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DEFERRED ACTION: THE NEXT GENERATION

Posted on June 19, 2012 by Cyrus Mehta

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President Obama at last came through with a bold memorandum on June 15, 2012, executed by DHS Secretary Janet Napolitano, granting deferred action to undocumented people. The Administration has always had authority to grant deferred action, which is a discretionary act not to prosecute or to deport a particular alien. While critics decry that Obama has circumvented Congress, the Administration has always had executive branch authority to exercise prosecutorial discretion, including deferred action, which is an expression of limited enforcement resources in the administration of the immigration law. It makes no sense to deport undocumented children who lacked the intention to violate their status and who have been educated in the US, and who have the potential to enhance the US through their hard work, creativity and determination to succeed.

We have always advocated that the Administration has inherent authority within the INA to ameliorate the hardships caused to non-citizens as a result of an imperfect and broken immigration system. In Tyranny of Priority Dates, we argued that the Administration has the authority to allow non-citizens who are beneficiaries of approved family (I-130) or employment-based (I-140) petitions affected by the crushing backlogs in the priority date system to remain in the US through the grant of parole under INA 212(d)(5) based on "urgent humanitarian reasons or significant public benefits." When the DREAM Act passed the House in 2010, but narrowly failed to garner the magic super majority of 60 in the Senate, we proposed that the President could also grant similar parole to DREAM children as well as deferred action in our blog, Keeping Hope Alive: President Obama Can Use His Executive Power Until Congress Passes The Dream Act.

The new memorandum directs the heads of USCIS, CBP and ICE to exercise prosecutorial discretion, and thus grant deferred action, to an individual who came to the United States under the age of 16, has continuously resided in the US for at least 5 years preceding the date of the memorandum and was present in the US on the date of the memorandum, and who is currently in school, or has graduated from school or obtained a general education certificate, or who is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States. Moreover, this individual should not be above the age of thirty and should also not have been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety. This directive further applies to individuals in removal proceedings as well as those who have already obtained removal orders. The grant of deferred action also allows the non-citizen to apply for employment authorization pursuant to an existing regulation, 8 CFR § 274a(c)(14).

While this memorandum is indeed a giant step in providing relief to a class of immigrants who have been out of status for no fault of their own, we propose other incremental administrative steps so that such individuals, even after they have been granted deferred action and work authorization, can obtain permanent residence. We are mindful, as the accompanying FAQ to the memorandum acknowledges, that the grant of deferred action does not provide the individual with a pathway to permanent residence and "nly the Congress, acting through its legislative authority, can confer the right to permanent lawful status." But just as people were skeptical about our ideas for administrative action when we first proposed them, some of which has come to fruition, we continue to propose further administrative steps that the President can take, which would not be violative of the separation of powers doctrine.

There are bound to be many who have been granted deferred action to also be on the pathway to permanent residence by being beneficiaries of approved I-130 or I-140 petitions. Unless one is being sponsored as an immediate relative, i.e. as a spouse, child or parent of a US citizen, and has also been admitted an inspected, filing an application for adjustment of status to permanent residence will not be possible for an individual who has failed to maintain a lawful status under INA § 245(a). Such individuals will have to depart the US to process their immigrant visas at a US consulate in their home countries. Although the grant of deferred action will stop unlawful presence

from accruing, it does not erase any past unlawful presence. Thus, one who has accrued over one year of unlawful presence and departs the US in order to process for an immigrant visa will most likely face the 10 year bar under INA § 212(a)(9)(B)(i)(II). While some may be able to take advantage of the proposed provisional waiver rule, where one can apply in the US for a waiver before leaving the US, not all will be eligible under this new rule. A case in point is someone who is sponsored by an employer under the employment-based second preference, and who may not even have a qualifying relative to apply for the waiver of the 10 year bar.

We propose that the USCIS extend the holding of the Board of Immigration Appeals in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) to beneficiaries of deferred action. In *Arrabelly and Yerrabelly*, the BIA held that an applicant for adjustment of status, who leaves the US pursuant to a grant of advance parole, has not effected a departure from the US in order to trigger the 10 year bar under INA § 212(a)(9)(B)(i)(II). If a beneficiary of deferred action is granted advance parole, this person's trip outside the US under this advance parole ought not to be considered a departure. Such facts would square with *Matter of Arrabelly and Yerrabelly* if the individual returned back to the US under advance parole. However, here, the individual may likely return back on an immigrant visa and be admitted as a permanent resident. That might be hard to sell to the government – how can you apply for a visa at a consulate in a foreign country and still not leave USA? Still, this idea has merit as it is the initial "departure" under advance parole that would not be a trigger for the bar to reentry, not the subsequent admission as an immigrant. In the leaked July 2010 memorandum to USCIS Director Mayorkas, the suggestion is made that the USCIS "reexamine past interpretations of terms such as 'departure' and 'seeking admission again' within the context of unlawful presence and adjustment of status." Using *Matter of Arrabally and Yerrabelly* in the manner we propose seeks to do just that. Once again, as with the concept of parole, we seek to build on past innovation to achieve future gain.

