26 Jul 2016

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

RE: Executive Authority Related to DREAM Act Beneficiaries

Dear Mr. President,

As law professors engaged in teaching and scholarship that often focuses on matters of U.S. immigration and citizenship law, we ask that you consider issues that may arise as federal agencies and officials within the Executive Branch consider options in cases involving potential beneficiaries of the Development, Relief, and Education for Alien Minors (DREAM) Act.

We believe there is ample opportunity within all agencies involved to grant administrative relief where it is appropriate and within the law. However, we are also aware that relief is sometimes granted too sparingly so that it is of detriment to U.S. interests. This is the quandary addressed in this letter. Though your Administration has considered various forms of prosecutorial discretion for individual applicants who are eligible for DREAM consideration, we encourage you to consider DREAM beneficiaries as a group. We have no interest in delving into the policy variables of a decision to exercise or to not exercise this authority. We hope 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." The Executive Branch has full authority to advance prosecutorial discretion, with several effects. All effects depend on the timing of the action. One such action is to prevent an individual from being placed in a position of removal, or to suspend proceedings that have already begun. It can also stay the completion of an existing removal order. The Immigration and Nationality Act (INA) § 103(a), 8 U.S.C. § 1103(a), which grants the Secretary of Homeland Security the authority to enforce immigration laws, grants authority for deferred action. Recent Supreme Court decisions clearly place authority for initiating or terminating enforcement decisions within the authority of the Executive Branch. Matters of immigration have been within the jurisdiction of the Executive Branch since at least

1971. Federal courts have acknowledged the existence of this executive power at least as far back as the mid–
1970s.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.

Parole–in–place is defined as a form of parole granted by the Executive Branch under the authority of INA § 212(d), (5), 8 U.S.C. § 1182(d) (5). The provision directs that 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." Those granted parole may remain lawfully in the United States, although parole does not constitute an "admission" under the INA. However, paroled individuals are eligible for work authorization. In fact, several previous Presidents have granted parol to noncitizens who did not qualify for admission under existing immigration law. For example, President Jimmy Carter allowed Cubans into the United States in 1980. Similarly, President Bill Clinton did the same in 1994. More recently, the Obama Administration granted parole in January 2010 to Haitian orphans who were in the process of being adopted by U.S. citizens. As recently as May 2010, the Obama Administration granted parole to spouses, parents, and children of U.S. citizens serving in the military. Although each case must stand on its own merits, there is certainly a historical and current pattern that promotes discretionary judgments based on group circumstances. And, according to the Supreme Court, the Executive Branch can use group circumstances as a basis for decision–making.

Deferred enforced departure is often referred to as DED. Every administration since that of President Dwight D. Eisenhower has granted DED to at least one group of noncitizens. With authority granted under immigration laws as set out in INA § 103(a), 8 U.S.C. § 1103(a), executive authority to defer enforced departure is clearly delineated. DED is typically used in response to upheavals and stresses in various countries; however, the statute in no way limits action only to such situations. DED recipients can apply for work authorization.

Our intention in writing this letter is not to direct or suggest specific action or outcomes. We only seek to explain that past precedents and Supreme Court opinions conclude that the Executive Branch is within its authority to grant these three forms of administrative relief to a significant number of DREAM Act beneficiaries. In fact, it has been done historically and recently.

Respectfully yours,

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