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Advanced Issues In Immigration

Indiana Continuing Legal Education Forum (ICLEF)

6th Annual Advanced Issues In Immigration
November 5, 2021
Index

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6TH ANNUAL ADVANCED ISSUES IN IMMIGRATION

November 5, 2021

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6TH ANNUAL
ADVANCED ISSUES IN IMMIGRATION

Agenda

8:20 A.M. Introduction and Overview
- *Christie Popp,* Popp & Bullman, Bloomington

8:30 A.M. Agency Panel Part I – Representatives Invited from the various government-related agencies including:
- *Karen E. Lundgren*, Chief Counsel, Chicago Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement
- *Sylvie Renda*, *Lynette Sumait*, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement
- *Manda Walters*, Office of Partnership & Engagement, U.S. Immigration and Customs Enforcement
- *Erin Bultje ,* U.S. Immigration and Customs Enforcement Office of Public Affairs
- *Kenneth Madsen*. Director, Chicago Asylum Office, U.S. Department of Homeland Security

10:00 A.M. Coffee Break

10:15 A.M. Agency Panel Part II – Representatives Invited from the various government-related Agencies.

11:15 A.M. Adjourn for lunch

11:30 A.M. Luncheon / AILA Indiana Chapter Meeting (All attendees Welcome!)

12:45 P.M. Prosecutorial Discretion and Deferred Action
- *Professor Shoba Sivaprasad Wadhia*

2:00 P.M. Trafficking Visas (T Visas)
- *Erika Asgeirsson & Jess Hunter-Bowman* from National Immigrant Justice Center

3:15 P.M. Refreshment Break

3:30 P.M. Breakout Session # 1
Business: *Jenifer Brown & Christl Glier*
Refugees Resettlement Updates: *Rachel Van Tyle*
Family-based Immigration: *Dallin Lykins & Sarah Burrow*
Detention & Removal: *Maria Baldini-Potermin & Hannah Cartwright*

4:15 P.M. Breakout Session # 2 – Ask the Experts
Business: *Ryan Marques, Christl Glier & Jenifer Brown*
Humanitarian: *Abby Seif, Lacy Panyard, Rachel Van Tyle, & Erika Asgeirsson*
Crimmigration: *Angela Joseph & Jason Flora*

5:00 P.M. Adjourn

November 5, 2021

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ADVANCED ISSUES IN IMMIGRATION

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Enforcement and Removal Operations,
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Kenneth Madsen
Director,
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Christie E. Popp
Popp & Bullman, Bloomington

Christine Popp is the owner of Popp & Bullman Law Office. Prior to opening the Popp Law Office, she was the Director of the Immigrants' and Language Rights Center of Indiana Legal Services and she worked for several years as an immigration staff attorney for the organization. Christine graduated from Vermont Law School in 2005 and from Indiana University, Bloomington in 2001, with Latin American studies major and a Spanish minor. Christine is fluent in Spanish.

Shoba Sivaprasad Wadhia is Associate Dean for Diversity, Equity, and Inclusion; the Samuel Weiss Faculty Scholar; and Clinical Professor of Law at Penn State Law in University Park. Her research focuses on the role of prosecutorial discretion in immigration law and the intersections of race, national security, and immigration. Her work has been published in numerous law journals, including *Duke Law Journal, Emory Law Journal, Texas Law Review, Washington and Lee Law Review, Harvard Latino Law Review, Administrative Law Review, Howard Law Journal, Georgetown Immigration Law Journal, and Columbia Journal of Race and Law*. Wadhia is the author of two award-winning books with New York University Press: *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* (2015) and *Banned: Immigration Enforcement in the Time of Trump* (2019). She is also the author of *Immigration and Nationality Law: Problems and Solutions*, (w. Steve Yale-Loehr and Lenni Benson), published by Carolina Academic Press.

Wadhia's scholarship has been cited in dozens of law journals and by numerous federal circuit courts, including Judge Richard Posner (article on deferred action), Judge Paul J. Watford (article on the role of discretion in speed deportation), and Judge Kim McLane Wardlaw ("See generally" citation to book Beyond Deportation), Judge Julius N. Richardson (co-authored article and Chevron deference and immigration), and Judge Andrew S. Oldham (co-authored article on Chevron deference and immigration). She serves as the inaugural Editor-In-Chief of the American Immigration Lawyers Association (AILA) Law Journal, a partnership between AILA and Fastcase. In 2019, she served as the Enlund Scholar In Residence at DePaul University School of Law. In 2019, Wadhia testified before Congress on the historical role of prosecutorial discretion and deferred action in immigration cases.

Wadhia has written or been quoted by numerous media outlets, including *New York Times, USA Today, Los Angeles Times, Philadelphia Inquirer, The Hill*, SCOTUS blog, blog of the Harvard Law Review, American Constitution Society, Yale Journal on Regulation's Notice & Comment, and Immigration Law Professors Blog. She has also served as an expert witness, lead author, or co-counsel in connection with Deferred Action for Childhood Arrivals (DACA), the asylum ban, the travel ban, and prosecutorial discretion more generally.

At Penn State Law, Professor Wadhia teaches doctrinal courses in immigration and asylum and refugee law. She is also the founder/director of the Center for Immigrants' Rights Clinic (CIRC), where she supervises students in three areas: 1) community outreach; 2) legal support in individual immigration cases; and 3) policy work for institutional clients. CIRC has earned a national reputation for its high-quality work product and impact in the community. 2018 marked the 10-year anniversary of CIRC. CIRC was honored with the Excellence in Legal Advocacy Award in 2017 by the American-Arab Anti-Discrimination Committee and named legal organization of the year in 2019 by the Pennsylvania Immigration Resource Center.

Prior to joining Penn State, Professor Wadhia was deputy director for legal affairs at the National Immigration Forum in Washington, D.C., where she provided legal and policy expertise on multiple legislative efforts, including the creation of the Department of Homeland Security, comprehensive immigration reform, immigration enforcement, and immigration policy post 9-11. Wadhia has also been an associate with the immigration law firm, Maggio Kattar of P.C. in Washington, D.C., where she represented individuals and families in asylum, deportation, family, and employment-based immigration.

Wadhia has received many awards for her scholarship, teaching, and service, including Pro Bono Attorney of the Year by the American-Arab Anti-Discrimination Committee in 2003, leadership awards by the Department of Homeland Security's Office of Civil Rights and Civil Liberties and Office of the Inspector General in 2008, 2017 Honoree by the National Immigration Project, Arnold Addison Award for Town and Gown Relations by the Borough of State College in 2019, and the 2019 Elmer Friend Excellence in Teaching Award by the American Immigration Lawyers Association. In 2020, Wadhia received the university-wide Rosemary Schraer Mentoring Award and was named a Fastcase 50 Awardee, which honors 50 of "the law's smartest, most courageous innovators, techies, visionaries, & leaders."

Erika Asgeirsson
National Immigration Justice Center, Chicago, IL

Erika Asgeirsson is an Equal Justice Works/Crime Victims Justice Corps Fellow with NIJC's Counter-Trafficking Project. She provides direct representation and victims' rights advocacy to survivors of human trafficking and conducts outreach and training to improve early identification of trafficking survivors. Prior to joining NIJC, Erika was a legal fellow at Human Rights First, where she advocated for policies to combat hate crime. Before law school, she served as a community health development volunteer in the Peace Corps in Burkina Faso. She earned her J.D. from New York University School of Law and her B.A. from George Washington University. She is licensed to practice law in New York.

Jess Hunter-Bowman
National Immigration Justice Center, Chicago, IL

Jess Hunter-Bowman is a Skadden Fellow in NIJC's Goshen, Indiana office. He provides direct representation to victims of crime and human trafficking and advocates for victims' access to immigration relief. Before joining NIJC, Jess clerked for U.S. District Court Judge Robert L. Miller, Jr. Prior to law school, he worked on human rights and U.S. foreign policy in Latin America, including ten years based in Guatemala, Mexico, and Colombia. Jess is licensed to practice law in Indiana.

Jenifer M. Brown

Jenifer is one of the founding partners of Brown Glier Law and practices exclusively in the area of immigration law. She advises companies, organizations and institutions of higher education on the hiring and retention of key foreign national talent. Jenifer assists clients with securing nonimmigrant (temporary) and immigrant visa benefits through filings made with U.S. Citizenship and Immigration Services and the Departments of Labor and State. She also counsels clients on I-9 employment verification, Social Security mismatch issues and E-Verify. Jenifer is a passionate advocate for innovation across the legal industry and is a regular speaker on these topics, as well as a variety of topics related to U.S. immigration law and policy.

Jenifer graduated with Honors from Ball State University in 1994 with a Bachelor of Science degree in History and Political Science. During her undergraduate education, she interned with Senator Richard G. Lugar in Washington D.C. and with the State of Indiana House of Representatives. She graduated from Indiana University McKinney School of Law in 1998 and completed coursework at the Université de Lille, France and the J. Reuben Clark Law School at Brigham Young University. Following graduation from law school, Jenifer was a partner in an AmLaw 200 law firm where she served as the Practice Group Leader for the firm's Labor Employment and Immigration practice, chaired the firm's inaugural Women's Initiative and was a regular contributor to the firm's strategic planning efforts. She is licensed to practice law in the state of Indiana.

Christl P. Glier
Brown Glier Law LLC, Indianapolis

Christl Glier's area of practice is focused exclusively on immigration law. She counsels and works with clients in various industries to secure appropriate visa status and employment authorization for foreign national professionals in the U.S. and abroad.

Christl's work includes obtaining nonimmigrant employment authorization and lawful permanent residency in the United States for foreign national professionals, managers, executives, outstanding researchers, athletes and religious workers. She additionally assists companies in obtaining temporary employment authorization for professionals on assignment outside of the United States. She also advises corporate clients on I-9 compliance, E-Verify requirements and worksite enforcement issues.

Rachel Van Tyle is the Director of Legal Services and an immigration attorney at Exodus Refugee Immigration. As the Director of Legal Services, she oversees Exodus' Legal Services Program that provides legal assistance to refugees, asylum seekers, and other vulnerable populations.

Rachel was born and raised in Indianapolis. After completing her undergraduate degree at Xavier University in Cincinnati she then went on to attend the Salmon P. Chase College of Law at Northern Kentucky University.

Rachel has been practicing immigration law for 10 years and her practice has been almost exclusively limited to humanitarian immigration law including asylum, deportation defense, and work with refugees. Rachel regularly presents to both professionals and potential clients on topics related to refugees, asylum and other immigration legal matters.

Dallin Lykins

LEWIS KAPPES

Dallin is a director at Lewis Kappes in the firm's Immigration practice group, where he handles all types of immigration matters. Dallin also handles legal issues for religious and nonprofit clients. He frequently speaks and presents to school administrators, bar associations, and other organizations on immigration matters. Dallin graduated cum laude from the Maurer School of Law in Bloomington. He is fluent in Spanish.

