



PRESIDENT ANNOUNCES DEFERRED ACTION, WORK AUTHORIZATION FOR CERTAIN CHILDREN OF UNDOCUMENTED PERSONS

Posted on June 18, 2012 by Cyrus Mehta

In a surprise move, President Barack Obama announced that certain children of undocumented persons may be granted deferred action and work authorization, based on prosecutorial discretion.

Secretary of Homeland Security Janet Napolitano detailed the change in a memorandum sent on June 15, 2012, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP); Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services (USCIS); and John Morton, Director, U.S. Immigration and Customs Enforcement (ICE). The memo explains that additional measures are necessary to ensure that enforcement resources are not expended on "low priority cases" such as those who were brought to this country as children and lack the intent to violate the law.

Before a person may be considered for an exercise of prosecutorial discretion under the memo, he or she must:

- have come to the United States under the age of 16;
- have continuously resided in the United States for at least five years preceding June 15, 2012, and have been present in the United States on June 15, 2012;
- be currently in school, have graduated from high school, have obtained a general education development certificate, or be an honorably discharged veteran of the U.S. Coast Guard or Armed Forces;
- not have been convicted of a felony, a significant misdemeanor, multiple misdemeanors, or otherwise not pose a threat to national security or public safety; and

- not be above the age of 30.

The above criteria are to be considered, the memo states, whether or not an individual is already in removal proceedings or subject to a final order of removal. "No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis." The memo notes that the Department of Homeland Security "cannot provide any assurance that relief will be granted in all cases."

The memo details what ICE, CBP, and USCIS should do when encountering individuals meeting the above criteria, with specifics for various circumstances. For example, for those who are in removal proceedings but not yet subject to a final order of removal, ICE should exercise prosecutorial discretion "by deferring action for a period of two years, subject to renewal." The memo also notes that, for those granted deferred action by either ICE or USCIS, USCIS will accept applications to determine whether such individuals qualify for work authorization during the period of deferred action.

The memo explains that U.S. immigration laws "are not to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language."

Several weeks ago, a letter from nearly 100 law professors outlined options under prosecutorial discretion the President could use to provide administrative relief in these cases, such as the use of deferred action. The letter noted, "Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decision to initiate or terminate enforcement proceedings fall squarely within the authority of the Executive."

In fact, Gary Endelman and Cyrus Mehta were one of the early voices to advocate for administration action when Congress has been in a stalemate with respect to much needed immigration reform in a blog entitled [Keeping Hope Alive: President Obama Can Use His Executive Power Until Congress Passes the Dream Act](#). Endelman and Mehta have also argued in [Tyranny of Priority Dates](#) that such administrative actions do not violate the separation of powers doctrine in the US Constitution.

Not everyone agrees with that viewpoint, however. Kris Kobach, Kansas'

Secretary of State, asserted that Congress removed prosecutorial discretion for such purposes in 1996, and accused President Obama of "breaking federal law." However, Stephen Yale-Loehr, professor of immigration law at Cornell law school, noted that the 1996 law focused on restricting the ability of federal courts to overturn immigration agency decisions; it did not address the rule of the executive branch on this particular issue. "Deferred action is a longstanding form of administrative relief used by presidents of both parties over many years," he noted.

Credit mainly goes to the thousands of Dream Act youth activists who boldly staged rallies, many of whom courageously revealing their undocumented status, thereby creating a sense of moral urgency for President Obama to act.

Secretary Napolitano's memo is available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

A related ICE announcement is available at <http://www.ice.gov/news/releases/1206/120615washingtondc.htm>. A Spanish-language version of the ICE announcement is available at http://www.ice.gov/espanol/releases/120615washingtondc_sp.htm. An ICE FAQ on the process is available at <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/deferred-action-process.htm>. USCIS's related memo is available at <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf>. (Director Morton said additional guidance "will be issued as soon as possible.") The professors' letter is available at <http://www.nilc.org> by typing "professors letter deferred action" in the Search field.

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