



NIGHTMARE IN ARIZONA: GOVERNOR BREWER'S NONSENSICAL AND MEAN-SPIRITED EXECUTIVE ORDER AGAINST DREAMERS

Posted on August 16, 2012 by Cyrus Mehta

On August 15, 2012, the day that the [Consideration of Deferred Action For Childhood Arrivals](#) programs (DACA) took effect, thousands of young undocumented people lined up at legal assistance clinics with hope and joy. They got to know whether they were eligible to file an application under DACA, and by filing an application, their deportation would be deferred and they would also obtain employment authorization.

It was extremely gratifying to be an immigration attorney that day volunteering at a DACA legal assistance clinic [organized by the New York Immigration Coalition](#), among others. I could see in the twinkle in the eyes of each potential youth applicant when told that he or she could file under DACA. That twinkle revealed a whole new world of opportunity opening up. The sky seemed to be the limit, which before the June 15, 2012 announcement was simply unimaginable.

I could not help broadcast this tweet, @cyrusmehta.com:

To see hope and joy in the faces of 100s lining up at pro bono #DACA clinic of #NYIC+ #AILA NY makes being an #immigration attorney gratifying

As I was basking in the glow of that day and returning home on the New York subway, I saw on my Twitter feed that Governor Brewer of Arizona passed a mean spirited and hateful [executive order](#) that evening. According to the executive order, since deferred action does not confer lawful status or lawful presence, the alien granted employment authorization under DACA continues to be unlawfully present, and thus cannot avail of benefits in Arizona, including a driver's license. I love Twitter because I can instantly express my thoughts,

and hopefully there is an audience. These were my new tweets, quite different from the prior exuberant one, in reaction to the horror of Brewer's executive order:

Brewer's executive order is unlawful & wicked – there are many who are allowed to remain without lawful status. When is she being sued? #DACA

Brewer's mean spirited exec order against granting #DACA applicants AZ driver's licenses will help Obama in elections, <http://bit.ly/N4LE8E>

I write this blog to expand on my impetuous tweets of last evening.

First, deferred action has existed for several decades. Many have been granted deferred action, including [John Lennon](#). Prior the announcement of DACA, non-citizens who have demonstrated extenuating circumstances, such as medical emergencies or who have lost parents, have been granted deferred action. In recent times, battered spouses, crime victims and widows/ers of US citizens have also been granted deferred action. There are other non-citizens who may not have lawful status but are allowed to remain in the US. These include people who are presently in removal proceedings. Even those who have been ordered removed, such as through the grant of withholding of removal (based on persecution in their home countries), can remain in the US and obtain work authorization. Moreover, due to a quirky split in jurisdiction involving arriving aliens between Immigration Court and USCIS, arriving aliens cannot file defensive adjustment applications in Immigration Court, but have to file them with the USCIS while an Immigration Judge can still order them removed. If the adjustment application is approved, they can become lawful permanent residents despite the removal order. How will Brewer's executive order be able to differentiate between each of these categories of people who have been allowed to remain in the US?

Second, the grant of deferred action stops the accrual of unlawful presence. However, unlawful presence is different from unlawful status. Governor Brewer's executive order does not seem to understand the difference. Unlawful presence is relevant, according to the USCIS DACA guidance, only with respect to determining whether one is inadmissible under the 3 and 10 year bars. Unlawful presence has nothing to do with status or the ability to remain in the US. There are situations when one may not be in lawful status and yet not be accruing unlawful presence since they are in a "period of stay authorized by the Attorney General." A classic example is someone who entered lawfully as a

tourist, fell in love with a US citizen and married him. She filed an adjustment of status application based on the US citizen spouse's green card sponsorship. She is allowed to remain in the US while waiting for the green card, although her underlying tourist visa has expired. Such a person may not be in lawful status but is in a "period of stay authorized by the Attorney General" and is also not accruing unlawful presence. Governor Brewer's executive order does not seem to have grasped any of these distinctions.

Third, in [Arizona v. USA](#), the Supreme Court acknowledged the federal government's role in exercising prosecutorial discretion. As noted in a [prior blog](#) I wrote with Gary Endelman, Justice Kennedy writing for the majority in that decision noted:

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. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal....

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 has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state maybe mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Arizona v. USA, supra, Slip Op. at pages 4-5.

Although the Supreme Court struck down all of the other provisions of Arizona's SB 1070, it narrowly upheld 2(B), the "show me your papers" law, which requires state officers to make "a reasonable attempt....to determine the immigration status" of any person they stop, detain, or arrest on some other

legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” Section 2(B) further provides that “ny person who is arrested shall have the person’s immigration status determined before the person is released.” The Supreme Court upheld the provision, for now, since it had not taken effect, but cautioned that a person’s detention under an Arizona provision cannot be prolonged because the state cannot readily determine this person’s immigration status.

Governor Brewer, through her executive order, has perhaps unwittingly opened up another challenge to 2(B). By not recognizing that a grant of deferred action to remain lawfully and work in the US, it will be disregarded by Arizona’s law enforcement personnel, such as by the notorious Sheriff Joe, and his troopers, when he stops a non-citizen for jay walking and suspects that a person is unlawfully present in the US. Even if this DREAMer shows Sherrif Joe an employment authorization that was issued through a DACA filing, it could be disregarded and the person’s detention could be needlessly prolonged even though the federal government has allowed this person to lawfully remain in the US and no longer considers him unlawfully present for purposes of the 3 or 10 year bar.

Finally, it remains to be seen whether Brewer’s executive order will be politically viable. The GOP may see more Latino voters flee by the November elections, and the future of the party without support from Hispanics and minorities looks grim. Moreover, the granting of status to undocumented youth under the proposed DREAM Act, with promise to do well and contribute to the US, has broad support among the American people. Governor Brewer will likely find herself on the wrong side of history, only to be relegated forever in its garbage heap.