Dallin serves on the Board of Directors for Reach for Youth, Inc. and as a volunteer judge for Teen Court. He served as the Chair of the ISBA Latino Affairs Committee from 2017-2018. Dallin grew up on a farm in Indiana, and he now lives in Indianapolis with his wife and their six children.

Sarah Burrow, Lewis Kappes - Indianapolis

Sarah Burrow has spent the last 15+ years working in the immigration law field. She has an affinity for the most challenging removal and deportation defense cases. A passionate litigator, she spends most of her time defending families and individuals, many who have been detained by Immigration and Customs Enforcement. Sarah is excited by the opportunity to zealously represent foreign nationals in immigration court, opposite the Department of Homeland Security, and has successfully tried hundreds of cases involving nearly all types of relief from removal.

In addition to practicing removal defense, Sarah gladly accepts transactional immigration cases. She has spent years navigating US Citizenship and Immigration Services, having prepared and filed adjustments of status, green card renewals, naturalizations, Violence Against Women Act (VAWA) petitions, U visa applications, parole requests, affirmative asylum applications, waiver applications, and more.

While in law school, Sarah worked for a boutique immigration law firm on the city's northside. Upon graduation from law school, she joined that firm as an associate and practiced there for nearly two years. After a brief hiatus, in 2008, she opened her own office and worked as a solo practitioner until her brother joined her in early 2010. Sarah and her brother managed a successful immigration law partnership, serving hundreds of clients, until she made the decision to join Lewis Kappes PC in January 2012. Sarah is excited to be part of a larger firm, with a sizeable immigration group. She warmly welcomes clients - to Lewis Kappes PC, and continues to provide the dependable, high-quality representation for which she is known in Indianapolis' immigrant community. Sarah, her husband, Brendan, and their triplets reside near Eagle Creek.

Bar Admissions

State – Indiana

Federal – Seventh Circuit

Maria Baldini-Potermin
Maria Baldini-Potermin & Associates, P.C., Chicago, IL

Maria is the founder of the firm. Maria has been recognized nationally as a leading immigration attorney. In June 2013, she was awarded an American Immigration Lawyers Association (AILA) President's Commendation, "For Always Fighting for What's Right." In July 2010, AILA awarded Maria the Edith Lowenstein Award for Excellence in Advancing the Practice of Immigration Law. Since 2004, she has been recognized as a Leading Lawyer in Illinois in the area of immigration law.

Maria obtained her B.A. degree magna cum laude from the University of Dayton (Ohio) in International Studies and Spanish in 1990. She has been involved in the field of immigration law since August 1990. She spent four years working with detained noncitizens on the Texas-Mexico border, first for Catholic Charities and then for the South Texas Pro Bono Asylum Representation Project (ProBAR), including two years as an accredited representative. Between 1994 and 1998, she trained law students and traveled to ProBAR during law school breaks with the Asylum Law Project. She received an award for Outstanding Service in Defense of Human Rights through Asylum Representation from ProBAR in 1995.

Maria received her J.D. degree cum laude in 1997 from the University of Minnesota Law School. She served as an adjunct professor at the University of Minnesota Law School's Immigration Law Clinic from 1997 to 1999. In 1999, Maria received the Human Rights Volunteer Award from the Minnesota Advocates for Human Rights.

Maria was the recipient of two National Association for Public Interest Law (NAPIL, now Equal Justice Works) Equal Justice Fellowships to work with the Immigrant Law Center of Minnesota in St. Paul (1997 – 1999) and the National Immigrant Justice Center in Chicago (1999 – 2001). In the aftermath of the 1996 legislative overhauls of the immigration laws, she wrote the second and third state-focused manuals on the intersection of criminal and immigration laws and trained public defenders in Minnesota and then Illinois about the immigration consequences of criminal dispositions.

Maria is a member of the American Immigration Lawyers Association (AILA) and is active on the national and local levels. In 2004, she was awarded the Chicago AILA Chapter's Minsky Mentor Award. She served as a member from 2003 to 2005 and then from 2008 to 2010 as the vice-chair of the national AILA-Executive Office for Immigration Review Liaison Committee, which meets twice a year with the leadership of the Board of Immigration Appeals and Office of the Chief Immigration Judge. She currently serves as the chair of the national AILA Federal Court Litigation Section Steering Committee. She is serving on AILA Chicago Chapter's USCIS Asylum Office

Liaison Committee and Liaison Committee with Chicago ICE Enforcement and Removal Office (ICE). At the national level, Maria is the Chair of the Federal Court Litigation Section. Maria regularly speaks at national, regional, and local continuing legal education seminars and trains public defenders and non-profit organizational staff.

Maria is a member of the Federal Bar Association, Illinois State Bar Association, and Chicago Bar Association where she previously served as the Chair of its Immigration Law Committee. A long-time member of the National Immigration Project of the National Lawyers Guild, she has served on the Board of Directors since 2009. She is also a member of the Detention Watch Network and chaired its 2005 national conference.

Licensed in Minnesota and Illinois, Maria is admitted to practice before the U.S. District Courts for the Districts of Northern Illinois, Southern Indiana, Eastern Wisconsin, and Western Michigan as well as the U.S. Circuit Courts of Appeals for the Second, Fifth, Sixth and Seventh Circuits and the Supreme Court of the United States. Maria speaks Spanish fluently.

Hannah Cartwright is the Executive Director and principal attorney at Mariposa Legal based in Indianapolis. She provides holistic, low bono legal representation to Indiana residents in detained removal proceedings. She has been practicing detained removal defense since 2016 when she served as a staff attorney at the Pennsylvania Immigration Resource Center in York, PA and then as a supervising attorney on the Detention Project at the National Immigrant Justice Center in Chicago, where she represented individuals detained around the midwest. She co-founded Mariposa Legal (www.mariposalegal.org) in January 2020. As a part of work at Mariposa, Hannah also continues to serve as a Qualified Representative ("QR") representing individuals with serious mental illness who have been found incompetent by an Immigration Justice through the National Qualified Representative Program in cases before immigration courts across the country.

Hannah holds her JD as well as a Masters of Social Work from the Catholic University of America in Washington, DC. She also previously served as an Attorney Advisor at the Philadelphia Immigration Court as a part of the DOJ Honors Program. Hannah is licensed in both Indiana and Maryland.

Ryan C. Marques

Ryan is a corporate immigration lawyer and the Honorary Consul of Portugal to the State of Indiana. Ryan manages corporate, investment, and employment-based immigration matters for public and privately held companies as well as for non-profit organizations across numerous industries, including manufacturing, engineering, logistics, information services and technology, energy, transportation, health care, retail, food and agriculture, professional sports, and higher education. He has counseled small, mid-size, and Fortune 500 U.S. and international companies on corporate, investment, and employment-based immigration issues for over a decade and also has extensive experience in familial adjustment of status and naturalization matters.

As the Honorary Consul of Portugal to the State of Indiana, Ryan is responsible for promoting trade, investment, culture, and tourism between the Country of Portugal and the State of Indiana. Ryan has been recognized as a Super Lawyer – Indiana Rising Star in the field of Business/Employment based Immigration Law for the following years: 2022, 2021, 2020, 2019, 2018, 2016, 2015, and 2014. Ryan is also an Indianapolis Business Journal Forty Under 40 Award recipient (2016) and a recipient of The Indiana Lawyer, Leadership in Law Up and Coming Award (2017).

Abigail L. Sei,
Epstein Cohen Seif & Porter, LLP, Indianapolis

MEMBERSHIPS AND LICENSE
Abigail Seif is licensed to practice law in Indiana, Ohio (currently on inactive status), The United States District Courts for the Northern and Southern Districts of Indiana, and a member of the United States Supreme Court. She is an active member of the American Immigration Lawyer's Association (AILA) and practice in the Immigration Courts and the Seventh Circuit Court of Appeals.

AWARDS
- International Academy of Trial Lawyers Award
- Order of Barristers, National honor society whose members are selected for excellence
in advocacy
- Jonathan M. Ault Prize
- William H. Wallace Award, Awarded for excellence in litigation skills.
- CWRU School of Law Leadership Award
- National Trial Competition-Regional finalist

PRACTICE AREAS
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- Juvenile Law
- Appellate Law
- Small Claims
- General Litigation
- Personal Injury

Lacy Panyard Holton is a private practice immigration lawyer at Panyard Holton Immigration, LLC. She focuses primarily on family, humanitarian, and removal defense immigration.

Angela Joseph is the Managing Attorney at Munoz Legal. She graduated from Southern Nazarene University with a degree in International Studies, subsequently she graduated from Indiana University Robert H. McKinney School of Law. Angela is excited to work for a firm that is committed to fighting for individuals with immigration and criminal defense needs.

Jason Flora
Flora Legal Group, Indianapolis

Jason Flora has over a decade of professional experience advocating for the rights of people just like you. He graduated from Butler University in 1998 with a degree in International Management and Spanish. He then graduated from the Indiana University Robert H. McKinney School of Law and was admitted to practice in the Indiana State Bar in 2009. He opened his practice on the west side of Indianapolis in 2009 and now operates both the west side and south side offices. Jason has a strong background in immigration and criminal defense and is ready to serve you. Jason is a proud resident of Indianapolis and resides there with his wife and three children.

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Regional Deputy Chief Immigration Judge

Karen E. Lundgren
Chief Counsel, Chicago Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement

Sylvie Renda
Enforcement and Removal Operation, U.S. Immigration and Customs Enforcement

Lynette Sumait
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Manda Walters
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Erin Bultje
U.S. Immigration and Customs Enforcement
Office of Public Affairs

Kenneth Madsen
Director, Chicago Asylum Office, U.S. Department of Homeland Security

Section One

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Section Two

Agency Panel Part II

Judge Sheila McNulty
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Chief Counsel, Chicago Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement

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Enforcement and Removal Operation, U.S. Immigration and Customs Enforcement

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Director, Chicago Asylum Office, U.S. Department of Homeland Security

Section Two

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Karen E. Lundgren
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Section Three

Prosecutorial Discretion and Deferred Action

Professor Shoba Sivaprasad Wadhia
Penn State Law
University Park, Pennsylvania

Section Three

Prosecutorial Discretion and Deferred Action……. Professor Shoba Sivaprasad Wadhia

TITLE

Response: In Defense of DACA, Deferred Action, and the DREAM Act

AUTHOR

Shoba Sivaprasad Wadhia

Texas Law Review
See Also
Volume 91

Response

In Defense of DACA, Deferred Action, and the DREAM Act

Shoba Sivaprasad Wadhia*

I. Introduction

This essay responds to *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause* by Robert J. Delahunty and John C. Yoo.[1] Delahunty and Yoo make four main arguments: 1) the President has a constitutional duty to execute the laws faithfully and has breached this duty by exercising deferred action for people who qualify under the Deferred Action for Childhood Arrivals (DACA) program;[2] 2) presidential "prerogative" is limited to actions that are related to national security in times of a war or related crisis and not to domestic immigration policy;[3] 3) the Administration's implementation of DACA cannot be justified by any of the various "defenses" or exceptions that allow a President to "breach" his duty to execute the laws faithfully;[4] and 4) Congress, not the Administration, has the power to regulate domestic immigration law.[5]

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* Clinical Professor of Law and Director, Center for Immigrants' Rights, Pennsylvania State University, Dickinson School of Law. I send a big thank you to David A. Martin, Michael Olivas, and Margaret Stock for their comments. I also appreciate the research assistance from Stephen Coccorese. I am grateful to Dean Phil McConnaughay for his support of my scholarship and also to Hemal, Devyani, and Neelesh for their boundless love.

1. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781 (2013).
2. *Id.* at 784–785.
3. *Id.* at 812.
4. *Id.* at 835.
5. *Id.* at 837.

Though I credit Delahunty and Yoo for considering the relationship between the DACA program and the President's duties under the Take Care clause, they miss the mark in at least three ways: 1) contrary to ignoring immigration enforcement, the Obama Administration has executed the immigration laws faithfully and forcefully;[6] 2) far from being a new policy that undercuts statutory law, prosecutorial discretion actions like DACA have been pursued by other presidents and part of the immigration system for at least thirty-five years;[7] and 3) despite the unsurprising fact that some people who could qualify for the congressionally created DREAM Act possess the kinds of equities that make them attractive for a prosecutorial discretion program like DACA, it is simply inaccurate to equate the limbo status offered with a grant under DACA to the secure status that attaches to those eligible under the congressional solution known as the DREAM Act. This essay examines these three points in greater detail below.[8]

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6. *See ICE Total Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf.

7. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–52 (2010); *see also* Letter from a Group of Law Professors to President Obama (May 28, 2012), *available at* http://lawprofessors.typepad.com/files/executive authorityfordreamrelief28may2012withsignatures.pdf.

8. Beyond the scope of this essay but of note is the striking position taken by Yoo during his tenure as the Deputy Assistant Attorney General during the George W. Bush Administration. Specifically, Yoo wrote a series of memoranda in support of the President's unfettered "Commander-in-Chief" authority during times of war. One of these policies, infamously known as the "torture memo," argued in eighty-one detailed pages the President's authority to seize, detain, and interrogate enemy combatants. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003), *available at* http://www.fas.org/irp/agency/doj/olc-interrogation.pdf; Elise Foley, *John Yoo, 'Torture Memo' Author, Says Obama Violated Constitution With Deferred Action Policy*, THE HUFFINGTON POST (Oct. 15, 2012, 5:43 PM), http://www.huffingtonpost.com/2012/10/15/john-yoo-obama-deffered-action_n_1966955.html. The torture memo was criticized by select members of Congress and by the Department of Justice's Office of Professional Responsibility. *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (July 29, 2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf. In response to the gap between Yoo's position in favor of presidential powers in the context of "torture" with the President's authority to implement the DACA program, Yoo responded,

> There is a world of difference between putting aside laws that interfere with an executive response to an attack on the country, as in Sept. 11, 2001, and ignoring laws to appeal to a constituency vital to re-election . . . . The former recognizes the president's primary duty to protect the national security. The latter, unfortunately, represents a twisting of the Constitution's fabric for partisan ends.

Foley, *supra*. I do not agree with Yoo's rationale. First, national security is itself a basis for prosecutorial discretion programs like DACA (e.g., a person who poses a national security risk is ineligible for DACA). Second, far from serving as a partisan tool for reelection, prosecutorial discretion programs like DACA reflect a reasonable administrative tool aimed at managing priorities and protecting those with compelling equities.

Before addressing Delahunty and Yoo's article, a brief description of the immigration structure and powers is necessary. The primary statute for immigration is called the Immigration and Nationality Act (INA). The INA was passed by the U.S. Congress in 1952 and has been amended many times since.[9] The cabinet level Department of Homeland Security (DHS) was created in the aftermath of September 11, 2011, and, as a practical matter, absorbed many of the immigration functions once handled by the Immigration and Naturalization Service (INS).[10] The main operating units for immigration within DHS are Customs and Border Protection (CBP),[11] Immigration and Customs Enforcement (ICE),[12] and United States Citizenship and Immigration Services (USCIS).[13] Another notable federal agency is the Department of Justice (DOJ), which houses both the immigration court structure known as the Executive Office for Immigration Review (EOIR)[14] and the Office for Immigration Litigation (OIL).[15]

DHS and DOJ are but two of the plethora of agencies within the Executive Branch responsible for administering and enforcing the immigration laws. The Executive Branch's role in enforcing immigration laws is breathtaking and has affected both domestic populations and countries of the world.[16] Moreover, the Supreme Court has interpreted the various portions of the United States Constitution to give the "political branches" the plenary power to regulate immigration.[17] The plenary power

9. *See Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD.

10. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in 6 U.S.C.).

11. *About CBP*, U.S. CUSTOMS AND BORDER PROTECTION, http://cbp.gov/xp/cgov/about/.

12. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov.

13. U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis.

14. *Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/.

15. *Office of Immigration Litigation*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/civil/oil/oil_home.html. For a more detailed discussion of the different immigration units within DHS and DOJ, see Wadhia, *supra* note 7, at 257–58.

16. Though Delahunty and Yoo create a distinction between Executive Branch decisions during times of "national security" and domestic policy, immigration law is replete with situations where the line is blurred or where national security is used by the immigration agency to interrogate, detain, and deport noncitizens living in the United States. *See, e.g.*, Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007).

17. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

doctrine has been applied to exclude and deport noncitizens without a check from the judiciary.[18]

II. The Obama Administration Has Executed the Immigration Laws Faithfully and Forcefully

Delahunty and Yoo center their argument on Article II, Section Three, of the United States Constitution (the Take Care Clause), which states in part that the President "shall take Care that the Laws be faithfully executed."[19] Specifically, they argue that the Obama Administration's DACA program is a violation of the President's duties under the Take Care Clause because under DACA the President is failing to enforce the immigration statute.[20] I cannot agree. First, the DACA program does not violate or undermine the immigration statute. There is no provision in the INA that prohibits the Administration from implementing programs like DACA.[21] Moreover, the immigration agency is charged with utilizing the funds appropriated by Congress to enforce the immigration laws against individuals who represent a "high priority" for removal, and DACA can be justified as an effort to enforce congressionally mandated priorities.[22] Moreover, the Obama Administration has detained and deported noncitizens at record levels during President Obama's tenure. To illustrate, ICE removed 392,862 noncitizens during fiscal year (FY) 2010, and a record 396,906 noncitizens during FY 2011.[23] Likewise, ICE detained 429,000 individuals in facilities in FY 2011, an increase of 18% from the previous fiscal year.[24]

Importantly, the President's faithful execution of the immigration laws is not just limited to bringing enforcement actions against individuals and ultimately deporting them, but also to prioritizing the deportable population in a cost-effective and conscientious manner, and providing benefits to

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18. *See, e.g.*, Wadhia, *supra* note 16, at 1524.

19. U.S. CONST. art. II, § 3.

20. Delahunty & Yoo, *supra* note 1, at 785.

21. On the other hand, the discretionary component that attaches to many forms of removal relief in the INA is consistent with the discretionary nature of the Obama Administration's DACA program, suggesting at the very least a consistency (not a contradiction) about the factors that should be considered in deciding whether individuals should be protected from removal. *See, e.g.*, INA § 240A, 8 U.S.C. § 1229b (2006).

22. *See Removal Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/removal-statistics/.

23. *ICE Total Removals*, s*upra* note 6. By contrast, there were 202,842 removals in 2004; 189,368 removals in 2003; and 150,542 removals in 2002. *See* MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2004 6 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf.

24. JOHN SIMANSKI & LESLEY M. SAPP, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011 4 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf. By contrast, the George W. Bush Administration detained about 235,247 noncitizens in 2004. *See* DOUGHERTY ET AL., *supra* note 23, at 1.

deportable noncitizens when they qualify for them. The President must "walk and chew gum" at the same time to carry out an effective immigration policy. Significantly, Delahunty and Yoo gloss over the significant relationship between the Take Care Clause and the exercise of prosecutorial discretion. The United States has an estimated unauthorized population of 11.5 million.[25] In contrast, Congress has appropriated funds to remove about 400,000 (less than 4%) of this population.[26]

Like with criminal law, there are far many more immigration laws and individuals who can be charged and potentially deported for having broken such laws than there are resources to prosecute them. In the criminal law field, prosecutorial discretion is frequently exercised, and prosecutors often refrain from bringing charges against people who have clearly broken the law. In the criminal context, the Supreme Court has confirmed the relationship between the exercise of prosecutorial discretion and the Take Care Clause:

> A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." As a result, "[t]he presumption of regularity supports" their prosecutorial decisions . . . .[27]

Similarly, in the administrative law context, the Court elucidated the relationship between the Take Care Clause and the exercise of prosecutorial discretion:

> [W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."[28]

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25. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 2011 1, (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

26. *See* Memorandum from John Morton, Assistant Secretary, U.S. Immigration & Customs Enforcement to All ICE Emps. 1 (Jun. 30, 2010), *available at* http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf; *see also* SHOBA SIVAPRASAD WADHIA, IMMIGRATION POLICY CTR., THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW 4 (2011), http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf.

27. United States v. Armstrong, 517 U.S. 456, 464 (1996) (citations omitted) (internal quotation marks omitted).

28. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

The ultimate source for the exercise of prosecutorial discretion in the Federal Government is the power of the President.[29] Under Article II, Section 1 of the Constitution, the executive power is vested in the President. Article II, Section 3, states that the President "shall take care that the laws be faithfully executed."

Delahunty and Yoo also question the Obama Administration's motivations in creating the DACA program and related costs.[30] The analysis falls short because the authors misidentify ICE (instead of USCIS) as the agency absorbing the costs of DACA;[31] fail to explain how the fees generated by the DACA program (DACA applicants must pay $465 with their application) interact with the USCIS's funding of the program; and, perhaps most importantly, misunderstand that alongside the economic considerations are the humanitarian factors that have driven prosecutorial discretion decisions for years. I agree with Delahunty and Yoo that cost savings alone cannot explain the DACA program, but I also believe that creating non-enforcement alternatives for people who have resided in the United States from their childhood and exhibit intellectual promise is an acceptable motivation for enacting the program.

