7] Although the INA gives the parole authority to the Attorney General, the statutes creating DHS in 2003 essentially transferred the parole–granting authority to DHS.

[8] 8 C.F.R. § 274a.12(c)(11).

to allow Cubans into the United States in 1980.[9] President Bill Clinton did the same in 1994.[10] More recently, this Administration granted parole in January 2010 to Haitian orphans who were in the process of being adopted by U.S. citizens.[11] In May 2010, this Administration adopted the current practice of granting parole to spouses, parents, and children of U.S. citizens serving in the military.[12] Though the text of the statute calls for case–by–case discretion, both historical and current practice make clear that such discretionary judgments may be based on group circumstances.[13] And, as the Supreme Court has made plain, the Administration's use of group circumstances as a basis for decision–making would be entitled to deference.[14]

Deferred enforced departure, often referred to as DED, is a form of prosecutorial discretion that is closely related to deferred action. Almost every Administration since President Dwight D. Eisenhower has granted DED or the analogous "Extended Voluntary Departure" to at least one group of noncitizens.[15] As with deferred action, executive authority to grant deferred enforced departure and extended voluntary departure exists under the general authority to enforce the immigration laws as set out in INA § 103(a), 8 U.S.C. § 1103(a).[16] Though Temporary Protected Status (TPS) in INA § 244, 8 U.S.C. § 1254a, has largely superseded the use of DED in practice, DHS's statutory authority for granting DED on bases other than nationality remains intact, and the President retains his inherent authority with respect to DED. Most recently, this Administration granted DED to Liberians in March 2009.[17] Though DED has been used in response to disturbed conditions in specific countries, there is nothing in the statutory authority for DED that limits its use to such situations. Recipients of DED are eligible to apply for work authorization.[18]

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[9] *See* T.A. Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 520 (7th ed. 2012).

[10] *See id.*

[11] *See* Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans, January 18, 2010, *available at* http://www.dhs.gov/ynews/releases/pr_1263861907258.shtm

[12] *See* Julia Preston, *Immigration Policy Aims to Help Military Families*, N.Y. Times, August 1, 2010, at A15.

[13] For a discussion of the historical use of the parole power, *see, e.g.*, Arthur C. Helton, *Immigration Parole Power: Toward Flexible Responses to Migration Emergencies*, 71 Interpreter Releases 1637 (Dec. 12, 1994). For examples of more recent categorical grants of parole, *see supra* notes 11 and 12.

[14] *See generally Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[15] *See* Ari Weitzhandler, Comment, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. Colo. L. Rev. 249, 256 & nn. 41–43 (1993).

[16] *Hotel and Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc) (opinion of Mikva, J.), *affirming by an equally divided court* 594 F. Supp. 502 (D.D.C. 1984); *see also American Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 768 (N.D. Cal. 1989).

[17] *See* Deferred Enforced Departure of Liberians, March 23, 2009, *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-deferred-enforced-departure-liberians

[18] 8 C.F.R. § 274a.12(c)(14).

These three forms of administrative relief differ in their requirements and consequences. In this letter, we do not reach these questions of specific application. Our purpose in writing is more limited and straightforward: to explain that the Executive Branch has the authority to grant these three forms of administrative relief to some significant number of DREAM Act beneficiaries, and that it has done so both historically and recently in similar situations.

Respectfully yours,

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