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IMPACT OF TEXAS V. USA ON OTHER EXECUTIVE ACTIONS INVOLVING EMPLOYMENT AUTHORIZATION

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Although the Fifth Circuit in *Texas v. USA* ruled against the Administration on November 9, 2015 by upholding the preliminary injunction against implementation of President Obama's program to grant deferred action to certain groups of undocumented persons, the ruling may impact other executive actions that President Obama had announced on November 20, 2014, especially relating to skilled immigrants. It is thus important for the the Supreme Court to reverse this erroneous decision to not only allow the Administration to implement Deferred Action for Parental Accountability program and the expanded Deferred Action for Childhood Arrival program (collectively referred to as DAPA in the decision), but to also allow the Administration to grant other kinds of administrative relief such as interim employment authorization to immigrants who face great hardship and are deprived of the benefits accorded to them under the Immigration and Nationality Act.

The majority's ruling in the Fifth Circuit went even further than Judge Hanen's decision in the lower district court by holding that DAPA was not authorized under any INA provision. Judge Hanen's ruling suggested that if the Administration had followed the notice and comment procedure under section 553 of the Administrative Procedures Act, DAPA could have survived judicial scrutiny. The Fifth Circuit, on the other hand, held that since DAPA implicated "questions of deep economic and political significance," Congress would have expressly authorized DHS, which it did not do. Hence, DAPA was a substantive APA violation under section 706(2) as it was not authorized under the INA. Thus, promulgating a rule at this juncture will not help to save DAPA.

One of the INA provisions relied on by the government to implement DAPA is INA section 274(h)(3), which provides:

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

While the ability to of INA 274A(h)(3) to provide authority to the Administration was completely overlooked in Judge Hanen's decision (and his flawed decision is discussed in David Isaacson's excellent blog entitled IGNORING THE ELEPHANT IN THE ROOM: AN INITIAL REACTION TO JUDGE HANEN'S DECISION ENJOINING DAPA AND EXPANDED DACA), the Fifth Circuit took notice of INA 274(h)(3), but gave it short shrift by observing that this provision, which is listed as a miscellaneous definitional provision is an unlikely place to find authorization for DAPA.

Contrary to the Fifth Circuit's gloss, INA 274A(h)(3) gives the Attorney General, and now the Secretary of Homeland Security, broad flexibility to authorize an alien to be employed, thus rendering the alien not an "unauthorized alien" under the INA. Indeed, INA 274(h)(3) was invoked by the DHS in promulgating a rule providing employment authorization for H-4 dependent spouses of H-1B visa holders in the US who are caught in the employment based second and third preference backlogs. INA 274A(h)(3) will also most likely be invoked when the DHS promulgates a rule to grant work authorization to beneficiaries of approved employment-based I-140 petitions who are waiting for their green cards in the backlogged employment preferences.

Indeed, if INA 274A(h)(3) is discredited, as suggested by the Fifth Circuit, many other justifications for providing an employment authorization document (EAD) would collapse. The reason the EAD regulations are principally located in 8 CFR 274a, after all, is that the authority for most of them has always been thought to stem from INA 274A. While many of the 8 CFR 274a.12(a) EADs have some specific statutory authorization outside of INA 274A(h)(3), which is why they exist incident to status, many 8 CFR 274a.12(c) EAD categories are based on INA 274A(h)(3) in just the same way that 8 CFR 274a.12(c)(14) EADs for deferred action are. People with pending adjustment applications under 8 CFR 274a.12(c)(9), including the "class of 2007" adjustment applicants, pending cancellation applications under 8 CFR 274a.12(c)(10), pending registry

applications under 8 CFR 274a.12(c)(16), all get EADs based on that same statutory authority. Even the B-1 domestic workers and airline employees at 8 CFR 274a.12(c)(17) have no separate statutory authorization besides 274A(h)(3). Some (c) EADs have their own separate statutory authorization, such as pending-asylum 8 CFR 274a.12(c)(8) EADs with their roots in INA 208(d)(2), and 8 CFR 274a.12(c)(18) final-order EADs with arguable roots in INA 241(a)(7), but they are in the minority. And even some of the subsection (a) EADs have no clear statutory basis outside 274A(h)(3), such as 8 CFR 274a.12(a)(11) for deferred enforced departure. If the Fifth Circuit's theory is taken to its logical conclusion, it would destroy vast swathes of the current employment-authorization framework.

It is thus important for the Supreme Court to uphold the Administration's authority to implement DAPA as part of its broad authority to exercise prosecutorial discretion, without the need to undermine INA 274A(h)(3). As I have advocated in FIFTH CIRCUIT PRECEDENT ON PREEMPTION CAN PROVIDE OBAMA WITH PATH TO VICTORY IN TEXAS v. UNITED STATES, the government's authority to exercise prosecutorial discretion, which includes deferred action, is non-justiciable and notwithstanding the Fifth Circuit decision, never required rule making. The dissenting opinion in the Fifth Circuit decision thankfully held that deferred action, which is a quintessential exercise of prosecutorial discretion, is non-justiciable. Indeed, one of the principal reasons why state regulations have been held to conflict with federal immigration law is because they interfere with the Administration's ability to exercise prosecutorial discretion. While on first brush *Texas v. USA* is not a preemption case, it would still provide a basis for any cantankerous state politician to sue the federal government, under the broad and dubious standing theory that the Fifth Circuit provided to Texas, whenever the federal government chooses to exercise prosecutorial discretion. While the DACA program of 2012 will be the most vulnerable, if the Supreme Court were to uphold the Fifth Circuit's majority decision, another court would hopefully reach another conclusion with respect to INA 274A(h)(3) as providing the authority to the Administration to grant work authorization in many other contexts.

The Supreme Court in *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012), articulated the federal government's authority to exercise prosecutorial discretion rather elaborately:

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.

The majority of the Supreme Court justices ought to latch onto the dissenting opinion, which is the correct opinion, and should reverse the preliminary injunction on the ground that the President's executive actions regarding DAPA are non-justiciable, and thus leave alone INA 274A(h)(3). The Administration ought to be provided flexibility to provide ameliorative relief, especially EAD under INA 274A(h)(3) to a number of non-citizens needing relief. The prime example are those who have to wait for decades in the India EB-2 and EB-3 backlogs for their green card, even though they have otherwise fulfilled all the conditions. Due to the lack of a current priority date, beneficiaries who are otherwise approved for permanent residence ought to be able to obtain EADs, and the same also should apply to H-4 spouses of H-1B visa holders who are caught in the employment based backlogs. Also, researchers, inventors and founders of startup enterprises ought to be paroled into the US and issued EADs under the broad authority provided in INA 274A(h)(3), and this too is one of the initiatives contemplated in the President's November 20, 2014 executive actions. There are many good reasons why the Administration should be allowed to issue work authorization to noncitizens, and INA 274A(h)(3) ought not be reinterpreted to curtail this flexibility.