III. Prosecutorial Discretion Actions Like DACA Have Been Part of the Immigration System for at Least Thirty-Five Years

Delahunty and Yoo fail to identify the numerous sources of authority for prosecutorial discretion in immigration law. The Supreme Court has reviewed the role of prosecutorial discretion in administrative, immigration, and criminal law contexts.[32] In *Arizona v. United States*, the Court highlighted the important role discretion plays in the immigration framework:

> A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . .
>
> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien

29. Memorandum from Sam Bernsen, Gen. Counsel, Immigration & Naturalization Serv. to Comm'r 2 (July 15, 1976), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

30. Delahunty & Yoo, *supra* note 1, at 847.

31. *Id*. at 788.

32. *See* Arizona v. United States, 132 S. Ct. 2492, 2506–07 (2012); Reno v. ADC, 525 U.S. 471, 473 (1999); *Heckler*, 470 U.S. at 846.

has children born in the United States, long ties to the community, or a record of distinguished military service.[33]

Likewise, the U.S. Congress has affirmed the role of prosecutorial discretion in immigration law. In language identifying the evidence that would be required for proving lawful status for purposes of a federally recognized state driver's license or identification card, Congress explicitly included "deferred action" as a valid lawful status in the REAL ID Act of 2005.[34]

Moreover, several members of Congress encouraged the Obama Administration to exercise prosecutorial discretion pursuant to its legal authority to provide a safety valve for special populations or individuals.[35] The use of prosecutorial discretion has also been recognized in the immigration statute—the Immigration Nationality Act (INA) and its

33. *Arizona*, 132 S. Ct. at 2499.

34. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313 (codified at 49 U.S.C. § 30301), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-109publ13/pdf/PLAW-109publ13.pdf. Similarly, the phrase "deferred action" appears in two other sections of the United States Code, 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (2006) ("(II) Any individual described in subclause (I) is eligible for deferred action and work authorization."; "(IV) Any individual described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."), and 8 U.S.C. § 1227(d)(2) (Supp. V 2011) ("(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States."). Delahunty and Yoo examine *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579 (1952), to analyze whether the Obama Administration has the prerogative power to violate the law. *Youngstown* dealt with President Truman's power to seize and operate most of the steel mills during a labor strike even though such seizure was not authorized by the Constitution or a statute. *Id.* at 582. Writing for the majority, Justice Hugo Black held that President Truman had no prerogative power because among other things, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here." *Id.* at 585. At least under this point and without conceding that the Obama Administration has violated any law, the DACA program appears to satisfy the threshold requirement under *Youngstown*, namely that deferred action stem from a Congressional act or the Constitution.

35. *See, e.g.*, *Hinder the Administration's Legalization Temptation (HALT) Act: Hearing on H.R. 2497 Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 57–59 (2011) [hereinafter *Hearing*] (statement of Margaret D. Stock), *available at* http://judiciary.house.gov/hearings/pdf/Stock07262011.pdf; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 25–27 (2012); Letter from Members of Cong. to Att'y Gen. Janet Reno & Doris M. Meissner, Comm'r, Immigration & Naturalization Serv. (Nov. 4, 1999), *available at* http://big.assets.huffingtonpost.com/Smith_to_Reno_1999.pdf; *Durbin, Reid, 20 Senate Democrats Write Obama on Current Situation of DREAM Act Students*, U.S. SENATE (April 13, 2011), http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c; Rep. Luis Gutierrez, *Ten Reasons Young People Should Come Forward For Deferred Action*, THE HILL (Aug. 14, 2012, 10:27 AM), http://thehill.com/blogs/congress-blog/homeland-security/243567-ten-reasons-young-people-should-come-forward-for-deferred-action.

governing regulations. The general authority for prosecutorial discretion can be found in § 103(a), which reads:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.[36]

Moreover, § 242(g) of the INA cabins three particular acts of prosecutorial discretion that are shielded from judicial review, namely the commencement of proceedings, adjudication of cases, and the execution of removal orders.[37] Finally, the governing regulations explicitly name "deferred action" as a basis for eligibility for work authorization.[38]

The legal authority to exercise prosecutorial discretion is not merely theoretical. The agency's use of deferred action was first revealed in 1975 in connection with the immigration case of music icon John Lennon.[39] The immigration agency (then INS) relied upon a guidance called the "Operations Instruction," which stated, "(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category."[40]

While the Operations Instruction was rescinded in 1997, the agency continued to exercise prosecutorial discretion in compelling immigration cases, relying largely on a memorandum from the former INS Commissioner Doris Meissner issued in 2000 and titled *Exercising Prosecutorial Discretion*.[41] Following the demise of INS and creation of the DHS, and throughout the George W. Bush Administration, the Meissner Memorandum operated as good policy. During the George W. Bush Administration, DHS issued at least two documents reaffirming the principles of the Meissner Memorandum and elucidating special cases worthy of prosecutorial discretion.[42]

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36. INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2006).

37. *See* INA § 242(g), 8 U.S.C. § 1252(g) (2006); *see also Reno*, 525 U.S. at 482.

38. *See* 8 C.F.R. § 274a.12(c)(14) (2012).

39. *See, e.g.*, Wadhia, *supra* note 7, at 246–47; Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979).

40. *See* David v. Immigration & Naturalization Serv., 548 F.2d 219, 223 n.1 (8th Cir. 1977).

41. Memorandum from Doris Meissner, Comm'r, Immigration and Naturalization Serv., to Reg'l Dirs. et al. (Nov. 17, 2000), *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf.

42. *See, e.g.*, Memorandum from William J. Howard, Principal Legal Advisor, on Prosecutorial Discretion (Oct. 24, 2005) (on file with author); Memorandum from Julie L. Myers, Assistant Sec'y

The exercise of prosecutorial discretion has not been limited to individual cases, but has also been applied to special categories of noncitizens.[43] To illustrate, from 1960 through 1990, the Attorney General used a form of prosecutorial discretion known as "Extended Voluntary Departure" (EVD) to protect classes of noncitizens for humanitarian reasons.[44] Today, the program is called "Deferred Enforcement Departure" (DED) and is exercised by the Secretary of Homeland Security. According to the Congressional Research Service:

> The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate, and the executive branch's position is that all blanket relief decisions require a balance of judgment regarding foreign policy, humanitarian, and immigration concerns. Unlike [Temporary Protected Status], aliens who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.[45]

Deferred action is another form of prosecutorial discretion the immigration agency has used to protect certain individuals from deportation. In 2005, the USCIS announced deferred action for the approximately 5,500 foreign academic students affected by Hurricane Katrina.[46] In 2009, USCIS announced deferred action for the widows of U.S. citizens for two years.[47] In the official press release, DHS Secretary Napolitano is quoted as saying,

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of Homeland Sec., Immigration & Customs Enforcement, to Field Office Dirs. & Special Agents in Charge (Nov. 7, 2007), *available at* http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07.

43. *See* Wadhia, *supra* note 7, at 246–47; Letter from a Group of Law Professors to President Obama, *supra* note 7; JANUARY CONTRERAS, U.S. DEP'T OF HOMELAND SEC., DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (2011).

44. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION § 38.2, *available at* http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html; *see also* Hotel & Rest. Emps. Union, Local 25 v. Att'y Gen., 804 F.2d 1256, 1261 (D.C. Cir. 1986).

45. RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 4 (2006), *available at* http://pards.org/tps/tps2006,0207-CRS.pdf.

46. *See* Press Release, U.S. Citizenship and Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), *available at* http://www.uscis.gov/files/pressrelease/F1Student_11_25_05_PR.pdf; *see also* Short-Term Employment Authorization and Reduced Course Load for Certain F-1 Nonimmigrant Students Adversely Affected by Hurricane Katrina, 70 Fed. Reg. 70,992, 70,992–70,996 (Nov. 25, 2005) (to be codified at 8 C.F.R. pt. 214).

47. *See DHS Establishes Interim Relief for Widows of U.S. Citizens*, U.S. DEPARTMENT HOMELAND SECURITY (June 9, 2009), http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens.

"Granting deferred action to the widows and widowers of U.S. citizens who otherwise would have been denied the right to remain in the United States allows these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved."[48]

Deferred action has also been used to protect individuals applying for relief under the Violence Against Women Act (VAWA).[49] VAWA was enacted by Congress in 1994 and twice amended to include statutory remedies for abused spouses, parents, and children; victims of crimes and domestic abuse; and victims of human trafficking.[50] One protection under VAWA allows abused spouses and children of U.S. citizens and green card holders (lawful permanent residents) or the abused parents of U.S. citizens to file petitions for themselves with USCIS.[51] The self-petition process is critical to victims of domestic violence and abuse because it allows them to achieve a positive immigration status without having to rely on their abuser. If the self petition is ultimately approved, and the noncitizen is not in a legal immigration status, she is granted deferred action status, the opportunity to apply for work authorization, and eventually lawful permanent residence.[52] Between 1997 and 2011, 98,192 VAWA petitions were filed with the USCIS, of which 75% were approved.[53] Deferred action has also been used as a mechanism to keep immigrants who are the spouses, parents, and children of military members together.[54]

The examples identified above are not exhaustive but demonstrate how the immigration agency has long used the instrument of prosecutorial discretion and the authority under the INA to protect classes of people temporarily.

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48. *Id*.

49. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. 13701).

50. *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 26–27 & n.143, 30 (2012), *available at* http://www.fas.org/sgp/crs/misc/R42477.pdf.

51. *See* INA §§ 204(a)(1)(D)(i)(II), (IV), 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (2009); KANDEL, *supra* note 43, at 3 (listing "abused noncitizen spouses married to U.S. citizens or LPRs; noncitizen parents in such a marriage whose children were abused by U.S. citizens or LPRs; unmarried noncitizen children under age 21 abused by a U.S. citizen or LPR parent; and noncitizen parents abused by U.S. citizen adult children" as those who may self-petition through VAWA in general); *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b85c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=b85c3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Jan. 16, 2013).

52. *See* KANDEL, *supra* note 43, at 4; *see also* Mayte Santacruz Benavidez, *Learning from the Recent Interpretation of INA Section 245(a): Factors to Consider When Interpreting Immigration Law*, 96 CALIF. L. REV. 1603, 1607, 1624–27 (2008).

53. KANDEL, *supra* note 43, at 4–5.

54. *See, e.g.*, Letter from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to Zoe Lofgren, Representative, U.S. House of Representatives (Aug. 30, 2010), *in Hearing*, *supra* note 35, at 60 (statement of Margaret D. Stock).

