

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

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

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,



Hiroshi Motomura
Susan Westerberg Prager Professor of Law
UCLA School of Law*

David Abraham
Professor of Law
University of Miami School of Law

Muneer I. Ahmad
Clinical Professor of Law
Yale Law School

Raquel Aldana
Professor of Law
University of the Pacific
McGeorge School of Law

Deborah Anker
Clinical Professor of Law
Director, Harvard Immigration and Refugee
Clinical Program
Harvard Law School

Angela M. Banks
Associate Professor
William & Mary School of Law

* All institutional affiliations indicated for identification purposes only.

*Signatures continued**

Melynda H. Barnhart
Associate Professor
New York Law School

Linda Bosniak
Professor of Law
Rutgers University School of Law-
Camden

Richard Boswell
Professor of Law
University of California, Hastings
College of the Law

Allison Brownell Tirres
Assistant Professor
DePaul University College of Law

Kristina M. Campbell
Assistant Professor of Law
Director, Immigration and Human Rights
Clinic
University of the District of Columbia
David A. Clarke School of Law

Stacy Caplow
Professor of Law
Brooklyn Law School

Ming Hsu Chen
Associate Professor
University of Colorado Law School

Gabriel J. Chin
Professor of Law
University of California, Davis School of
Law

Michael J. Churgin
Raybourne Thompson Centennial
Professor in Law
The University of Texas at Austin

Marisa S. Cianciarulo
Associate Professor of Law
Director, Bette & Wylie Aitken Family
Violence Clinic
Chapman University

Adam B. Cox
Professor of Law
New York University School of Law

Keith Cunningham-Parmeter
Associate Professor of Law
Willamette University College of Law

Alina Das
Assistant Professor of Clinical Law
New York University School of Law

Johanna K.P. Dennis
Associate Professor of Law
Southern University Law Center

Ingrid V. Eagly
Acting Professor of Law
UCLA School of Law

Jill E. Family
Associate Professor of Law
Widener University School of Law

Niels W. Frenzen
Clinical Professor of Law
Gould School of Law
University of Southern California

Maryellen Fullerton
Professor of Law
Brooklyn Law School

* All institutional affiliations indicated for
identification purposes only.

*Signatures continued**

César Cuauhtémoc García Hernández
Assistant Professor
Capital University Law School

Lauren Gilbert
Professor of Law
St. Thomas University School of Law

Denise Gilman
Clinical Professor
Co-Director, Immigration Clinic
University of Texas School of Law

Jennifer Gordon
Professor of Law
Fordham University School of Law

Pratheepan Gulasekaram
Assistant Professor of Law
Santa Clara University

Anjum Gupta
Assistant Professor of Law
Director, Immigrant Rights Clinic
Rutgers School of Law - Newark

Jonathan Hafetz
Associate Professor of Law
Seton Hall University School of Law

Barbara Hines
Clinical Professor of Law
Co-Director, Immigration Clinic
University of Texas School of Law

Geoffrey A. Hoffman
Clinical Associate Professor and
Director, University of Houston
Immigration Clinic
University of Houston Law Center

Alan Hyde
Distinguished Professor and Sidney
Reitman Scholar
Rutgers University School of Law

Kate Jastram
Lecturer in Residence
Senior Fellow, Miller Institute for Global
Challenges and the Law
University of California, Berkeley School
of Law

Michael Kagan
Associate Professor
William S. Boyd School of Law
University of Nevada, Las Vegas

Daniel Kanstroom
Professor of Law and
Director, International Human Rights
Program
Boston College Law School

Kathleen Kim
Professor of Law
Loyola Law School, Los Angeles

David C. Koelsch
Associate Professor and
Director, Immigration Law Clinic
University of Detroit Mercy School of
Law

Sylvia R. Lazos
Justice Myron Leavitt Professor
William S. Boyd School of Law
University of Nevada, Las Vegas

Stephen Lee
Assistant Professor of Law
University of California, Irvine

* All institutional affiliations indicated for
identification purposes only.

*Signatures continued**

Jennifer Lee Koh
Assistant Professor of Law
Western State University College of Law

Beth Lyon
Professor of Law
Villanova University School of Law

Lynn Marcus
Professor of the Practice
Co-Director, Immigration Law Clinic
University of Arizona Rogers College of
Law

Peter L. Markowitz
Associate Clinical Professor of Law
Benjamin N. Cardozo School of Law

Fatma E. Marouf
Associate Professor of Law
Co-Director of the Immigration Clinic
William S. Boyd School of Law
University of Nevada, Las Vegas

Elizabeth McCormick
Associate Clinical Professor of Law
University of Tulsa College of Law

Karla McKanders
Associate Professor of Law
University of Tennessee, College of Law

