CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

PREEMPTION OF ARIZONA DRIVER'S LICENSE POLICY PROVIDES ANOTHER BASIS FOR SUPREME COURT TO UPHOLD PRESIDENT'S DEFERRED ACTION PROGRAMS

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On August 15, 2012, when the Deferred Action for Childhood Arrival (DACA) program took effect, Arizona's then Governor Janet Brewer tried everything in her book to de-legitimize DACA in Arizona. DACA would not confer lawful or authorized status, according to an Arizona executive order signed by Governor Brewer. Arizona's Motor Vehicle Division announced that it would not accept an employment authorized document (EAD) issued to DACA recipients pursuant to 8 CFR 274a.12(c)(14) with code C33 as proof that their presence was authorized under federal law for purpose of granting a driver's license.

In 2013, the Arizona Department of Transportation (ADOT) further tried to justify its animus to DACA by revising its policy to only recognize EADs if 1) the applicant has formal immigration status; 2) the applicant is on a path to obtain formal immigration status; or 3) the relief sought or obtained is expressly pursuant to the INA. Under these new criteria, Arizona refused to grant driver's licenses not only to DACA recipients but also to beneficiaries of traditional deferred action and deferred enforced departure. It continued to grant driver's licenses only from applicants with EADs pursuant to 8 CFR 274a.12(c)(9), those who had filed adjustment of status applications, or 8 CFR 274a.12(c)(10), those who had applied for cancellation of removal. Under this revision, even one who received deferred action other than DACA under 8 CFR274a.12(c)(14) would now be deprived of a driver's license.

On April 5, 2016, the Ninth Circuit in *Arizona Dream Act Coalition v. Brewer* held that these arbitrary classifications defining authorized status were preempted under federal law and has finally put to rest Arizona's "exercise in regulatory bricolage." Although the Ninth Circuit also found that these distinctions

between different EADs likely violated the Equal Protection Clause, in order to avoid unnecessary constitutional adjudications, the Court also found that these arbitrary classifications under Arizona's law were preempted as they encroached on the exclusive federal authority to create immigration classifications. The latest ruling permanently enjoins Arizona's policy of depriving DACA and other deferred action recipients driver's licenses, following an earlier ruling that affirmed a preliminary injunction of the same executive order.

While Arizona sought to exalt the status of an EAD that was obtained when one sought adjustment of status or cancellation of removal, the Ninth Circuit gave short shrift to such arbitrary classification. There is no difference if one receives an EAD though cancellation of removal or through deferred action as submitting a cancellation application does not signify that the applicant is on a clear path to formal legal status. Such an application could well be denied. In this regard, noncitizens holding an EAD under C9 or C10 are in no different a position than one who has received an EAD pursuant to DACA under C33. The following extract from the Ninth Circuit's opinion is worth quoting:

> *Arizona thus distinguishes between noncitizens based on its own definition of "authorized presence," one that neither mirrors nor borrows from the federal immigration classification scheme. And by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design*

Arizona Dream Act Coalition thus provides another basis for the Supreme Court in *United States v. Texas* to uphold the expanded deferred action programs as part of President Obama's November 20, 2014 executive actions, especially the Deferred Action for Parental Accountability (DAPA) and extended DACA. There is simply no difference between an EAD granted under DACA as an EAD granted based on an application for relief, such as adjustment of status or cancellation or removal. Indeed, it is INA section 274A(h)(3), which provides the authority for a granting of EADs under both DACA and based on application for adjustment of status or cancellation of removal. According to the Ninth Circuit ruling, "DACA recipients and noncitizens with (c)(9) and (c)(10) EADs all lack formal immigration status, yet the federal government permits them to live and work

in the country for some period of time, provided they comply with certain conditions."

INA 274A(h)(3) 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*

If INA 274A(h)(3) is discredited, as suggested by the Fifth Circuit in *Texas v. USA* for the purpose of justifying a grant of EADs under DAPA , many other justifications for providing an employment authorization document (EAD) would collapse. The reason the EAD regulations are principally located in 8 CFR 274a is that the authority for most of them has always been thought to stem from INA 274A(h)(3). 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 and extended DACA as part of its broad authority to exercise prosecutorial discretion, and its authority to grant EADs under INA

274A(h)(3). While on first brush *Texas v. USA* is not a preemption case, 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, which can be deployed to preclude states from opposing this federal authority under dubious standing theories:

> *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....*
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> *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 Ninth Circuit, on the eve of oral arguments to be presented before the Supreme Court on April 18, 2016 in *United States v. Texas*, has provided added impetus for the upholding of President Obama's deferred action programs. A grant of an EAD under DACA or DAPA is not any less than a grant of EAD to an applicant seeking lawful status through an adjustment of status application or by seeking cancellation of removal. All of these EADs stem from INA 274A(h)(3), which ought to be upheld as a legal basis for the executive to grant work

authorization to noncitizens as part of its discretionary authority. Moreover, it should also not make a difference whether the EAD stems from an application that would ultimately result in permanent residence, such as adjustment of status or cancellation of removal, or through a grant of deferred action. The executive branch has equal authority to grant adjustment of status or deferred action, provided certain conditions are met, from which separately ensue EADs to a noncitizen. The latest Ninth Circuit ruling in *Arizona Dream Coalition* could not have made this clearer.