IV. DACA Is Not the DREAM Act.

Delahunty and Yoo charge that by creating the DACA program, the Obama Administration "effectively wrote into law 'the DREAM Act.'"[55] While it is true that would-be DREAMers bear the equities and qualities that would be traditionally considered under a prosecutorial discretion policy, it is inaccurate to conclude that the DACA program is identical to the DREAM Act. The Development, Relief, and Education for Alien Minors Act (DREAM Act)[56] is a piece of legislation that has been introduced in several Congresses, most recently in 2011.[57] The DREAM Act would allow for the "cancellation of removal and adjustment of status of certain alien students who . . . entered the United States as children."[58] Put another way, beneficiaries of the DREAM Act are provided with a secure lawful status and benefit under the laws and the opportunity to apply for permanent status. The DREAM Act contains a series of requirements relating to continuous physical presence, good moral character, and age at the time of entry into the United States.[59] Significantly, the DREAM Act requires the noncitizen to show that she bears no significant criminal history and is "not inadmissible" under the INA. By contrast, DACA results in no lawful status, no path to permanent residency, and no means for qualifying for U.S. citizenship. Notably, following its announcement of DACA, the DHS published the following question and answer regarding the importance of passing the DREAM Act:

> Q14: Is passage of the DREAM Act still necessary in light of the new process?
>
> A14: Yes. The Secretary of Homeland Security's June 15th memorandum allowing certain people to request consideration for deferred action is the most recent in a series of steps that DHS has taken to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety. Deferred action does not provide lawful status or a pathway to citizenship. As the President has stated, individuals who would qualify for the DREAM Act deserve certainty about their status. Only

55. Delahunty & Yoo, *supra* note 1, at 784.

56. Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong. (2011).

57. *See, e.g.*, H.R. 1842; S. 952; *see also* Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1785–86 (2009); AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., THE DREAM ACT: CREATING OPPORTUNITIES FOR IMMIGRANT STUDENTS AND SUPPORTING THE U.S. ECONOMY 1, 5 (2011), http://www.immigrationpolicy.org/sites/default/files/docs/Dream_Act_updated_051811.pdf.

58. H.R. 1842; S. 952; *see also* Olivas, *supra* note 56, at 1785 n.121.

59. *See, e.g.*, H.R. 1842 § 3(a)(1); S. 952 § (3)(b)(1).

> the Congress, acting through its legislative authority, can confer the certainty that comes with a pathway to permanent lawful status.[60]

V. Conclusion

While the DACA program "feels" like something more or greater in scope than previous acts of prosecutorial discretion, the authority being exercised by the agency is no greater or different. I believe the discomfort held by opponents of DACA is linked less to the legality of the program and tied more to a fear about increased immigration generally, the size of the population who appear to be eligible for DACA, the public fanfare the program has received, or a combination of the three. Contrary to the outcome drawn by Delahunty and Yoo, the Obama Administration has *not decided* "not to enforce the removal provisions of the [INA] against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States," but has created a program that enables qualifying applicants to be considered for deferred action on an individualized basis if they meet specific criteria and in the exercise of the USCIS's prosecutorial discretion.[61]

As of November 15, 2012, less than 55,000 have been granted deferred action under the DACA program.[62] In fact, many eligible individuals are choosing not to apply for DACA because of the costs of applying, the tenuous posture of deferred action, and related concerns about turning over information about themselves and their family members.[63] More importantly, it is dangerous to argue that the potential size of the class that stands to benefit from DACA or the greater transparency somehow makes the DACA program legally unsound or different. Conceivably, a future Administration could place a cap on the number of applications that can be approved under DACA, but this is a policy question, not a constitutional one.

Lastly, and fundamental to the understanding of the theory of prosecutorial discretion in immigration law, are the economic and humanitarian motivations that have driven such discretion for more than thirty-five years. Prosecutorial discretion is not just a wise enforcement policy because it enables the agency to manage resources in a paradigm

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60. *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Jan. 18, 2003),http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD.

61. Delahunty & Yoo, *supra* note 1 at 783.

62. Office Of Performance And Quality, *Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Nov. 16, 2012), *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static_files/2012-1116%20DACA%20Monthly%20Report.pdf.

63. *See, e.g.*, Saundra Amrhein, *Immigrants Come Out of the Shadows to Fulfill a Dream*, REUTERS (Oct. 24, 2012, 3:25 AM), http://www.reuters.com/article/2012/10/24/us-usa-immigration-deferment-idUSBRE89N07K20121024.

where it has the capacity to remove just a slice of the population that is technically deportable from the United States, but also because there are significant humanitarian considerations that have historically been and continue to be acknowledged in determining whether discretion should be exercised. Would-be DREAMers who are living in the shadows with a string of compelling attributes and equities in the United States present a humanitarian situation that is perfectly suited for deferred action.

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NOTICE & COMMENT

Prosecutorial Discretion in the Biden Administration: Part 4, by Shoba Sivaprasad Wadhia

– *September 30, 2021*

In a memorandum (https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf) dated September 30, 2021, Alejandro Mayorkas, Secretary of the Department of Homeland Security, issued long-awaited guidance on prosecutorial discretion and civil enforcement priorities. Titled "Guidelines for the Enforcement of Civil Immigration Law," the seven-page document is Department wide and provides guidance for the apprehension and removal of noncitizens. This post includes some highlights of this memorandum but also encourages earlier readings on this blog (here (https://www.yalejreg.com/nc/prosecutorial-discretion-in-a-biden-administration-by-shoba-sivaprasad-wadhia/), here (https://www.yalejreg.com/nc/prosecutorial-discretion-in-the-biden-administration-part-2-by-shoba-sivaprasad-wadhia/) and here (https://www.yalejreg.com/nc/prosecutorial-discretion-in-the-biden-administration-part-3-by-shoba-sivaprasad-wadhia/)) and here (https://www.acslaw.org/expertforum/understanding-prosecutorial-discretion-in-immigration-policy-and-recommendations-for-moving-forward/) for earlier thoughts and recommendations on prosecutorial discretion in the Biden administration. A letter from immigration law scholars to the Secretary with recommendations on prosecutorial discretion can found here (https://pennstatelaw.psu.edu/sites/default/files/Final%20Law%20Prof%20Letter%20Aug%202021.pdf).

Foundation. The September 30 memorandum begins with naming prosecutorial discretion as a foundational principle in the immigration arena. Consistent with earlier guidance on prosecutorial discretion,

the new memo notes the limited resources of the agency the impossibility of enforcing the immigration laws against every undocumented or otherwise removable noncitizen.

The new memo states that the fact of being removable should not alone be a basis for immigration enforcement. It also recognizes the contributions of the majority of those who are undocumented, profiling those "who work on the frontlines in the battle against COVID, lead our congregations in faith, teach our children, do back-breaking work to help deliver food to our table, and contribute in many other meaningful ways."

Priorities. The September 30 memorandum lists the following three civil immigration enforcement priorities. 1) Threat to National Security; 2) Threat to Public Safety; 3) Threat to Border Security. Whereas earlier guidance had defined "Threats to Public Safety" to include those who committed an aggravated felony, the new memorandum is more nuanced, and takes into account the individual aggravating and mitigating factors of the individual, requiring an assessment of "the individual and the totality of factors and circumstances."

Like the positive factors listed in historical guidance documents on prosecutorial discretion, the mitigating factors listed in the September 30 memorandum include advanced or tender age, lengthy presence in the United States, a mental condition that would have contributed to criminal conduct, impact of removal on family in the United States, and military service to name a few. This is an important change as it provides officers with more flexibility to consider each case individually.

The September 30 guidance defines "Threats to Border Security" as those who were apprehended at the border while trying to enter the United States unlawfully as well as those who were apprehended in the United States after unlawfully entering the United States on or after November 1, 2020. Again, the guidance advises officers to consider cases individually and based on a totality of the facts and circumstances.

Civil Rights and Civil Liberties. Importantly, the guidance states that a noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political associations, as well as First Amendment activity, shall never be factors in deciding to take enforcement action. Notably, the guidance states "We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes." This language is more inclusive than what has existed historically and is an important step towards improving racial disparities in immigration enforcement.

Guarding Against Immigration Enforcement as a Tool for Retaliation. The guidance instructs that immigration enforcement should not be used as a retaliatory tool again noncitizens who exercise their workplace, tenant and other rights and that serving as a witness in a labor or housing dispute should be considered a mitigating factor. This is important to ensuring that noncitizens have the agency to exercise

their rights without fear of immigration enforcement.

Process and Review. The September 30 memorandum leaves the exercise of prosecutorial discretion to the judgement of personnel and identifies extensive training, a review of enforcement decisions in the first 90 days of implementation, and assurance that decision making is consistent across the agency and Department. This is a significant and important change given the historical lack of transparency or consistency in how prosecutorial discretion decisions are applied.

Data Collection. The September 30 memorandum also underscores the importance of data collection on every enforcement action. This data collection is crucial to help identify disparities in immigration enforcement and discretion, and to improve transparency and accountability.

Effective Date. The September 30 memorandum is effective 60 days from publication, November 29, 2021. On this date, the previously issued interim guidelines will be rescinded.

The September 30 Memorandum is at once comprehensive, compassionate and pragmatic about the important role prosecutorial discretion plays in the immigration system. The guidance is also attentive to the intersection between race and immigration enforcement, and the contributions of most immigrants living in the United States without formal status.

Shoba Sivaprasad Wadhia (https://twitter.com/shobawadhia) *is a law professor and immigration scholar at Penn State Law* (https://pennstatelaw.psu.edu/) *at University Park. She is the author of two books: Beyond Deportation* (https://www.amazon.com/gp/product/B00WNI7PRS/ref=dbs_a_def_rwt_hsch_vapi_tkin_p1_i1)*: The Role of Prosecutorial Discretion in Immigration Cases (NYU Press) and Banned* (https://www.amazon.com/Banned-Immigration-Enforcement-Time-Trump/dp/1479857467/ref=tmm_hrd_swatch_0?_encoding=UTF8&qid=&sr=)*: Immigration Enforcement in the Time of Trump, (NYU Press).*

Testimony of

Shoba Sivaprasad Wadhia

Samuel Weiss Faculty Scholar, Clinical Professor of Law, Director, Center for Immigrants' Rights Clinic at

Penn State Law
The Pennsylvania State University

Regarding a Hearing on

"The Administration's Apparent Revocation of Medical Deferred Action for Critically Ill Children."

Before the
U.S. House of Representatives Committee on Oversight and Reform
Subcommittee on Civil Rights and Civil Liberties

Washington, D.C. September 11, 2019

Chairman Cummings, Ranking Member Jordan, Subcommittee Chairman Raskin, Subcommittee Chairman Roy, and distinguished Members of the Committee. Thank you for inviting me to appear before you today. It is an honor.

I am the Samuel Weiss Faculty Scholar, Clinical Professor of Law, and the Director of the Center for Immigrants' Rights Clinic at Penn State Law in University Park. My scholarship, teaching, and practice focus on immigration and nationality law. I have worked in the immigration field for nearly twenty years. Over the past twelve years, I have closely studied and analyzed the role of prosecutorial discretion generally, and deferred action in particular, in immigration law. My testimony was prepared in my individual capacity and does not reflect the views of the University.