Michelle McKinley
Associate Professor
University of Oregon School of Law

M. Isabel Medina
Ferris Family Distinguished Professor of
Law
Loyola University New Orleans College
of Law

Jennifer Moore
Regents Professor of Law
University of New Mexico School of
Law

Daniel Morales
Assistant Professor
DePaul University College of Law

Nancy Morawetz
Professor of Clinical Law
New York University School of Law

Karen Musalo
Clinical Professor of Law &
Director, Center for Gender & Refugee
Studies
University of California, Hastings
College of the Law

Noah Benjamin Novogrodsky
Associate Professor of Law
University of Wyoming College of Law

Mariela Olivares
Assistant Professor of Law
Howard University School of Law

Michael A. Olivas
William B. Bates Distinguished Chair in
Law
University of Houston Law Center

Sarah H. Paoletti
Practice Associate Professor
Director, Transnational Legal Clinic
University of Pennsylvania School of
Law

* All institutional affiliations indicated for
identification purposes only.

*Signatures continued**

Huyen Pham
Professor of Law
Texas Wesleyan University School of
Law

Polly J. Price
Professor of Law
Emory University School of Law

Nina Rabin
Associate Clinical Professor of Law
Director, Bacon Immigration Law and
Policy Program
James E. Rogers College of Law,
University of Arizona

Jaya Ramji-Nogales
Associate Professor of Law
Temple University, Beasley School of
Law

Jayesh Rathod
Assistant Professor of Law
American University Washington
College of Law

Maritza Reyes
Assistant Professor of Law
Florida A&M University College of Law

Ediberto Roman
Professor of Law &
Director of Citizenship and Immigration
Initiatives
Florida International University

Victor C. Romero
Maureen B. Cavanaugh Distinguished
Faculty Scholar & Professor of Law
The Pennsylvania State University,
Dickinson School of Law

Rachel E. Rosenbloom
Assistant Professor
Northeastern University School of Law

Kevin Ruser
M.S. Hevelone Professor of Law
Director of Clinical Programs
University of Nebraska-Lincoln College
of Law

Leticia M. Saucedo
Professor of Law
University of California, Davis School of
Law

Michael Scaperlanda
Edwards Family Chair in Law
University of Oklahoma College of Law

Irene Scharf
Professor of Law
University of Massachusetts School of
Law – Dartmouth

Andrew I. Schoenholtz
Visiting Professor of Law
Georgetown University Law Center

Philip G. Schrag
Delaney Family Professor of Public
Interest Law
Georgetown University Law Center

Rachel Settlage
Assistant Professor
Wayne State Law School

* All institutional affiliations indicated for
identification purposes only.

*Signatures continued**

Ragini Shah
Associate Clinical Professor of Law
Suffolk University Law School

Rebecca Sharpless
Associate Clinical Professor
University of Miami School of Law

Dan R. Smulian
Associate Professor of Clinical Law
Safe Harbor Project
BLS Legal Services Corporation
Brooklyn Law School

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Jayashri Srikantiah
Professor of Law &
Director, Immigrants' Rights Clinic
Stanford Law School

Juliet P. Stumpf
Professor of Law
Lewis & Clark Law School

Maureen A. Sweeney
Clinical Instructor
Immigration Clinic
University of Maryland Francis King
Carey School of Law

Margaret Taylor
Professor of Law
Wake Forest University School of Law

David B. Thronson
Professor of Law
Michigan State University College of
Law

Enid Trucios-Haynes
Professor of Law &
University Faculty Grievance Officer
Brandeis School of Law
University of Louisville

Diane Uchimiya
Professor of Law
Director of the Justice and Immigration
Clinic
University of LaVerne College of Law

Katherine L. Vaughns
Professor of Law
University of Maryland Francis King
Carey School of Law

Prof. Sheila I Vélez Martínez
Immigration Law Clinic
University of Pittsburgh School of Law

Leti Volpp
Professor
University of California, Berkeley
School of Law

Shoba Sivaprasad Wadhia, Esq.
Clinical Professor and
Director, Center for Immigrants' Rights
The Pennsylvania State University
The Dickinson School of Law

David P. Weber
Associate Professor of Law
Creighton Law School

Jonathan Weinberg
Professor of Law
Wayne State University

* All institutional affiliations indicated for
identification purposes only.

*Signatures continued**

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor
of Law
University of North Carolina School of
Law

Virgil Wiebe
Professor of Law
University of St. Thomas School of Law
(Minneapolis)

Michael Wishnie
William O. Douglas Clinical Professor of
Law and
Director of the Jerome N. Frank Legal
Services Organization
Yale Law School

Elizabeth L. Young
Associate Professor of Law
University of Arkansas School of Law –
Fayetteville

* All institutional affiliations indicated for
identification purposes only.