As an alternative we propose, as we did in The Tyranny of Priority Dates, that the government, in addition to the grant of deferred action, also grants parole in place on a nunc pro tunc or retroactive basis under INA 212(d)(5). For instance, the USCIS informally allows spouses of military personnel who would otherwise be unable to adjust under INA § 245(a) if they were neither "inspected and admitted or paroled" to apply for "parole in place." The concept

of parole in place was also proposed in the leaked memo. Interestingly, in this memo, a prime objective of granting parole in place was to avoid the need for consular processing of an immigrant visa application: "By granting PIP, USCIS can eliminate the need for qualified recipients to return to their home country for consular processing, particularly when doing so might trigger the bar to returning." This would only be the case, however, where the adjustment applicant is married to a US citizen, or is the minor child or parent of a US citizen, and need not be barred due to lack of an inspection or admission. Because we advocate a much wider extension of parole in place, the need for retroactivity, both for the parole and companion employment authorization becomes readily apparent. The use of parole in place, while not common, is certainly not without precedent and, as the leaked memo recites, has been expansively utilized to promote family unity among military dependents. For our purposes, "applicants for admission who entered the US as minors without inspection" were singled out as a class for whom parole in place was singularly suitable.

Upon such a grant of parole in place retroactively, non-immediate relatives who have not maintained status may also be able to adjust status. Such a retroactive grant of parole, whether in the I-130 or I-140 context, would need to be accompanied by a retroactive grant of employment authorization in order to erase any prior unauthorized employment. We acknowledge that it may be more problematic for the individual to be eligible for adjustment of status through an I-140 employment-based petition rather than an I-130 petition, since INA § 245(c)(7), requires an additional showing of a lawful nonimmigrant status, in the case of an employment-based petition under INA § 203(b). Still, the grant of nunc pro tunc parole will wipe out unlawful presence, and thus this individual can leave the US and apply for the immigrant visa in the US Consulate in his or her home country without the risk of triggering the 3 or 10 year bar.

One conceptual difficulty is whether parole can be granted to an individual who is already admitted on a nonimmigrant visa but has overstayed. Since parole is not considered admission, it can be granted more readily to one who entered without inspection. But this impediment can be overcome: It may be possible for the government to rescind the grant of admission, and instead, replace it with the grant parole under INA § 212(d)(5). As an example, an individual who was admitted in B-2 status and is the beneficiary of an I-130 petition but whose

B-2 status has expired can be required to report to DHS, who can retroactively rescind the grant of admission in B-2 status and be retroactively granted parole.

There may be other obstacles for individuals in removal proceedings or with removal orders, but those too can be easily overcome. If the individual is in removal proceedings, if he or she is also eligible for deferred action, such removal proceedings can be terminated and he or she can also receive a grant of nunc pro tunc parole, thus rendering him eligible for adjustment of status in the event that there is an approved I-130 or I-140 petition. Even a person who already has a removal order can seek to reopen the removal order through a joint or consent motion with the government for the purposes of reopening and terminating proceedings, and this person too could potentially file an adjustment application, if he or she is the beneficiary of an I-130 upon being granted nunc pro tunc parole, and the beneficiary likewise could travel overseas for consular processing without risking the 10 year bar.

We of course would welcome Congress to act and pass the DREAM Act, as well as Comprehensive Immigration Reform, so that this memorandum does not get reversed or discontinued in the event that a new Administration takes over from January 2013. However, until Congress does not act, the June 15, 2012 memo does provide welcome relief for young people, but it still leaves them in a limbo with only deferred action. The elephant in the room may be whether the USCIS has the capacity to deal with hundreds of thousands of requests for deferred action. In the absence of congressional action, the agency lacks the capacity to charge special fees for this purpose. Consequently, all relevant federal agencies, including ICE and CBP, must willingly but swiftly reassign existing personnel now devoted to less urgent tasks so that the President's initiative of last Friday does not become a dead letter. Our proposal for an additional grant of nunc pro tunc parole in place to individuals who have already been conferred deferred action will at least allow them to enter the regular immigration system and hope to adjust status to permanent residence, or consular process, and thus on the path to citizenship, should they become the beneficiaries of approved family or employment-based petitions. Again, as we noted earlier, and as we noted in Tyranny of Priority Dates, we are not asking for the executive branch to create new forms of status. We are only asking for the Executive to remove barriers to the ability of otherwise deserving applicants for permanent residents to take advantage of the existing system.

We want to emphasize there is nothing in the INA that prevents the immediate adoption of our recommendations just as there was nothing in the INA that prevented last Friday's memorandum. We also want to emphasize that I-130's and I-140s will still be necessary. We do not want to create a new system, only to allow the old one to work more effectively. The future is ours to shape. For those who lack faith, we remind them of Tennyson's injunction in Ulysses: "Come my friends, 'tis not too late to seek a newer world."