My testimony focuses on the history and use of prosecutorial discretion and deferred action in particular. In my testimony, I will how show:

1. Prosecutorial discretion is an essential part of the immigration system;

2. Deferred action is a form of prosecutorial discretion in immigration law and enjoys a long history in both Republican and Democratic administrations;

3. The Department of Homeland Security ("DHS") and its predecessor have used deferred action for decades in medical and other humanitarian cases; and

4. The U.S. Citizenship and Immigration Services ("USCIS") has a long history and the expertise of handling cases for vulnerable populations and should continue to process deferred action cases.

My testimony and conclusions are drawn largely from my research in the area of prosecutorial discretion in immigration law as well as recent expert opinions on the history of deferred action.

Background

In 1999, I received my Juris Doctorate degree from the Georgetown University Law Center. Since that time, I have worked in the immigration field in the following settings: private practice, non-profit organizations, and institutions of higher education. As a practitioner, I have practiced immigration law on behalf of individuals seeking a benefit before the immigration agency as well as those challenging removal or seeking relief from removal before an immigration judge or the appellate agency. In the non-profit sector, I have drafted, reviewed, and analyzed legislative proposals on immigration and convened or participated in meetings with government officials, organizational leaders, and the public on immigration topics.

As an academic researcher, my work focuses on the role of prosecutorial discretion in immigration law and the intersections of race, national security and immigration. In the area of prosecutorial discretion in immigration law, my scholarship has served as a foundation for scholars, advocates, and government officials seeking to understand or design a strong prosecutorial discretion policy. My first book, *Beyond Deportation: The Role of Prosecutorial*

Discretion in Immigration Cases, was published by New York University Press and binds together nearly one decade of research on the role of prosecutorial discretion and deferred action in particular in immigration cases. My second book *Banned: Immigration Enforcement in the Time of Trump*, was released by New York University Press on September 10, 2019 and examines immigration enforcement and discretion in the first eighteen months of the Trump administration. I have published more than 30 articles, book chapters, and essays on immigration law, including a number discussing the use of prosecutorial discretion in immigration cases. My work has been published in eighteen law journals, including but not limited to *Washington and Lee Law Review; Emory Law Journal*; *Texas Law Review*; *Columbia Journal of Race and Law*; *Notice & Comment, Yale Journal on Regulation*; *Harvard Latino Law Review*; *Connecticut Public Interest Law Journal*; *Georgetown Immigration Law Journal*; and *Howard Law Journal*. I am the co-author of the second edition of an immigration textbook, *Immigration and Nationality Law: Problems and Solutions*, to be published by Carolina Academic Press later this year.

My scholarship on prosecutorial discretion has been cited by federal appellate court judges, including Judge Richard Posner (article on deferred action), Judge Paul J. Watford (article on the role of discretion in speed deportation), and Judge Kim McLane Wardlaw ("See generally" citation to my book *Beyond Deportation*). I have served as an expert witness on the history of deferred action as well as a co-counsel or co-author in amicus briefs and statements from immigration law scholars on the topic of prosecutorial discretion generally and deferred action in particular.

As an educator, I teach law students in the doctrinal survey course in immigration law and a specialized course in asylum and refugee law. I also supervise students in a law school clinic known as the Center for Immigrants' Rights Clinic (CIRC), which I founded. Since the Fall 2008 semester, I have supervised more than 100 students at CIRC on the following types of cases and projects: policy products on behalf of institutional clients, outreach and education with the community and local municipality, and legal support in individual cases. CIRC is a 2017 recipient of the Legal Advocacy Award by the American-Arab Anti-Discrimination Committee, and a 2019 recipient of the Light of Liberty Award for legal organization of the year by the Pennsylvania Immigration Resource Center.

In 2018, I was named and serve as the inaugural Editor-In-Chief of the American Immigration Lawyers Association (AILA) Law Journal, a partnership between AILA and Fastcase. I currently sit on the Board of Directors of the American Immigration Council and previously served as a Commissioner on the American Bar Association's Commission on Immigration. I have received multiple awards and honors, including Pro Bono Attorney of the Year by the American-Arab Anti-Discrimination Committee in 2003, leadership awards by the Department of Homeland Security's Office of Civil Rights and Civil Liberties and Office of the Inspector General in 2008, and the 2019 Elmer Friend Excellence in Teaching Award by AILA.

1. Prosecutorial discretion is an essential part of the immigration system

Prosecutorial discretion refers to the choice by the DHS and its predecessor agencies, including the Immigration and Naturalization Service ("INS"), of whether and how to enforce the full scope of immigration law against a person or group of persons. When an individual enters the

country without inspection, overstays a visa, or engages in conduct that makes her removable, they are subject to removal by DHS. This requires enforcement action (*i.e.*, prosecution) by DHS to effectuate. To illustrate, when DHS chooses not to file legally valid immigration charges against a person who is present in the United States without authorization, discretion is being exercised favorably. In other words, the question of whether to use discretion is raised only where there is a legally sufficient basis to bring immigration enforcement actions in the first place.

There are more than one dozen forms of prosecutorial discretion in federal immigration law. These forms have been outlined in several guidance documents issued by DHS and INS, including a memorandum published in 1976 by then-INS General Counsel Sam Bernsen (the "Bernsen Memo"),[1] a 2000 memorandum published by then-INS Commissioner Doris Meissner (the "Meissner Memo"),[2] a 2011 memorandum by then-Immigration and Customs Enforcement ("ICE") Commissioner John Morton (the "Morton Memo"),[3] and more recently by then-DHS Secretary Jeh Johnson (the "Johnson Memo").[4] The memoranda list at least 15 types of prosecutorial discretion. The most commonly used forms are:

- Deciding whether to issue, serve, file, or cancel a Notice to Appear;
- Deciding whom to stop, question, and arrest;
- Deciding whom to detain or release;
- Deciding whether to settle, dismiss, appeal, or join in a motion on a case; and
- Deciding whether to grant deferred action, parole, or a stay of removal.

The concept behind prosecutorial discretion is entrenched in the prioritization of limited government resources and compassion for individuals without a lawful immigration status who present strong equities in their cases. When DHS decides not to take enforcement actions against a mother caring for an ill child, a student affected by a natural disaster back home, or a teenager who came to the United States as a baby and calls America home, prosecutorial discretion is being exercised favorably with respect to that individual.

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[1] Memorandum from Sam Bernsen, General Counsel, Immigration and Naturalization Service, to Commissioner, Immigration and Naturalization Service, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976) (on file with U.S. Immigration and Customs Enforcement), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

[2] Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, (Nov. 17, 2000) (on file with author).

[3] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, (June 17, 2011) (on file with U.S. Immigration and Customs Enforcement), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[4] Memorandum from Jeh Charles Johnson, Secretary of U.S. Department of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Alan D. Bersin, Acting Assistant Secretary for Policy, U.S. Department of Homeland Security, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, (Nov. 20, 2014) (on file with the U.S. Department of Homeland Security), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

Prosecutorial discretion in immigration law has been recognized repeatedly by federal courts and former agency heads.[5] The basis for this discretion is inherent to agency enforcement action as well as statutory authority.

A review of the immigration statute, the Immigration and Nationality Act ("INA"), also makes clear that Congress authorizes DHS to use its discretion. Section 103 delegates the administration and enforcement of immigration law to DHS, 8 U.S.C. § 1103(a)(1), and INA section 242 prohibits judicial review of three specific acts of prosecutorial discretion (commencement of proceedings, adjudication of cases, and execution of removal orders), *id.* § 1252(g).

The Homeland Security Act delegates the establishment of national immigration enforcement policies and priorities to the DHS Secretary. 6 U.S.C. § 202(5).

The Supreme Court has also explicitly recognized the use of discretion in immigration law. In *Arizona v. United States*, 567 U.S. 387 (2012), the Court concluded that several anti-immigration provisions in an Arizona statute overreached into federal domain over immigration matters and explained that "a principal feature of the removal system is the broad discretion exercised by immigration officials" in relation to how "federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Id.* at 396.

2. Deferred action is one form of prosecutorial discretion and enjoys a long history in both Republican and Democratic administrations

Deferred action is one of the most common forms of prosecutorial discretion in immigration law and enjoys a long history. It is one of the few forms of prosecutorial discretion to include work authorization, the others being parole[6] and orders of supervision.[7] Historically, decisions to grant deferred action have rested on identifiable humanitarian factors for consideration.

For many years, deferred action was in operation through case-by-case determinations but not publicly understood. Previously described as "nonpriority," it operated essentially informally for much of the 20th century. In the early 1970s, as part of his effort to support his clients John Lennon and Yoko Ono, attorney Leon Wildes pursued Freedom of Information Act (FOIA) litigation to obtain deferred action records from INS. INS provided Wildes with records for 1,843 deferred actions, after which he identified five primary reasons for granting deferred action: (1)

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[5] *See, e.g.*, Bernsen Memo, *supra* note 1, at 1-3.

[6] 8 U.S.C. § 1182(d)(5)(A) ("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, but such parole of such alien shall not be regarded as an admission.…").

[7] Shoba S. Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. OF RACE AND L. 1, 7-8 (2016) ("Unlike deferred action, which can be granted or processed at any stage of immigration enforcement, an order of supervision may be processed after the government orders removal."); 8 U.S.C. § 1231(a)(3).

tender age, (2) elderly age, (3) mental incompetency, (4) medical infirmity, and (5) family separation if deported.[8] This data illustrates how long deferred action has operated and the significant role of medical infirmity and family separation.

Following Wildes' litigation on behalf of Lennon and Ono, INS issued guidance on deferred action through "Operations Instructions." These instructions contained factors for INS agents and officers to determine whether a case should be referred for deferred action. They included: (i) young or old age; (ii) years present in the United States; (iii) health condition requiring care in the United States; (iv) impact of removal on family in United States; and (v) criminal or other problematic conduct.[9]

The Operations Instructions noted that "[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category…."[10] In 1996, the Operations Instructions were moved into a new publication known as Standard Operating Procedures ("SOP").

When DHS was created, USCIS published an SOP for deferred action. I received the SOP through FOIA and was able to obtain the version published in 2012. The SOP details that a request for deferred action can be formally filed by the individual, a legal representative, or USCIS officers.[11] The SOP details that deferred action requests must have at least four components: an explanation supporting the request with supplemental documentation, proof of identity and nationality, any documents used to enter the U.S., and biographical information.[12] The SOP describes a three-step process that includes the field office to first prepare a memo with a case summary and recommendation, a district director to review the field office recommendation and make their recommendation, and a regional director to review and make the final determination.[13] There is no appeals process for a decision to deny or terminate deferred action.[14]

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[8] SHOBA S. WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 64 (2015).

[9] *Id.* at 187 n.8 (citing (Legacy) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, O.I. § 103.1(a)(1)(ii) (1975)).

[10] *Id.*

[11] Shoba S. Wadhia, Standard Operating Procedure for Deferred Action (non-DACA) (Mar. 7, 2012) (obtained under the Freedom of Information Act from U.S. Citizenship and Immigration Services; received Aug. 2015), *available at* http://works.bepress.com/shoba_wadhia/36/.

[12] *Id*. at 3.

[13] *Id*. at 6.

[14] The Ombudsman Office of DHS also summarizes the deferred action process: "Normally, a deferred action request is reviewed at the local office. A summary sheet explaining the positive and negative equities associated with the deferred action request is completed. The district director reviews the summary and makes a recommendation. That recommendation is forwarded to the regional director. The regional director issues a decision on the recommendation and returns the final decision to the district director so that he/she may deliver it to the requestor. Deferred action requests are not filed on a standardized application form and no fee is collected to defray the costs associated with processing deferred action requests."
JANUARY CONTRERAS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN, DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (July 11, 2011), https://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf.

In 2019, I received a new internal policy from USCIS that appears to be updated guidelines for deferred actions requests at USCIS. The policy appears to continue to allow individuals, legal representatives, or USCIS to initiate deferred action requests. The policy indicates that starting in September 2017, USCIS launched the "National Deferred Action reporting site" and "National Deferred Action Log" for its field offices to enter deferred action information.[15]

Deferred action does not provide a legal status, but the legal foundation to use it is crystal clear. This foundation is clear from opinions of federal courts, federal statutes, regulations, and memoranda published by DHS and INS. Agency regulations that have been in place for more than 30 years explicitly identify "deferred action" as one basis for work authorization. 8 C.F.R. § 274a.12(c)(14). Federal immigration law provides that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action[.]" 8 U.S.C. § 237(d)(2).

Shortly after the Operations Instructions were published in 1975, several federal courts recognized the ability of INS to offer deferred action to individuals who were facing removal or who were removable.[16] In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Supreme Court specifically mentioned "deferred action" when analyzing 8 U.S.C. § 1252(g), which precludes judicial review over certain acts of prosecutorial discretion decisions.

Memoranda published by DHS provide guidance on the use of prosecutorial discretion in immigration law and in doing so identify the grant of deferred action as one such use of discretion. In 2003, then INS Associate Director of Operations Williams Yates published memoranda directing officers to use prosecutorial discretion forms like deferred action to protect victims who were eligible for eligible for certain statutory protections such as a U visa.[17] In 2005, USCIS announced a "deferred action" program for foreign academic students affected by Hurricane Katrina.[18] In 2009, USCIS announced deferred action for the widow(er)s of U.S. citizens. In announcing the decision, DHS Secretary Janet Napolitano said: "Granting deferred action to the widows and widowers of U.S. citizens who otherwise would have been denied the right to remain

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[15] Shoba S. Wadhia, Response from USCIS for Deferred Action (non-DACA) (May 22, 2019) (obtained under the Freedom of Information Act from U.S. Citizenship and Immigration Services; received May 2019), *available at* https://works.bepress.com/shoba_wadhia/46/

[16] *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1211 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 755 (8th Cir. 1976); *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977).

[17] Memorandum from William Yates, Associate Director of Operations, U.S. Citizenship and Immigration Services, to Director, Vermont Service Center, on Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003) (on file with U.S. Citizenship and Immigration Services), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf; Memorandum from William Yates, Associate Director of Operations, U.S. Citizenship and Immigration Services, to Paul Novak, Director, Vermont Service Center, on Assessment of Deferred Action Requests for Interim Relief from U Nonimmigrant Status Aliens in Removal Proceedings (May 6, 2004) (on file with U.S. Citizenship and Immigration Services), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/uprcd050604.pdf; *see also* Wadhia, *supra* note 25, at 61.

[18] Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005) (on file with U.S. Citizenship and Immigration Services), http://www.uscis.gov/files/pressrelese/F1Student_11_25_05_PR.pdf.

in the United States allows these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved."[19]

Deferred action has also been used to protect individuals applying for relief under the Violence Against Women Act (VAWA). VAWA was enacted by Congress in 1994 and twice amended to include statutory remedies for abused spouses, parents, and children; victims of crimes and domestic abuse; and victims of human trafficking. One protection under VAWA allows abused spouses and children of U.S. citizens and green card holders (lawful permanent residents) or the abused parents of U.S. citizens to file petitions for themselves with USCIS. The self-petition process is critical to victims of domestic violence and abuse because it allows them to achieve a positive immigration status without having to rely on their abuser. If the self-petition is ultimately approved, the petitioner may receive deferred action.[20]

Deferred Action for Childhood Arrivals or DACA is another form of deferred action. Announced by President Barack Obama in 2012, it requires an individual to document entry into the United States before the age of sixteen and presence in the United States since June 15, 2007.[21]

The foregoing examples are not exhaustive but demonstrate how DHS (and INS before it) has long used the instrument of deferred action and its authority under the INA to protect certain individuals and classes of people.

3. DHS and its predecessor have used deferred action for decades in medical and other humanitarian cases

The idea of using deferred action to protect a noncitizen with a serious medical condition or for other humanitarian reasons is longstanding and in fact customary. Deferred action is a long-recognized form of prosecutorial discretion in immigration law and with a strong legal foundation.

I sought deferred action records from USCIS beginning in 2009. In June 2011, I received a response to my FOIA that included a 270-page document. Several of the cases included applicants affected by an earthquake in Haiti. One data set I was able to identify included 118 deferred actions, of which 107 were approved, pending, or unknown. Nearly half of these cases involved serious medical conditions and many of the cases involved more than one "positive factor."[22] For example, deferred action was granted to a forty-seven-year-old schizophrenic who overstaying his visa, was the son of a lawful permanent resident, and had siblings who were U.S.

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[19] U.S. DEPARTMENT OF HOMELAND SECURITY, DHS ESTABLISHES INTERIM RELIEF FOR WIDOWS OF U.S. CITIZENS (June 9, 2009), https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens.

[20] WILLIAM A. KANDEL, U.S. CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 4 (May 15, 2012), https://fas.org/sgp/crs/misc/R42477.pdf.

[21] Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file with the U.S. Department of Homeland Security), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[22] SHOBA S. WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 67 (2015).

citizens.[23] Other cases involved applicants who had a U.S. citizen family member, long term residence in the United States, or were of a tender or elder age.

In 2013, I filed a new FOIA request with USCIS for deferred action records and received a spreadsheet of deferred action cases for a four-month period. The data set contained 578 cases, 336 of which were based on a medical issue. Four cases involved individuals from Nigeria, presumably from the same family, where one of the family members had cancer. Another case involved a Mexican female who entered the United States without inspection and had two U.S. citizen children. One of her children had Down syndrome and the other had serious medical issues.[24]

I received a final data set from USCIS in January 2016 in a 27-page PDF-format.[25] The data set included 185 cases and is divided into four regions.[26] The data for each of the regions included a basis for a deferred action case in one or two words, most regularly "Family," "Medical," or "Other." Many of the deferred action requests were based on a serious medical condition by the noncitizen seeking relief or by a parent whose child suffered a serious medical condition. Below are some of the medical reasons listed in the 2016 data set:

- USC child with Leukemia
- USC child with Spina Bifida
- USC child with severe brain and bodily injuries requiring assistance
- USC child with Autism
- Child with burns over 65% of body
- USC child with cerebral palsy
- Child has Hemophilia A requiring monitoring – son granted SL6 status
- Has severe medical issues – Type 1 Diabetes, Heart valve repair/replacement, requiring monitoring
- Diagnosed as Paranoid Schizophrenia, parents are LPRs and pending I-130
- USC child(ren) has/have severe medical issues
- USC child(ren) with cerebral palsy
- USC child(ren) has/have autism and/or ADHD
- Being treated in US (or child is) for a brain tumor
- Has (or spouse has) degenerative eye disease
- USC child has Nephrotic Syndrome
- Has (or child has) Short Bowel Syndrome
- USC child has a chromosomal defect
- Doesn't want USC child to live in Mexico
- USC child has severe brain malformation, neuromuscular disease, dependent on requestor
- USC child has severe brain malformation
- USC children have heart defects, respiratory distress syndrome and anemia

[23] *Id*. at 68.
[24] *Id*. at 69.
[25] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (on file with author).
[26] *Id*.

- USC child has heart defect; may need transplant
- USC child has heart defect; but still in B-2 status
- USC child has heart defect; but failed to provide proper documentation

Many of the cases in the 2016 data set were also based on family and labeled "Family Support."[27] The foregoing research underscores just how significant the deferred action program is to individuals and families.

4. USCIS has a long history of and the expertise in handling cases for vulnerable populations and should continue to process deferred action cases

USCIS has a long history processing cases for vulnerable populations, including asylum, VAWA, U applications for victims of crime, and T applications for victims of trafficking.[28] USCIS should reinstate the humanitarian deferred action policy and should centralize deferred action cases. USCIS has more familiarity with humanitarian forms of relief than ICE. Further, work authorization applications based on a deferred action grant are already processed by USCIS, so this kind of centralization would improve efficiency.

USCIS has recently indicated that individuals may redirect their requests for deferred action to "Immigration and Customs Enforcement" or "ICE," the enforcement arm of DHS. Like USCIS, ICE has played a role in processing and granting deferred action requests, in particular to those who are in removal proceedings or with a final order of removal.[29] However, ICE has also played a significant role in arresting, detaining and deporting people who previously would have been treated favorably in the exercise of discretion.[30] Executive orders issued by the White House in January 2017 and expanded upon in fact sheets by DHS reveal a much broader set of enforcement priorities without any articulation for the humanitarian factors that should be considered when making prosecutorial discretion decisions. Cumulatively, the policies and actions by ICE provide little foundation or faith that ICE will process deferred action cases terminated by USCIS with compassion or consideration.

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[27] *Id.*

[28] *See, e.g.*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, GREEN CARD FOR VAWA SELF-PETITIONER (July 26, 2018), https://www.uscis.gov/green-card/green-card-vawa-self-petitioner; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS (June 12, 2018), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, VICTIMS OF HUMAN TRAFFICKING: T NONIMMIGRANT STATUS (May 10, 2018), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

[29] *See, e.g.*, Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 347 (2013).

[30] *See, e.g.*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (Dec. 13, 2017), https://www.ice.gov/removal-statistics/2017; AMERICAN IMMIGRATION COUNCIL, THE END OF IMMIGRATION PRIORITIES UNDER THE TRUMP ADMINISTRATION (Mar. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_pripriorit_under_the_trump_administration.pdf.

DHS should increase transparency about the deferred action program. USCIS should publish statistics about the number of and outcome in deferred action cases and provide greater notice and information to the public about how to make a deferred action request.[31] If DHS is unwilling to do this voluntarily, Congress should require the agency to publish such statistics.

Thank you.

[31] *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 152-155 (2015).

Section Four

Trafficking Visas
(T Visas)

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Section Four

Trafficking Visas
(T Visas)……..Jess Hunter-Bowman
Erika Asgeirsson

PowerPoint Presentation – Getting from Tricky to Triumphant:
Successfully Navigating T Visas

NATIONAL IMMIGRANT JUSTICE CENTER

A HEARTLAND ALLIANCE PROGRAM

Getting from Tricky to Triumphant: Successfully Navigating T Visas

November 5, 2021

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With offices in Chicago, Indiana, San Diego, and Washington, D.C., Heartland Alliance's National Immigrant Justice Center is a nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers through a unique combination of direct services, policy reform, impact litigation, and public education.

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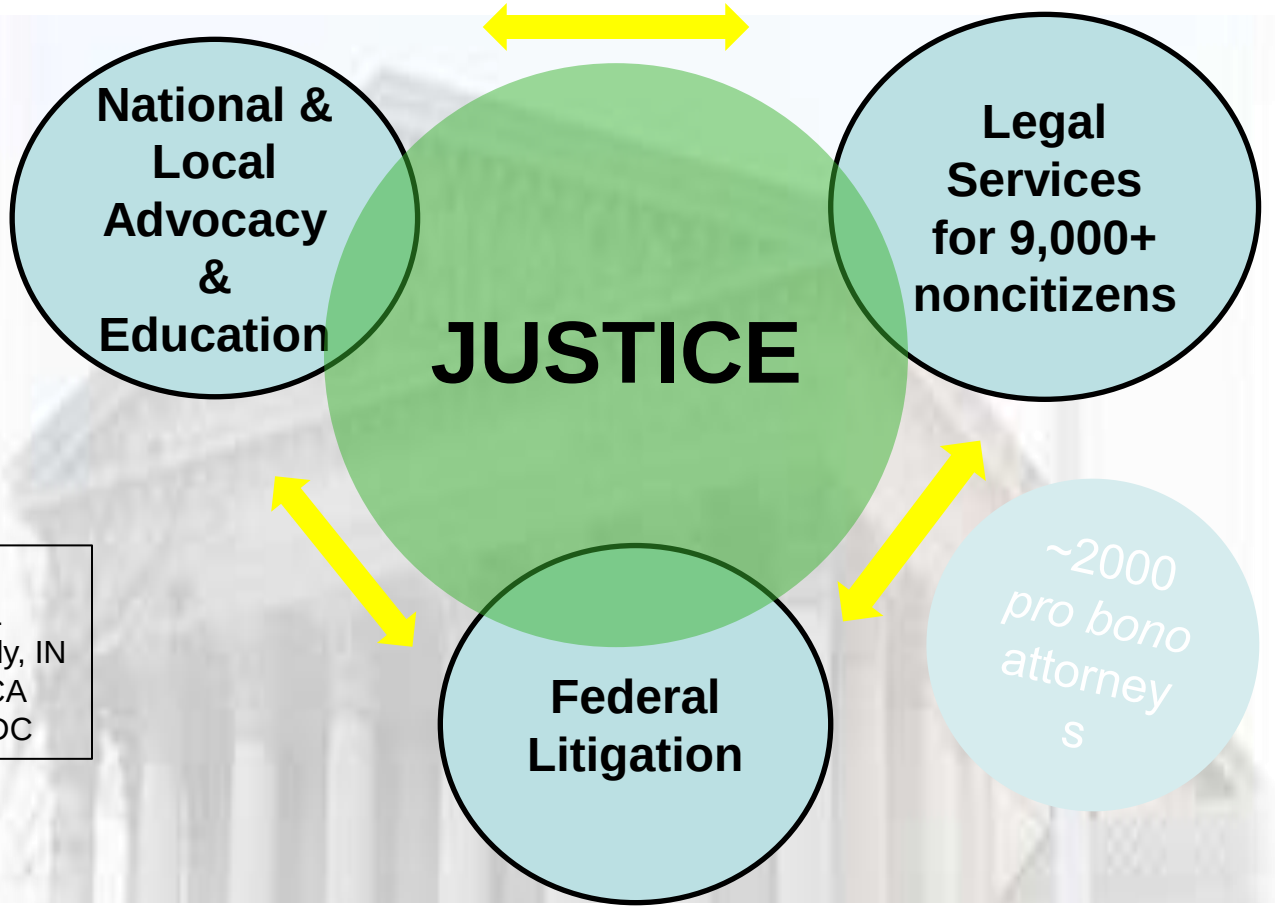

Offices in:
Chicago, IL
Goshen and Indy, IN
San Diego, CA
Washington DC

Goals

- Collaboratively identify different scenarios in which a trafficking survivor may present in your daily work.

- Build toolbox for responding to requests for evidence

Poll: Who has worked on a T visa case? Who has worked with a survivor of human trafficking on a different immigration matter?

Identifying Survivors of Human Trafficking

Defining Human Trafficking: Act (red), Means (blue), Purpose (green)

Labor trafficking: the **recruitment, harboring, transportation, provision, or obtaining** of a person for labor or services, through the use of **force**, **fraud**, or **coercion** for the purpose of subjection to **involuntary servitude, peonage, debt bondage, or slavery**.

Sex trafficking: the **recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting** of a person through **force, fraud, or coercion**, or in which the person is under the age of 18 years old, for the purpose of **a commercial sex act**.

See 22 U.S.C.A. § 7102(11); see also 8 C.F.R. § 214.11

Case Example 1

Eduardo is a citizen of Mexico. He entered the United States on an H-2A visa in 2010. About a year ago, he married a U.S. citizen. He came to you with his spouse to consult with you about a family petition.

When you ask him the details of his entry to the United States, he doesn't make direct eye contact and gives short, vague answers about his employment.

What do you ask Eduardo next?

Case Example 1

After asking to speak with Eduardo privately, you learn that he no longer has his passport because upon arriving in the United States, he employer took his passport for “safe keeping.”

Eduardo described that he worked 12 hour days in the heat in Florida, and that his employer deducted more than half of his promised pay for housing and to repay his visa costs. His employer would not allow him to take breaks, and he was not allowed to leave the employee housing area when he was not working.

Eduardo described mistreatment from his employer. His employer frequently yelled at him and threatened to have him deported if he did not work fast enough. His employer told him that if he tried to leave, the police would deport him for breaking immigration laws.

Case Example 2

Nina is a citizen of India. She came to your office to consult about a VAWA self-petition. She described that her U.S. citizen spouse physically and mentally abused her. She recently left him and is living in a domestic violence shelter. The shelter referred her to your firm/agency/organization.

She described one particular instance of abuse when her husband pulled her out of bed and hit her for refusing to help his mother cook for an event she was catering for.

What do you ask Nina next?

Case Example 2

You learn that Nina came to the US after her husband proposed to her. He told her she would have a good life in the US.

When she got to the US, everything changed. Her husband mostly ignored her and went out on his own, leaving her in the house. She was forced to do all of the cooking and cleaning in the house for her husband and her in-laws. She also had to prepare food for her mother-in-law's catering business, even though she was never paid for this work. She was told it was her job as their daughter-in-law.

One night, Nina didn't finish cleaning all of the dishes. The next morning, her mother-in-law and husband yelled at her, and her mother-in-law threw a pot at her. Her husband said she should be thankful for bringing her to the US, and that she must do all of the housework and work for the catering business in return.

Screening Questions

- Have you ever been mistreated by an employer?
- Have you ever had income withheld from you or not paid?
- Have you ever been forced to work against your will, or do something you didn't want to do?
- Has someone else ever taken the money you earned from working?

In domestic violence cases:

- Did your partner ever force you to work, mistreat you for refusing to work, or take your income away from you?
- Did your partner ever force you to be with other people?

Responding to Requests for Evidence

RFE for Case Example 1

You filed a T Visa application for Eduardo. USCIS has issued a request for evidence, stating that his initial T visa application did not show that he is “present on account of the trafficking.” Specifically, they state that since over 10 years has passed since he exited the trafficking, he is no longer present on account of the trafficking. They acknowledge that he was a victim of trafficking, but state that the evidence submitted does not establish that his “continuing presence” is related to the trafficking pursuant to 8 C.F.R. 214.11(g)(iv).

How would you respond?

Present on Account of

Presence is described in the present tense.
USCIS looks to the applicant's *current* presence in the United States

USCIS Rationale:

(I) ***is or has been*** a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22

(II) ***is*** physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

T Visa Eligibility Requirements at INA 101(a)(15)(T); 8 USC 1101(a)(15)(T)

Legal Standard for Presence

8 C.F.R. 214.11(g)(4)

USCIS will consider all evidence presented to determine the physical presence requirement, including the alien's responses to questions on the application for T nonimmigrant status about **when he or she escaped from the trafficker**, **what activities he or she has undertaken since that time including the steps he or she may have taken to deal with the consequences of having been trafficked**, and **the applicant's ability to leave the United States**.

What has the RFE requested?

SAMPLE

Evidence to establish that your continuing presence in the United States is on account of your trafficking victimization may include, but is not limited to:

- A detailed description from a mental health provider of any mental health condition(s) resulting from your trafficking and the corresponding impact on your daily life and current presence in the United States;
- A detailed description from a medical health provider of any physical health condition(s) resulting from your trafficking and the corresponding impact on your daily life and current presence in the United States;
- Evidence that your trafficker has continued to interact with you in an effort to regain control over you and the resulting impact on your daily life and current presence in the United States; or
- Any other consideration that will credibly establish that your current presence in the United States is on account of your trafficking victimization.

Arguments to Support "Present on Account of"

- Fear of retaliation from trafficker in home country
- Recent realization of victimization
- Experiencing adverse consequences of trafficking victimization
- Accessing trafficking specific support services in U.S.
- No resources to leave the U.S.
- Continued cooperation with law enforcement
- Access legal remedies including civil remedies
- Need for continued protection of US legal system

Subsequent family ties in the U.S. <u>does not</u> support POA, and extensive focus on subsequent family ties can undermine POA.

Evidence to Include in RFE Response

- Client's supplemental statement describing: continuing impacts of trafficking, need for services, recent realization of victimization, threats or contact from trafficker
- Psychological evaluation from a mental health provider
- Letter from client's social worker describing nature of restorative services
- Letters of support from family members or friends describing threats of retaliation
- Police reports or orders of protection
- Medical report ***if*** medical issues arising from trafficking
- Secondary sources describing lack of self-identification, hardship if removed

Include an annotated index of new supporting documents highlighting key quotes and information (except for supplemental statement).

1. In responding to RFEs, what strategies/arguments/types of evidence have been helpful? What challenges have you faced?

2. In reporting trafficking cases, what agencies do you work with often? How can you protect your client's rights and safety while reporting to law enforcement?

DISCUSSION

THANK YOU!

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